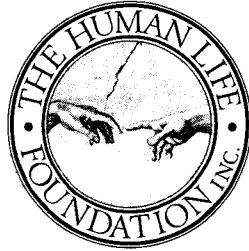


# the HUMAN LIFE REVIEW



FALL 1975

*Featured in this issue:*

Prof. Alexander M. Bickel on . . . . The Supreme Court  
and Evolving Principle

Prof. David Louisell on . . . A Life-Support Amendment

Dean Joseph O'Meara on . . . . . The Court's Non-Case

Prof. Baruch Brody on . . . . . Morality and Abortion

Dr. C. Everett Koop on . . . . . The Right to Live

John A. Hardon, S.J. on . . . . . A Catholic View

M. J. Sobran on . . . . . The Abortion Sect

*Fetal Experimentation: A Symposium*

Rabbi Seymour Siegal · Harold O. J. Brown · Charles P. Kindregan

*Published by:*

The Human Life Foundation, Inc.

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. . . about THE HUMAN LIFE REVIEW

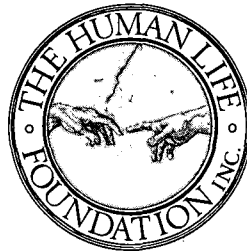
*In this, our fourth (and final 1975) issue, we had hoped to do several things, including a) investigate the question of experimentation on human subjects; b) begin reviewing new books (and others not so new) that have to do with the "life" issues that concern us, and c) inaugurate a Letters-to-the-Editor section.*

*The first proved a much more complex subject than we had at first imagined, and we have settled for beginning a discussion of fetal research with the four articles in this issue. We hope to have more in future issues.*

*We were also greatly surprised by what we found in looking for "suitable" books to review: we had no idea that so many books just on the abortion/euthanasia problems—not to mention other life-related issues—have been published recently. And, as we read them, we began to wonder if ordinary reviews were really suitable for the kind of in-depth treatment this journal has so far given the subjects we focus on. Therefore, in this issue, we publish significant excerpts from three current books—all, we hope, of considerable interest—and intend to continue this approach in the future, whether or not we begin reviewing current books in the "normal" fashion. And we herewith supply readers interested in reading the books for themselves the necessary information (which is regularly supplied in reviews): Alexander M. Bickel's new book, *The Morality of Consent*, is published by Yale University Press (New Haven, Conn.; \$10); John A. Hardon's *The Catholic Catechism* is published by Doubleday & Co., Inc. (Garden City, New York; hardcover \$9.95, paperback \$5.95) and Baruch Brody's *Abortion and the Sanctity of Human Life: A Philosophical View* is published by the MIT Press (Cambridge, Mass.; \$8.95). The editors recommend all three.*

*Re letters, while we have received a great many, they have mostly been comments on the launching, and concept of, this journal (the majority, we are happy to report, favorable). Few criticized (or praised) in detail the articles so far published, which is the kind of thing we would need to justify a "Letters" column. We hope we will begin receiving this kind of commentary soon, and we certainly invite your comments.*

# THE HUMAN LIFE REVIEW



FALL 1975

Introduction .....	2
The Supreme Court & Evolving Principle .. <i>Alexander M. Bickel</i>	5
The Burdick Proposal:	
A Life-Support Amendment .....	<i>David W. Louisell</i> 9
Abortion: The Court Decides a Non-Case .....	<i>Joseph O'Meara</i> 17
The Morality of Abortion .....	<i>Baruch Brody</i> 42
The Right to Live .....	<i>C. Everett Koop</i> 65
Euthanasia and Abortion:	
A Catholic View .....	<i>John A. Hardon</i> 88
The Abortion Sect .....	<i>M. J. Sobran</i> 101
A Symposium: Fetal Research	
I. A Bias for Life .....	<i>Rabbi Seymour Siegal</i> 109
II. The Ethical Questions .....	<i>Harold O. J. Brown</i> 118
III. A Dissenting Statement .....	<i>David W. Louisell</i> 129
IV. The State's Role .....	<i>Charles P. Kindregan</i> 133

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## INTRODUCTION

66 **T**HE PUBLIC must be encouraged to see clearly what most of them dimly and confusedly believe already: that a healthy society, however tolerant at the margins, must be based on the perception that sex is essentially procreative, with its proper locus in a loving family. This is not a sentimentalized view but a rigorous and realistic one, because love must be sustained by the will, with charity, patience, fidelity, devotion; a marriage vow is not a prediction that the flames will never die down, but a mutual consecration which humanizes sexuality by absorbing it, in the solemnist way, into the system of social responsibility. It is based on the most fundamental sexual truth of all, yet one that requires a little courage to reaffirm in our day: that the purpose of sex is not fun—it is life. And this truth, harsh as it will sound to many, means that those who employ sexuality in frivolous ways may not demand that somebody else take the consequences of their doing so.”

That is Mr. M.J. Sobran’s conclusion (in this issue) as to what the abortion problem comes down to: an indivisible trinity of life, love, and sex that exists, irrespective of legal or social recognition of it. Can the courts properly deal with such essentially metaphysical problems? *Should* they? We begin this issue with a series of articles that focus broadly on the meaning of the United States Supreme Court’s historic Abortion Cases.

First is an excerpt from a newly-published book by the late Alexander M. Bickel, a highly-respected authority on the Court and its history. The *New York Times*, in devoting the front page of its book section to a major review, called *The Morality of Consent* “provocative . . . fitting testimony to the author’s extraordinary . . . career as a constitutional scholar, lawyer and teacher.” We think you will find Bickel’s opinions provocative indeed, for while he obviously agrees with the Court on abortion, he strongly *disagrees* with its “legislative rather than judicial” handling of the issue. His analysis seems especially timely, since the Court will, in the current session, take up some of the very problems which, in Bickel’s view, it failed to solve in the original cases.

Next, Professor David W. Louisell makes an eloquent case for reversing what the Court has done via a “Life-Support” constitutional amendment. His suggestion is also timely, stemming from the tie vote on an abortion amendment in the U.S. Senate in September (Dr. Louisell explains it all admirably).\*

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\*The “Life-Support” amendment is a slightly-modified version of the constitutional amendment proposed by John T. Noonan Jr., Professor of Law at the University of California, Berkeley, who provided an analysis of what the amendment could accomplish in the first issue of this review (HLR, Winter, 1975, pps. 26-43, 110-11).

## THE HUMAN LIFE REVIEW

Dr. Joseph O'Meara is another well-known and highly-respected figure (he is Dean Emeritus of Notre Dame Law School) in the legal community. He gives us his view of the Court's 1973 decisions. While, as he writes us, he "reveres the Court as an institution, and does not doubt the sincerity of its members," he believes "they took the wrong fork in the road" in the Abortion Cases. (Dr. O'Meara feels so strongly on the issue that, in 1974, he resigned his long-time membership in The American Civil Liberties Union because of that organization's interpretation of what the Abortion Cases meant.)

We follow with three chapters from a new book on abortion by Professor Baruch Brody: the first deals with "the woman's right to her body," which was central to the Court's rationale; the second looks at the *Roe* and *Doe* decisions themselves, and the third (Epilogue) gives us Dr. Brody's reflections on the abortion issue as a whole.

In earlier issues, we have devoted considerable space to articles written from specifically religious viewpoints, on various subjects—abortion, euthanasia, birth control, population, and so on. These seem to have been generally well received, partly (some say) because such writings are a novelty nowadays in serious journals. In any case we present two more such articles here. First, Dr. C. Everett Koop, who is best known as a children's surgeon (he performed the operation separating the Rodriguez Siamese twins that made front-page news a year ago), discusses "The Right to Live" from the viewpoint of his own deeply-held religious convictions (the article is based on an address by Dr. Koop at the Billy Graham Evangelistic Association headquarters in North Carolina last August). Then we have two articles taken from another new book, *The Catholic Catechism* by John A. Hardon, S.J., dealing with euthanasia and abortion from a Roman Catholic viewpoint.

There follows a four-part section on a whole new subject of controversy: fetal experimentation. Last July, the Department of Health, Education and Welfare lifted a year-old ban on research on living fetuses, pursuant to the advice of the National Commission on Protection of Human Subjects of Biomedical and Behavioral Research (which had reported to the Department in May). The Commission's report was not unanimous, and remains controversial.\* We make no pretense to comprehensive treatment of this most complex subject here (we hope to have more on it in the future), and we urge all interested readers to seek out the original documents avail-

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\**The New York Times* carried a lengthy lead article on fetal experimentation and the Commission's actions (see "The fetus as guinea pig," by Maggie Scarf; *The New York Times* magazine, Sunday, Oct. 19, 1975), which contains this arresting description of the general dilemma: "As one may readily see, the Roe-Wade decision has a curious impact upon our perception of the fetus prior to the age of viability. It places that fetus not only in an odd legal limbo, but in a metaphysical and moral one as well. For, by defining the fetus in the first two trimesters of pregnancy as 'not a person in the whole sense,' the Court leaves open the entire question of what it actually is—and, more important, what may be done with it."

## INTRODUCTION

able (e.g. *The Federal Register* of August 8, 1975). What we *have* attempted to do here is to give the reader an overall view of what is involved, as follows: a) Rabbi Seymour Siegal's recommendations to the Commission on what it *should* do; Dr. Harold O.J. Brown's account of what the Commission *did* do; c) the major part of Dr. Louisell's dissent (the full text is included in *The Federal Register*) to the Commission's report, and d) Prof. Charles Kindregan's analysis of what all this federal activity means *vis à vis* the continuing interest of the several states in regulating experimentation on human beings.

We close with Mr. M.J. Sobran, our most faithful contributor (to every issue so far), who continues his verbal wrestling with the eschatological problems of faith and morals, public and private. (It was Mr. Sobran who, in our very first issue, pointed out the very selective use, by the *New York Times* and others, of "Roman Catholic" in describing those involved in the abortion controversy.) This time, in what we believe to be his finest effort yet, he explains why pro-abortionists make up a kind of religious cult of their *own* ("The Abortion Sect")!

If that description tempts the reader to begin at the end, so be it. Sobran's leavening common sense may be just what should be kneaded into the weighty mass of problems we consider in this, our largest (by far) issue to date.

J. P. MCFADDEN  
*Editor*

# The Supreme Court and Evolving Principle

*Alexander M. Bickel*

SINCE FEW principles are inscribed sharply in the Constitution itself, the Supreme Court speaking in the name of the Constitution fills, in part, the need for middle-distance principles that [Edmund] Burke described. It proffers, with some important exceptions, a series of admonitions, an eighteenth-century checklist of subjects; it does this cautiously and with some skepticism. It recognizes that principles are necessary, have evolved, and should continue to evolve in the light of history and changing circumstance. That—and not Hugo Black’s—is the Constitution as the Framers wrote it. And that is what it must be in a secular democratic society, where the chief reliance for policy-making is placed in the political process.

The Constitution, said Justice Holmes in a famous dissent in 1905,<sup>1</sup> “is made for people of fundamentally differing views.” Few definite, comprehensive answers on matters of social and economic policy can be deduced from it. The judges, themselves abstracted from, removed from political institutions by several orders of magnitude, ought never to impose an answer on the society merely because it seems prudent and wise to them personally, or because they believe that an answer—always provisional—arrived at by the political institutions is foolish. The Court’s first obligation is to move cautiously, straining for decisions in small compass, more hesitant to deny principles held by some segments of the society than ready to affirm comprehensive ones for all, mindful of the dominant role the political institutions are allowed, and always anxious first to invent compromises and accommodations before declaring firm and unambiguous principles.

Yet in the end, and even if infrequently, we do expect the Court to give us principle, the limits of which can be sensed but not defined and are communicated more as cautions than as rules. Confined to a profession, the explication of principle is disciplined, imposing stan-

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Alexander M. Bickel was Sterling Professor of Law at Yale University until his death in November, 1974 (at age 49). A onetime law clerk to Justice Felix Frankfurter (1952), he was generally regarded as an influential authority on matters of constitutional law (he was chief counsel for *The New York Times* in the Pentagon Papers case). This article is taken from his posthumously-published book, *The Morality of Consent* (reprinted with permission of Yale University Press, © 1975 by Joanne Bickel).

dards of analytical candor, rigor, and clarity. The Court is to reason, not feel, to explain and justify principles it pronounces to the last possible rational decimal point. It may not itself generate values, out of the stomach, but must seek to relate them—at least analogically—to judgments of history and moral philosophy. We tend to think of the Court as deciding, but more often than not it merely ratifies or, what is even less, does *not* disapprove, or less still, decides not to decide. And even when it does take it upon itself to strike a balance of values, it does so with an ear to the promptings of the past and an eye strained to a vision of the future much more than with close regard to the present. Burke's description of an evolution meets the case: to produce nothing wholly new and retain nothing wholly obsolete. The function is canalized by the adversary process, which limits the occasions of judgment and tends to structure issues and narrow their scope to manageable proportions.

In 1905, when Holmes wrote the *Lochner* dissent, the justices were grinding out annual answers to social and economic questions on the basis of personal convictions of what was wise—derived, as it happens, from the laissez-faire philosophy of Herbert Spencer. That would not do, Holmes told them, and it did not, although it took thirty years for a majority of the justices to see it, and Holmes was gone by then. None has reread Herbert Spencer into the Constitution since, but in the 1960s a majority of the justices, under Earl Warren, again began to dictate answers to social and sometimes economic problems. The problems were different—not regulation of economic enterprise, not labor relations, but the structure of politics, educational policy, the morals and mores of the society. And the answers were differently derived, not from Spencer's Social Statics, but from fashionable notions of progress. Again, it may take time before the realization comes that this will not do.

On January 22, 1973, the Supreme Court, paying formal tribute to Holmes's 1905 dissent but violating its spirit, undertook to settle the abortion issue.<sup>2</sup> In place of the various state abortion statutes in controversy and in flux, the Supreme Court prescribed a virtually uniform statute of its own. During the first three months of pregnancy, the Court decreed, a woman and her physician may decide on an abortion quite free of any interference by the state, except as the state requires the physician to be licensed; during the second three months the state may impose health regulations, but not forbid abortion; during the last three months, the state may if it chooses forbid as well as regulate. That may be a wise model statute, although there is considerable question why the Court foreclosed state regulation of



#### THE HUMAN LIFE REVIEW

the places where the abortion is to be performed. The state regulates and licenses restaurants and pool halls and Turkish baths and God knows what else in order to protect the public; why may it not similarly regulate and license abortion clinics, or doctors' offices where abortions are to be performed?

But if the Court's model statute is generally intelligent, what is the justification for its imposition? If this statute, why not one on proper grounds of divorce, or on adoption of children? Medical evidence, the Court tells us now, shows that abortions during the first three months of pregnancy present no great risk. Well and good. It is also clear that the fetus is not a life in being at the early stages of pregnancy, is not entitled to constitutional protection, and the Constitution cannot be construed to forbid abortion. Well and good again. But the fetus is a potential life, and the Court acknowledges that society has a legitimate interest in it. So has the individual—the mother, and one would suppose also the father; an interest that may be characterized as a claim to personal privacy, which in some contexts the Constitution has been found to protect. The individual's interest, here, overrides society's interest in the first three months and, subject only to health regulations, also in the second; in the third trimester, society is preeminent.

One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject. It simply asserted the result it reached. This is all the court could do because moral philosophy, logic, reason, or other materials of law can give no answer. If medical considerations only were involved, a satisfactory rational answer might be arrived at. But, as the Court acknowledged, they are not. Should not the question then have been left to the political process, which in state after state can achieve not one but many accommodations, adjusting them from time to time as attitudes change? It is astonishing that only two dissented from the Court's decision, although Justice Potter Stewart noted in his agreement, presumably with some discomfort, that the decision joined the long line of earlier cases imposing judicially made social policy to which Holmes had objected.<sup>3</sup> The dissenters were Justices Byron White and William Rehnquist. The Court's decision was an "extravagant exercise" of judicial power, said Justice White;<sup>4</sup> it was a legislative rather than judicial action, suggested Justice Rehnquist.<sup>5</sup> So it was, and if the Court's guess on the probable and desirable direction of progress is wrong, that guess will nevertheless have been imposed on all fifty states. Normal legislation, enacted by legislatures not judges, is happily less rigid and less presumptuous in claims to universality and perma-

ALEXANDER M. BICKEL

nence. The claim to universality and permanence is illusory, in any case, for the ongoing political process which follows upon the declaration of law is another discipline the Court is subject to. Yet the Court is not excused in transgressing all limits, in refusing its own prior discipline, for in its initial process of law formation the Court is not under the discipline of the political process. Neither the Court nor its principles directly originate there. The discipline is subsequent.

NOTES

1. *Lochner v. New York*, 198 U.S. 45 (1905).
2. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).
3. *Roe v. Wade*, 410 U.S. at 167.
4. *Doe v. Bolton*, 410 U.S. at 221 (White, J., dissenting from *Roe* and *Doe*).
5. *Roe v. Wade*, 410 U.S. at 171.

# The Burdick Proposal: A Life-Support Amendment

David W. Louisell

JULY 8, 1975 was the last day of hearings on abortion amendments of the Subcommittee on Constitutional Amendments of the Committee of the Judiciary of the United States Senate. While testifying on that occasion, during the course of dialogue with the Chairman, Senator Birch Bayh, I suggested the following as the minimally adequate proposal, that is, adequate to promise relief from the chief errors of the Supreme Court's 1973 abortion decisions,<sup>1</sup> yet consistent and harmonious with the purpose, structure, style and rhythm of our Constitution:

*The Congress within federal jurisdictions and the several States within their respective jurisdictions shall have power to protect life including the unborn at every stage of biological development irrespective of age, health, or condition of physical dependency.*

This was the language which Senator Quentin Burdick (Dem., No. Dakota) introduced before the Subcommittee at its closed session on September 17, 1975.<sup>2</sup> It won a 4-4 tie vote. Besides Senator Burdick, it was voted for by Senators William Scott (Rep., Virginia), Strom Thurmond (Rep., So. Carolina), and James Eastland (Dem., Miss. who voted by proxy). Opposed were Senators Bayh (Dem., Indiana), Hiram Fong (Rep., Hawaii), James Abourezk (Dem., So. Dakota), and Charles Mathias (Rep., Maryland). Whether the Committee of the Judiciary will resolve the tie vote during the current session is unknown at this writing. Even if it does not, the issue will remain to challenge the conscience of America until the people gain the right to resolve it by constitutional process.

None will claim that the Burdick proposal is perfect. But on balance of all relevant and calculable factors—the urgency of correct-

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David W. Louisell is currently Elizabeth Josselyn Boalt Professor of Law at the University of California (Berkeley), and Visiting Professor of Law at the University of Virginia. He is a member of the Bar of the Supreme Court of the United States, a frequent contributor to professional journals, and co-author of *Medical Malpractice* (rev. 1970).

ing a great mistake before it engulfs us, the political realities, and the desirability that amendments be harmonious with the nature and spirit of the Constitution—it is the best rallying point for prolife forces. None of the other proposals attracted enough support in the Subcommittee reasonably to warrant hope for them. The Burdick proposal seems to be the real hope for all segments of our pluralistic society who remain committed to the American ideal of the inalienable right to life of all human beings.

To understand the reasonableness of hope for the Burdick proposal, and its preference in the Subcommittee, it is helpful to juxtapose the chief errors of the Court's decisions with the correctives of the Burdick proposal:

1. By judicial fiat, the mere *ipse dixit* of seven Justices, the decisions supplanted the constitutionally prescribed legislative power of all the states and the federal government with the subjective value judgments of the seven Justices. The decisions are the very culmination of the evil of judicial usurpation of legislative power, warned against by Justice Oliver Wendell Holmes,<sup>3</sup> and which took the Court to the edge of doom in the court-packing plan of Franklin Roosevelt in 1937. While other judicial supersessions of legislative power have of course been resented by portions of the population at given times and places, this one is unique in the extremity of its reach, the universality of its effect, and the subjectivity of the basis of the Court's action. The Court even had hesitancy about which constitutional provision to use to supplant historic legislative power with the new-found "right to privacy." This is why the Court's action was characterized by dissenting Justice White as an exercise of "raw judicial power"<sup>4</sup> and is resented as much from the constitutional viewpoint by scholars in sympathy with legislative liberalization of abortion, as it is by those opposed to permissive abortion.<sup>5</sup>

The Burdick proposal should appeal to all believers in the historic American pattern of a written constitution of limited powers exercised by three separate departments, irrespective of their attitudes on abortion. It invokes the commitment of political realists who appreciate that our claim to a democratic society is sham and pretense in the face of such elitist judicial usurpation of legislative function. Thus this proposal presumably should have a widespread popular base because it is sound in constitutional theory and the American people, however otherwise disillusioned, still believe in the fundamentals of their constitutional system.

2. The Court's abortion decisions are in contravention of elemental states' rights by any standard of federalism, old or new. The

## THE HUMAN LIFE REVIEW

statutes of all fifty of the states were set at naught, most of them completely so, all at least in part. It is true that the history of the country has been one of nationalization, for many reasons, of many powers formerly exercised by the states. But there has been no serious proposal for nationalization of the criminal law, and there is no adequate reason to make an exception for abortion, least of all by judicial fiat unequalled in American history. The one notorious error of such nationalization, the Eighteenth (Prohibition) Amendment repealed by the Twenty-First, could at least claim the credentials of Congressional proposal and ratification by the states. Thus the Burdick proposal should engender the support of all believers in states' rights, whether under the rubric of our classical federalism, or in the light of the new federalism—that so far as possible the essentials of government should stay close to the people.

It is of course true that the states' rights approach won't provide a universal norm of life protection. But it will return us to the *status quo ante*, which by and large was a workable arrangement for our diverse society. It is true that battles will continue to be fought over exceptions and qualifications. But when has a prolife philosophy been made secure forever, by a single stroke of the pen? We should be happy at the chance to fight for life, perhaps best of all at the local level, nearest to the people. It is a chance now foreclosed by the Court's decisions. Moreover, if and when national norms truly evolve, as distinguished from being superimposed or contrived, they may be effectuated by uniform state laws, which already run the gamut from the Uniform Anatomical Gift Act to the Uniform Commercial Code.

3. The Court's decisions are anti-scientific and anti-biological. Under the pretext of disclaiming theological approaches, the Court falls into a subjective theologism of its own. Justice Blackmun, for the Court, states: "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."<sup>6</sup> One would expect, in accordance with logic, history and constitutional doctrine, that the next premise would be: therefore, while lack of certainty prevails, the judgment is necessarily in the legislative domain. But instead, the Court indulges not only in the abjured speculation, but in dogmatic conclusions of its own. The unborn represent only "potential" human life, and have only partial human personhood; human life to be worthy of protection must be "meaningful."<sup>7</sup> This resuscitation of ideas about partial personhood, thought dead since the overthrow of

the *Dred Scott* decision,<sup>8</sup> is in the teeth of the biological realities; it can only be characterized as a theologism of the Court's very own. One may speculate as to the motivation for the departure by a majority of the Court from the certainties of biological knowledge for their own subjective value judgments. My suspicion is that at least subconsciously fear carried the day; the new concern about *excessive* human life outweighed the old reverence for *all* human life. The Court's cryptic appeal for justification of its decision to "the demands of the profound problems of the present day"<sup>9</sup> may bespeak much more than it chose to explicate.

In any event, the practical question is: What is the most candid, honest and effective way for the nation constitutionally to face up to the Court's new anti-scientific theologism? Perhaps paradoxically, I submit it is not by counterposing conflicting theologies, however much more venerable and compelling. The theory of the Burdick proposal is that the best way is to restore to government the power to rely upon scientific fact. This makes possible the broadest kind of appeal to all Americans whether of theistic or humanist persuasion, still respectful of our cherished tradition of the essential equality of all human life. Any constitutional amendment is an uphill fight at best; in this difficult area (and in our pluralistic society), it seems essential to propose one with the broadest possible credentials.

4. Putting aside essentially legal considerations and viewing the Court's decisions from a philosophical, political, sociological, or common-sense stance, a chief mischief was its grossly blunt and simplistic approach to an intricate and complicated problem. This "raw judicial power" is in fact *carte blanche* for permissive abortion, explicitly so for the first two trimesters, and *realistically* so even for the third, because of the all-inclusive scope of the Court's definition of maternal "health."<sup>10</sup> Is a gross judicial pro-abortion authorization to be countered by an equally broad pro-life generalization? Theoretically and ideally, perhaps so. But many of our people, including many essentially pro-life, perceive various necessary refinements and qualifications in the governance of abortion in a pluralistic society. The history of the struggle for any corrective amendment already bespeaks tragic diffusion of energies into essentially red-herring paths of rape, incest, psychological health, and defective offspring. However profoundly and sympathetically these problems must be approached in principle, and whatever results are reached as a matter of prudential public policy, of course they are not at the heart of today's reality. That reality is a mass slaughter of *normal* offspring grounded only in desire, or whim.

## THE HUMAN LIFE REVIEW

Recognizing that a constitution is not a criminal code, and that in our pluralistic society one's personal conscience cannot always be perfectly fulfilled in the public philosophy, the Burdick approach leaves necessary refinements where they have to be left, to reasonable legislative adjustment. Today, even some moralists and ethicists, presumably of good will, debate whether under some circumstances a fetus may legitimately be regarded as an unjust aggressor, and whether there are conditions justifying aid to nature's apparent purpose of discarding the seriously defective. And whatever one's opinion about such speculations, after all, until January 1973, we all lived, in all of the states, with a rule of law that at least permitted abortion necessary to prevent the death of the mother. As Professor Noonan has pointed out in these pages, discrimination between the crime of murder and that of abortion has been a not-unusual feature in the Anglo-American tradition.<sup>11</sup> Nor should the problem be conceived of exclusively, perhaps not even primarily, as one of criminal law. Criminal sanctions, whether rightly or wrongly, seem in the process of becoming increasingly less significant as instruments of social control in modern society, which turns more and more to civil sanctions and education. When the abortion problem is again within legislative competence, where the Burdick proposal would put it, other prolife sanctions may prove as meaningful or more so than the traditional criminal ones: counseling, succor, aid and community support for the pregnant, particularly those with special problems.

The grossness of the Court's approach perhaps instinctively urges a gross response. But experience to date suggests that a more reasoned effort is more promising, perhaps because fairer. The prolife forces cannot afford to match the Court's simplism with a simplism of their own. True, some of the Court's errors historically have been susceptible of relatively simple correction, such as *Pollock v. Farmers' Loan and Trust Company*,<sup>12</sup> corrected by the Sixteenth Amendment. But the abortion problem is not like income taxation. A more comparable error was the monumental one of *Dred Scott v. Sandford*,<sup>13</sup> corrected only after a tragic war. The error of *Roe* and *Doe* is profound, pervasive, comprehensive. A simplistic, now-and-forever solution seems neither constitutionally feasible nor politically possible. An escape hatch, such as the Burdick proposal, is possible.

5. Even more regrettable than the Court's decisions themselves, is the rationale by which they were reached. It would be hard to put a concept more antithetical to our tradition of reverence for all human life, than the idea that it is only "meaningful" life that is worthy of legal protection. Reciprocally, a corrective amendment, in terms con-

DAVID W. LOUISELL

sistent and harmonious with constitutional purpose and style, should sound a clarion call in 1976 for return to our most fundamental tradition. That is what the Burdick proposal does. It is couched neither in stark terminology, nor in euphemistic expression. Rather, it rings with the affirmation of "power to protect life including the unborn at every stage of biological development." It has the psychology not of a mere verbal formula, but a rallying cause for the 200th anniversary of a people who once dared to proclaim, against kings and tyrants and the forces of death, an inalienable right to life.

True, it is arguable that it attempts too much. The judicial *carte blanche* for permissive abortion has not yet spilt over into the area of euthanasia for the born. One might conclude, with Lincoln, "One war at a time," or invoke the admonition, "Sufficient unto the day are the evils thereof." But the present judgment of the Burdick proposal, certainly subject to revision by the Congress, is that the dangers implicit in the Court's abortion rationale warrant, if they do not require, provision for governmental power to protect human life at "every stage of biological development irrespective of age, health, or condition of physical dependency." If this be error, it is only one of excessive caution. It may help to arouse the country to the real nature of today's tragedy.

It is almost three years since the Court's abortion decisions. Attempts to arrest their overwhelming legal impact by new statutes or litigation have proved largely futile. To the contrary, under the aegis of *Roe* and *Doe*, the courts increasingly compel governmental agencies to provide abortions, and *all* taxpayers, however morally repelled, to pay for them.<sup>14</sup> As this is written, the press reports that pro-abortion forces have prevailed upon the military bureaucracy to open wide the gates to permissive abortion. Talk of legislative remedies, such as definition of fetal rights under the Fourteenth Amendment, seems largely illusionary while *Roe* and *Doe* remain uncorrected. The defenders of life with their conscience clauses and other palliatives may be as gallant as the defenders at Thermopylae. But as long as *Roe* and *Doe* stand, a constitutional amendment is the *sine qua non* of a true return to the American tradition of reverence for life. When *Roe* and *Doe* were first handed down, the amazing victory of the abortion forces was almost as surprising to them as it was shocking to prolife people. In the meantime, permissive abortion is becoming our beaten path, extermination of new life the routine of the day. The ultimate absurdity is reached when a public agency with public funds has the gall to present the preposterous contention that an attempt to correct *Roe* and *Doe* itself violates the Constitution!<sup>15</sup>



## THE HUMAN LIFE REVIEW

The poet's admonition is trite only because so true:

Vice is a monster of such frightful mein  
That to be hated needs but to be seen.  
Yet seen too oft, familiar with its face  
We first endure, then fondle, then embrace.

Whatever his conscience may dictate as his personal norm, what defender of life can be so sure of the wisdom of his individual appraisal of prudential judgment in the public domain, as to justify withholding his support of a workable amendment (which I judge the Burdick proposal to be) under today's conditions? The clock strikes high noon. The morning hours are spent—I do not say wasted—for the education in the cause of life achieved by those who shouldered the burden the Court sadly laid down in January, 1973, is monumental and a lasting tribute to their conviction and courage. But the hour for a common prolife cause is here, lest the shadows of a long night engulf us.

### NOTES

1. *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973); *Doe v. Bolton*, 410 U.S. 179, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973).

2. The Burdick proposal had its genesis in the thinking and conferences of legal scholars, with the interest in this approach consistently sustained by John T. Noonan, Jr., Professor of Law, University of California, Berkeley, who has explained its rationale, advantages and limitations in this Review (Vol. 1, No. 1, App. 2, p. 110, Winter, 1975). Since then, one refinement has been made, and the language quoted above is that used by Senator Burdick.

3. For example, in *Lochner v. New York*, 198 U.S. 45, 75 (1905).

4. 410 U.S. at 222.

5. For example, in this Review, John Hart Ely, *The Wages of Crying Wolf*, (Vol. 1, No. 1, p. 44, Winter, 1975, rep. from Yale L. J. 1973).

A profound analysis of the error of the Court, strictly from the constitutional viewpoint of usurping legislative power, appears in the latest book of Alexander M. Bickel, *The Morality of Consent* 25-30 (1975).

6. 410 U.S. at 159.

7. 410 U.S. at 162, 163. The Court's displacement of scientific fact with its own anti-scientific presuppositions seems largely a function of asking the wrong question. The question is not, when does life begin? If a point of beginning must be picked, it would be eons ago. Biological life, including human life, is a continuum. The question is, when does an individual human's life begin? And the biological answer is, when his genetic code is impressed upon him at fertilization. See *The Position of Modern Science on the Beginning of Human Life* (Scientists for Life, Inc., Fredericksburg, Va., July, 1975).

8. *Dred Scott v. Sanford*, 19 How. (U.S.) 393 (1857).

9. 410 U.S. at 165.

10. 410 U.S. at 153, 165; 410 U.S. at 192.

11. See note 2, *supra*.

12. 157 U.S. 429 (1895).

13. 19 How. (U.S.) 393 (1857).

DAVID W. LOUISELL

14. For a current showing of the all but incredible extent to which the lower federal courts have gone, in assumed obligatory obeisance to Roe and Doe, see R. Destro, *Comment*, forthcoming in 63 Calif: L. Rev. (Sept. 1975).

15. Report, *Constitutional Aspects of the Right to Limit Childbearing* (United States Commission on Civil Rights, April, 1975).

## Abortion: The Court Decides A Non-Case

Joseph O'Meara

IT TOOK THE Supreme Court 105 years to discover that the Fourteenth Amendment guarantees a personal right of privacy which invalidates State statutes forbidding abortion except to save the mother's life.<sup>1</sup> As Mr. Justice Rehnquist pointed out, in a devastating dissent in *Roe v. Wade*,<sup>2</sup> (which no member of the Court attempted to answer), at least 36 states had similar anti-abortion statutes when the Fourteenth Amendment was adopted. None was attacked on the ground that it offended the newly-adopted amendment. "The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter."<sup>3</sup>

Not until the recent past did a small but clamorous group begin to agitate for abortion on demand.<sup>4</sup> In *Roe v. Wade* the Court yielded to the pressure of this strident minority. Mr. Dooley once wrote that even the Supreme Court follows the election returns. Mr. Dooley to the contrary notwithstanding, in these indefensible cases—indeffensible on any ground—the Court disregarded the election returns in the only States in which the abortion issue recently has been on the ballot. In 1972, in Michigan and North Dakota, crushing majorities voted against abortion.<sup>5</sup> Moreover, in light of recent congressional and state legislative action,<sup>6</sup> it is hard to believe that what the Court has legislated would be passed by Congress or approved by a popular referendum. To be sure, the Court should not be a political weather vane. It owes allegiance to the Constitution, not to the electorate. Nevertheless, the will of the people, as expressed at the polls and by the legislatures they choose, is relevant. It is relevant because it demonstrates that the right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>7</sup> And the Court acknowledged in *Wade* that "only personal rights that

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JOSEPH O'MEARA

can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in [the constitutional] guarantee of personal privacy"<sup>8</sup> which the Court has created.

**Privacy: What Is It?**

The word "privacy" is defined as follows in *Webster's Third New International Dictionary* (Unabridged):

1. a) the quality or state of being apart from the company or observation of others: SECLUSION (unwilling to disturb his [~]); b) isolation, seclusion, or freedom from unauthorized oversight of observation (protected by law in the enjoyment of [~]).
2. *archaic*: a place of seclusion or retreat; private apartment (remote woodland *privacies*).
3. a) private or clandestine circumstances: SECRECY; b) *archaic*: a private or personal matter: SECRET; 4. *obs*: FAMILIARITY, INTIMACY.
5. *privacies pl, archaic*: GENITALIA, PRIVATES.

Thus, like the flowers that bloom in the spring, privacy has nothing to do with the case. If it be agreed, *arguendo*, that privacy does have something to do with the case, the question remains: What basis is there, in the Constitution or in the cases, for holding that its role diminishes as pregnancy lengthens until the fetus becomes viable (capable of surviving outside the mother's womb)? According to Mr. Justice Blackmun, this occurs between the twenty-fourth and twenty-eighth week of pregnancy, usually after about seven months.<sup>9</sup> When viability is achieved, privacy runs out of steam, in consequence of which State legislatures are free to forbid abortion except to preserve the life or health of the mother.<sup>10</sup> There is no basis, and the Court cites none, for holding that the role of privacy declines from absolute dominance at the beginning of pregnancy to zero importance at viability. This arrangement is the Court's invention, based on legislative not judicial considerations.

There is nothing private about an in-hospital abortion—a fact which Mr. Justice Blackmun seems not to understand. The admissions office must be told that the patient (the woman to be aborted) is entering the hospital for surgery, and the name of the surgeon must be given. In no time at all the surgeons who perform abortions will become known. So the admissions office will know. And, of course, everybody in the operating room will know. Every surgical procedure—even a routine tonsillectomy—involves risks. To guard against the risks common to all operations and those peculiar to abortions, all the nurses on the surgical service must be told. Anything else would render the hospital, and perhaps the surgeon, liable

#### THE HUMAN LIFE REVIEW

for damages in case of untoward circumstances. And, of course, those who keep the patients' records will know. Thus, a very considerable number of hospital personnel will know—will have to know.

No, there is nothing private about an abortion. Yet privacy is what makes an abortion legal. What an upside-down use of the English language!

If the abortion is not performed in a hospital but in a facility such as a clinic, required by the State to possess all the staffing and services necessary to perform the operation safely, the number of persons "in the know" might be somewhat reduced. It still would be true that there is nothing private about an abortion.

It is appropriate to call attention at this point to the fact that the women who challenged the constitutionality of the Texas and Georgia statutes did so under fictitious names. Why? The obvious answer is that they wanted privacy in the usual and commonly understood meaning of that term. Anonymity had a value to them. It is not ironical that each won her case on the ground that the statutes she attacked invaded her right of privacy? "When *I* use a word, Humpty-Dumpty said . . . it means just what I choose it to mean—neither more or less."<sup>11</sup> Mr. Justice Blackmun has proclaimed his solidarity with Humpty-Dumpty.

In *Doe v. Bolton*<sup>12</sup> Mr. Justice Douglas said that the right of privacy was called by Mr. Justice Brandeis (dissenting in a wire-tapping case) the right "to be let alone." But, in the present context, that proves too much. Is there a right "to be let alone" while committing a felony, or disturbing the peace, or doing any other unlawful act? So the right "to be let alone" begs the question, which is whether abortion is lawful when a State has made it a crime. The Court simply legislated the legality of abortion and, in seeking a basis for this usurpation of legislative power, seized upon the right of privacy—the reason put forward by the small minority clamoring for what the Court has given them, namely, abortion on demand.

Mr. Justice Blackmun conceded that the "Constitution does not explicitly mention any right of privacy."<sup>13</sup> Nevertheless, he said that:<sup>14</sup>

. . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution . . . only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" . . . are included in this guarantee of personal privacy.

To support these propositions he cited a long line of cases. But a

JOSEPH O'MEARA

few pages later the learned Justice flatly contradicted himself, saying:<sup>15</sup>

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. . . . The situation therefore is *inherently different* [emphasis supplied] from marital intimacy, or bedroom possessions of obscene material, or marriage, or procreation, or education, with which *Eisenstadt*, *Griswold*, *Stanley*, *Loving*, *Skinner*, *Pierce*, and *Meyer* were respectively concerned.

These were among the cases cited in *Wade*<sup>16</sup> to support the Court's propositions about privacy. What can one say of such a performance—citing cases to support the Court's position and then saying, in effect, that they don't apply?

In his dissent in *Miller v. California*<sup>17</sup> Mr. Justice Douglas said: "The difficulty is that we do not deal with constitutional terms, since 'obscenity' is not mentioned in the Constitution or Bill of Rights." Neither is "privacy" mentioned in the Constitution or Bill of Rights. The dissenting opinion of the eminent jurist in *Miller* cannot be reconciled with his concurring opinion in *Bolton*. Consistency demands that he change his vote in one or the other case. Like crabbed age and youth, they cannot live together.

Our nation is approaching its bicentennial, and no one can gainsay the fact that, from the beginning, there have been rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental"<sup>18</sup>—rights "implicit in the concept of ordered liberty."<sup>19</sup> They are proclaimed in the Declaration of Independence. But we have not had, from the beginning, a constitutional right to an induced abortion. On the contrary, abortion was a crime for over a century, that is, from 1821<sup>20</sup> until January 22, 1973, when the Court discovered that we had all been all wrong all along and that rights we have had from the birth of our country entitled a pregnant woman to an induced abortion. Does that make sense? It makes no sense at all.

Moreover, the Abortion Cases are regressive. They contravene *Ferguson v. Skrupa*.<sup>21</sup> In that case Mr. Justice Black, speaking for the Court, declared:

We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.<sup>22</sup>

But the majority in the Abortion Cases did just that. It substituted its judgment for the judgment of the Texas and Georgia legislatures. Mr.

## THE HUMAN LIFE REVIEW

Justice Stewart mentioned this in his concurring opinion in *Wade*, but apparently felt bound by *Eisenstadt v. Baird*,<sup>23</sup> which recognized:<sup>24</sup>

. . . the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.

And that, in turn, necessarily means abortion on demand.

### The Mother

Mr. Justice Blackmun all but weeps about the miseries of motherhood:<sup>25</sup>

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

Mr. Justice Blackmun seems unconscious of the fact that most women *want* children; the few who don't, and those who don't want any more, need not become pregnant. In view of easily available contraceptive devices, there is only a minimal possibility of unwanted pregnancy.<sup>26</sup> It is incredible that not a single member of the Court mentioned this everyday fact of life. On the contrary, the majority decided on an either/or basis, either the miseries of motherhood or abortion. Nonsense.

*Doe v. Bolton* holds that a pregnant woman has a constitutional right to an abortion if a continuation of the pregnancy would endanger her life or seriously and permanently injure her health, according to the best clinical judgment of a duly licensed physician. The Court had previously held that the word "health" includes psychological as well as physical well-being and is not unconstitutionally vague.<sup>27</sup>

What then is "health?" The World Health Organization has given us the answer: "Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity."<sup>28</sup> Mr. Justice Blackmun seems to agree.<sup>29</sup>

We agree with the District Court . . . that the medical judgment may be

JOSEPH O'MEARA

exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health.

In view of the breadth of the meaning of health, as defined by the World Health Organization, and the statement by Mr. Justice Blackmun in which he used much the same language, a pregnant woman is constitutionally entitled to an abortion for any reason or no reason—that is, abortion on demand. For approximately the first three months she needs no reason or excuse.<sup>30</sup> Thereafter she needs only to imagine or magnify, or invent, some complaint and so persuade a practitioner to do the procedure—and that will not be difficult. She may be telling the truth; she may be a hypochondriac; she may be malingering. These possibilities present a real diagnostic problem, one that may resist solution. But time is of the essence. If there is to be an abortion, the sooner it is done the better; the longer it is put off the more dangerous it becomes. And remember that, according to the Court's opinion, not only physical but emotional, psychological and familial factors, as well as the woman's age, are relevant for diagnostic purposes.<sup>31</sup> So the pressure is very great to perform the abortion she insists on; to perform it on the ground that it is necessary for her "well-being." And let it be remembered that ". . . induced abortions are a source of easy income for doctors."<sup>32</sup> All this adds up to abortion on demand—the conclusion is inevitable, it follows as night the day.

Yet, in his concurring opinion in *Bolton* the Chief Justice said:<sup>33</sup>

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas [sic] impermissibly limit the performance of abortions necessary to protect the health of pregnant women, using the term health in its broadest medical context . . . Plainly, the Court today rejects any claim that the Constitution requires abortion on demand.

And Mr. Justice Blackmun said:<sup>34</sup> "*Roe v. Wade, supra*, sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to abortion on her demand."

It is a pity that neither Mr. Justice Blackmun, who wrote the Court's opinions, nor the Chief Justice, understands what the Court decided.

If a woman is poor she is entitled to an abortion at the public expense. In *Klein v. Nassau County Medical Center*,<sup>35</sup> a U. S. District Court held invalid a directive of the New York Welfare Commissioner the effect of which was that the defendant medical center refused to perform abortions unless the procedure was medically indi-



## THE HUMAN LIFE REVIEW

cated. The Supreme Court remanded the cases (both the commissioner and the medical center had appealed) for further consideration in light of *Wade* and *Bolton*.<sup>36</sup>

In primitive times . . . family life was dominated by the supreme power possessed by the father, which was lawfully exercised not only over the slaves of his household, but also over his wife and children. The pater familias had the option either to acknowledge the children borne by his wife (in which case he took the new-born child in his arms and raised it with a gesture that endowed it with legitimacy) or else to expose them out of doors, leaving them for anyone who wished to take them, which, in practice, amounted to condemning them to death, or at the best, to slavery.<sup>37</sup>

The Supreme Court has endowed the modern woman with the same brutal power before her baby's birth that the Roman father possessed after his baby's birth! So doth civilization advance.

As for the argument that abortion protects the mother's health, the Japanese experience indicates that her health may be *adversely* affected by termination of her pregnancy. Japan passed its Eugenic Protection Law in 1948. The following year 250,000 legal abortions were performed. In 1972 there were no fewer than 1.5 million abortions. What has been the effect? Dr. T. A. Ueno, a professor at Tokyo's Nihon University, believes that:<sup>38</sup>

The sudden change from pregnancy causes an imbalance of the sympathetic nervous system and has many other ill effects. Among them: dysmenorrhea, sterility, habitual spontaneous abortion, extrauterine pregnancies, cramps, headaches, vertigo, exhaustion, sleeplessness, lumbago, neuralgia, debility and psychosomatic illness, perforation of the uterus, cervical lesions, infections, bleeding, and retention of some tissue.

"We can now say the law is a bad one," he told the International Academy of Legal and Social Medicine meeting in Rome. . . . "The sooner Japan returns to a solid law which forbids the taking of the life of the unborn, the better for our nation."

The ill effects of abortion have become plain elsewhere as well:<sup>39</sup>

While abortion on demand is a growing trend in the U.S., another nation with a long history of free abortion—Czechoslovakia—has recently begun to tighten its liberal policy.

One reason: a rising incidence in premature births due to cervical scarring, which is the legacy of repeated abortion. Until recently, 6% of premature deliveries were the result of cervical incompetence; that figure has risen to 9% and continues to mount, according to a Czech official. To a large extent, the situation can be explained by the fact that only one Czech woman in ten uses any kind of contraceptive measure. Most count on their gynecologist to do the job. . . .<sup>40</sup>

JOSEPH O'MEARA

Drs. Vedra and Zidovsky [of the Institute for the Care of Mother and Child in Prague] are doubly concerned about the uprising in premature deliveries because their institution is known for high-quality obstetric care. The perinatal mortality rate stands at only 18 per 1000, one of the lowest in the world. And 70% of perinatal mortality can be attributed to prematurity, they stress.

Repeated abortion can have two effects: The cervix can become damaged and weakened, leading to spontaneous abortion or premature delivery; or the cavity of the endometrium can become damaged, leading to the formation of scar tissue and to spontaneous abortion. . . .

Another consequence of the abortion situation which Drs. Vedra and Zidovsky have noticed: a growing number of children born prematurely who must attend special schools because they are not as intelligent as their full-term peers.

**The Father**

The embryo does not put itself into the mother's uterus; it is begotten by a man. The child is as much his as hers; it is theirs. Has the father no right to a voice in the abortion decision? Inexplicably the Court completely disregarded this question, except for Mr. Justice Blackmun's statement: "We are aware that some statutes recognize the father under certain circumstances."<sup>41</sup>

The fact is that the Court itself has recognized the father. It has held in three recent cases that an unwed father has a Fourteenth Amendment right to a hearing in custody and adoption proceedings. In *Stanley v. Illinois*<sup>42</sup> the Court held unconstitutional Illinois statutes which presume that an unmarried father is unfit to have the care and custody of his offspring, and therefore is not entitled to a hearing as to his fitness in fact. Mr. Justice White there said:<sup>43</sup>

It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

A few weeks after *Stanley*, the Court decided *Vanderlaan v. Vanderlaan*,<sup>44</sup> a custody case, and *Rothstein v. Lutheran Social Services of Wisconsin*,<sup>45</sup> an adoption case. In each case, the Court reversed the lower court, which had held against the father, and remanded with instructions to reconsider in light of *Stanley*. Since a father, whether married or unmarried, has a constitutional right to be heard in proceedings for the custody or adoption of the child he has sired, on what basis can the child, before birth, be exterminated without his consent?

If the mother, whether married or unmarried, has a constitutional

## THE HUMAN LIFE REVIEW

right to an abortion, and the father, whether married or unmarried, is denied the right to veto the extinction of the child, which is his as much as hers, he is denied the equal protection of the law. This follows from the decision in *Stanley* in which the Court held (all members concurring):<sup>46</sup>

. . . Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and . . . by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the law guaranteed by the Fourteenth Amendment.

So here. If the mother, who conceived the child, is entitled to an abortion and the father who begot the child, is denied the right to protect the life of his offspring, he is discriminated against—in short, denied the equal protection of the law.

In *Doe v. Doe*<sup>47</sup> a husband specifically challenged the absence of a consent provision in the New York law. The couple involved had separated before the wife discovered she was pregnant. After the woman told her husband that she would have an abortion, he obtained a restraining order to stop her from terminating the pregnancy. Before Doe could serve the order, his wife entered a hospital and had an abortion. Doe then obtained an order compelling his wife to show cause why she should not be held in contempt of court for ignoring the injunction. Doe presented both constitutional and contractual arguments. These evidently did not impress the Court, which held the wife not in contempt. How could she be, since the abortion was performed before the restraining order was served on her?

The important fact about the case is that *a restraining order was issued*.

In the absence of a statutory provision requiring his consent, *Jones v. Smith*<sup>48</sup> held against a putative father who sought to restrain the mother of his unborn child from having an abortion. The Court bowed respectfully before *Wade* and *Bolton* but reached its decision primarily on State grounds. The Florida statute provided:<sup>49</sup>

### Section 3. Written requests required

One of the following shall be obtained by the physician prior to terminating a pregnancy:

(1) The written request of the *pregnant woman and, if she is married, the written consent of her husband, unless the husband is voluntarily living apart from the wife. . . .*

The Court held:<sup>50</sup>

## JOSEPH O'MEARA

The situation in the case under consideration involves neither a married woman nor a "husband." Moreover, the "consent" of a potential putative father is not included within nor is it required by the terms of the termination of pregnancy law. Therefore, if we were to resolve this question solely on the basis of the applicability of the Florida statute, the appellant would simply have no basis to claim his consent was necessary . . .

. . . Our decision is based upon our interpretation of the decisions of the Supreme Court of the United States and Florida Statute 458.22, F.S.A., as they relate to the right of a potential putative father to enjoin the natural mother from terminating her pregnancy. No such "right" exists.

This case contravenes *Stanley*. It denies the putative father the equal protection of the law.

Bear in mind that the child is the father's as much as the mother's. If that which is his as well as hers is not allowed to be born but is snuffed out without the father's consent, is not the surgeon who performs the abortion liable to the father who has been thus robbed of the child he begot? What viable defense would he have?

In *Touriel v. Benvenisle*<sup>51</sup> a husband sued the doctor who had performed an illegal abortion on his wife without his consent. It was held that the plaintiff had a legally protectable interest in his unborn child, which was separate from his wife's interest and thus unaffected by her consent.

The Supreme Court has not spoken to this question. In this situation no prudent surgeon will perform an abortion without the consent of the father as well as the mother, for to do so would be to invite litigation. And litigation there will be. The Court has decided that the father has rights after birth. On what ground could it decide that he has no rights before birth?

The Abortion Cases demonstrate that the Court can do strange things when it usurps legislative power. It can also change its mind and frequently has done so.<sup>52</sup> The surgeon who is sued for performing an abortion without the father's consent, at best would find himself involved in unsavory publicity and expensive time-taking proceedings. No prudent surgeon would involve himself in so dangerous and disagreeable a situation. The hospital, too, where the abortion is done, would have to face the prospect of being sued—not a pleasant prospect.

### **The Child in the Womb**

In *Wade* the Court held that an unborn child is not a person "in the whole sense,"<sup>53</sup> whatever that means (if anything), and thus is not entitled to the protection of the Fourteenth Amendment. Dean

## THE HUMAN LIFE REVIEW

Prosser, however, had no difficulty in describing an unborn child as a person:

All writers who have discussed the problem have joined in condemning the old rule, and in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother.<sup>54</sup>

*Webster's Third New International Dictionary* (Unabridged) defines "child" as follows: 1 A: an unborn or recently born human being: FETUS, INFANT, BABY.

Every reason given by the Court for holding that a fetus is not a person applies equally to a corporation:<sup>55</sup>

The word [person] appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators . . . ; in the Apportionment Clause . . . ; in the Migration and Importation provision . . . ; in the Emolument Clause . . . ; in the Electors provisions . . . ; in the provision outlining qualifications for the office of President . . . ; in the Extradition provisions . . . ; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

In short, these provisions are inapplicable to fetuses. "We are not aware," added Mr. Justice Blackmun, "that in the taking of any census under [the Apportionment] Clause, a fetus has ever been counted." Is he aware that a corporation has ever been counted? The provisions enumerated by the learned Justice, containing the word "person," which he declared "do not include the unborn," are equally and obviously inapplicable to corporations. Yet no one doubts that a corporation is a person within the meaning of the Fourteenth Amendment; it is settled law. The Court cannot have its cake and eat it. It can make no pretense at consistency unless and until it holds that a corporation is *not* a person or that a fetus *is*. To hold that a corporation is not a person would reverse, expressly or *sub silencio*, untold numbers of cases, and cause consternation and chaos in the land. Indeed, as a practical matter, it would be beyond the "raw judicial power" whose exercise eventuated in the Abortion Cases.<sup>56</sup> This impossible situation should be clear even to the Court which, accordingly, should reverse those indefensible cases without more ado.

JOSEPH O'MEARA

In footnote 54 of *Wade* Mr. Justice Blackmun sought to bolster his position by asking some questions:

. . . if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception [to the prohibition of abortion] appear to be out of line with the Amendment's command?

That question was answered by Mr. Justice Rehnquist in his dissent in *Wade*.<sup>57</sup> After pointing out that at least 36 States had statutes limiting abortion when the Fourteenth Amendment was adopted, and that apparently there was no question at that time of the validity of these enactments, he said:

The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

Thus although the fetus is a person, the States have power to prefer the life of the mother when one or the other must perish.

Mr. Justice Blackmun also asked why, if the fetus is a person, the mother is not a principal or an accomplice when it is aborted; and why the penalty for criminal abortion is less than the maximum penalty for murder. Because, in the words of Mr. Justice Holmes, dissenting in *Tyson v. Banton*<sup>58</sup> "a state legislature can do whatever it sees fit to do unless restrained by some express prohibition in the Constitution of the United States or of the State. . . ." There is no express Constitutional prohibition of the provisions Mr. Justice Blackmun inquired about. Thus it is for Texas and the other states to decide whether the mother is a principal or an accomplice and what the penalty should be for criminal abortion.

In a Canadian case, *Reynolds v. Reynolds*,<sup>59</sup> the Supreme Court of Ontario issued a temporary order restraining "the defendants, and each of them, their servants and agents, and anyone on their behalf . . . from taking the life of the infant plaintiff either by performing or undergoing an abortion." Thereupon the mother, a defendant, agreed to bear her child, which she did. A similar case had been disposed of in the same way a year earlier.<sup>60</sup>

In both Canadian cases the Therapeutic Abortion Committee of the hospital in question had recommended a therapeutic abortion. Yet in both cases delivery was normal and the mother suffered no ill effect.<sup>61</sup> These cases indicate the unreliability of medical advice that a therapeutic abortion is necessary.

Mrs. Reynolds had made it abundantly clear that she did not

#### THE HUMAN LIFE REVIEW

want the child she was carrying. Mr. Reynolds had said he would leave his wife if she had an abortion, and she had said she would leave him if denied an abortion. Yet, when the baby was born, she took it to her heart. Her behavior in doing so was quite normal. Many an unwanted child has been cherished after birth. The maternal instinct is real and strong. In this case it saved a marriage; husband, wife and baby are living happily together.

Dr. Bart T. Heffernan, St. Francis Hospital, Evanston, Illinois, in *The Early Biography of Everyman*<sup>62</sup> recounts the development of the child in the womb. He concludes:

The whole thrust of medicine is in support of the notion that the child in its mother is a distinct individual in need of the most diligent study and care, and that he is also a patient whom science and medicine treats just as it does any other person.

Such is the child the Court has decreed a pregnant woman and her physician have a constitutional right to kill. The child in the womb is a living human being. If it were dead, it would have to be removed to save the mother's life. And the question at issue involves a human fetus, not the unborn offspring of a cat or a cow.

"It was the general intent of the framers of both the Fifth and Fourteenth Amendments to treat all human beings as persons and therefore as falling within the protections of those amendments. Congressman John Bingham, who sponsored the Fourteenth Amendment in the House of Representatives, described it as having universal application and noted that it pertained to "any human being." Senator Allen A. Thurman, in commenting on the scope of the equal protection clause of the Fourteenth Amendment, stated that:

[It] covers *every human being* within the jurisdiction of a state. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, *every human being* within the jurisdiction of a State from any deprivation of an equal protection of the laws."<sup>63</sup>

Professor John T. Noonan, Jr., has pointed out that the mother's personal right of privacy, on which the Court professed to rely in *Wade*, had escaped attention for over a century.<sup>64</sup> The Court thus gave the Constitution an evolving meaning. In respect of "person" on the other hand, the Court gave the Constitution a static meaning. "Person" means exactly what it meant when the Constitution was adopted. This is another of the Court's manifold inconsistencies.

Instead of the incomplete history to which he devoted so many useless pages in *Wade*—incomplete because it contains no syllable

JOSEPH O'MEARA

concerning the genesis, purpose and adoption of the Fourteenth Amendment—Mr. Justice Blackmun would have been well advised to turn to modern science. If he had, he could not have written as he did:<sup>65</sup>

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.

In *fact*, of course, the Court decided that life does *not* begin before live birth. This follows from its repeated references to the "potential" life of the fetus. Thus, with characteristic inconsistency, the Court does what Mr. Justice Blackmun says it is "not in a position" to do.

Had it consulted modern science, the Court could have avoided this self-contradiction. Thus Dr. Jerome Lejeune, a French geneticist of international fame, who discovered the chromosome abnormality responsible for mongolism, declared at a symposium in Quebec:<sup>66</sup>

*[Life] begins . . . at conception. This is not questioned by any scientific person. [Emphasis supplied.]*

The fetus is a human being. Genetically he is complete. This is not an opinion, it is a fact.

Dr. Thomas W. Hilgers, former Fellow in Obstetrics and Gynecology at the Mayo Graduate School of Medicine, now teaching those subjects at St. Louis University, agrees with Dr. Lejeune. He has written:<sup>67</sup>

There is no scientific evidence which would indicate that human life begins at any other point than the moment of conception (i.e., the union of the egg from the female and the sperm from the male) . . .

In the midst of the abortion debate, a great deal of time has been spent on arguing when life begins. It is unfortunate that so much time has been spent on this question, since the answer had been known for decades! Human life begins at the moment of conception—at that moment when sperm and egg unite—and that is a scientific fact! It is at this moment that a totally new and unique individual, never before in existence and never again to be duplicated, comes to be.

Mr. Justice Blackmun repeatedly speaks of "the" patient. In fact there are two patients, the pregnant woman and her unborn child. Dr. Hilgers has written:<sup>68</sup>

Over the last several years, medicine has developed new techniques



## THE HUMAN LIFE REVIEW

whereby the unborn child can be treated while still in the womb. The first major development was about ten years ago when Dr. A. W. Liley, an obstetrician from Auckland, New Zealand, first performed an intrauterine transfusion to treat an infant afflicted with Rh disease. This marked the beginning of the new science of fetology, the study of the unborn, and Dr. Liley is generally considered to be the "father of fetology."

Since that time a number of other advances have been made, the most dramatic of which has been the direct surgical operation on the unborn. A pioneer in this field, Dr. Stanley Asensio, of the University of Puerto Rico School of Medicine, has actually taken the fetus out of the mother's womb, performed the operation, and then placed him back into the womb only to be later delivered as a healthy, normal child. The operation is so delicate that the surgeon must use fluid-filled gloves when handling his tiny patient.

The study of the unborn is still a relatively new science and yet, in its short existence, it has put into perspective what the obstetrician has known for years, i.e., when working with the pregnant woman, there are two patients to be considered.

A therapeutic abortion is seldom required.<sup>69</sup> It is necessary in the case of cancer of the uterus and conception in the Fallopian tube; in these situations, unless it is done, the death of *both* mother and child is a virtual certainty. There may be other conditions indicating a therapeutic abortion, but they are rare and diminishing.<sup>70</sup>

Let it be said [Dr. Hilgers has conceded] that there may be very rare and very individual situations in which a pregnancy may have to be terminated because the mother's life is imperiled.

But he has emphasized:

Medical science has made truly great advances over the last 30 years and, as a result, it is now highly unlikely that *any* pregnancy will be so hazardous as to necessitate its termination. . . . Now with our up-to-date knowledge, the risks are rarely [so] great that they require abortion. To indicate just how rare this really is, Dr. Denis Cavanaugh, former Chairman of the Department of Obstetrics and Gynecology at the St. Louis University School of Medicine and former Director of the obstetric service at St. Louis City Hospital, recently reported that between July 1, 1966 and July 1, 1968, there were 5,102 deliveries without a single maternal death (St. Louis City Hospital serves the medically underprivileged almost exclusively and one would expect a high maternal mortality rate). During this two year period, *only one abortion was considered necessary to save the life of the mother.* (Emphasis supplied.)

Nevertheless, a woman determined to have an abortion experiences little difficulty in obtaining medical advice that a termination of her pregnancy is indicated on therapeutic grounds. Since this is so, should not the living human being she wants to kill be entitled to

JOSEPH O'MEARA

representation? His life is at stake, and will be extinguished for no better reason than that a physician or committee of physicians has certified that the mother's life or health requires it. Every consideration of decency and fairness, every civilized instinct demands the appointment of a guardian *ad litem* to cross-examine those who have condemned him to death and to produce evidence to rebut the medical reasons advanced in support of the decision to take his life. Mr. Justice Blackmun acknowledged that "unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*."<sup>71</sup> How much more appropriate, indeed necessary, when life itself is at stake?

In *Byrn v. New York City Health and Hospital Corp.*,<sup>72</sup> plaintiff was a guardian *ad litem* for infant Roe and all similarly situated members of a class of unborn infants scheduled for abortion in public hospitals under the operation and control of defendant. In that capacity plaintiff sought a declaratory judgment that New York's 1970 abortion statute was unconstitutional. The Court conceded that an unborn child "is human, if only because it may not be characterized as not human and it is unquestionably alive." It held, nevertheless (two judges dissenting) that the question of conferring legal personality on the unborn was a matter of policy to be decided by the legislature. But no member of the Court questioned either the propriety of plaintiff's appointment as guardian *ad litem* or the propriety of his action in filing suite in that capacity. And in *Klein v. Nassau County Medical Center*<sup>73</sup> a guardian *ad litem* was permitted to intervene.

Indeed, to refuse to permit a guardian *ad litem* to represent an unborn child scheduled to be killed by an abortionist would be a repudiation of the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among those are Life, Liberty and the pursuit of Happiness.

In *Raleigh Fitkin—Paul Morgan Memorial Hospital v. Anderson*,<sup>74</sup> the hospital brought an action seeking authority to administer blood transfusions to defendant if they should become necessary to save her life and the life of her unborn child. Defendant had notified the hospital that he did not wish blood transfusions *for the reason that they would be contrary to her religious convictions as a Jehovah's Witness*. The Court held:<sup>75</sup>

We are satisfied that the unborn child is entitled to the law's protection

## THE HUMAN LIFE REVIEW

and that an appropriate order should be issued to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.

We have no difficulty in so deciding with respect to the infant child. . . .

The judgment [which had been against the hospital] is accordingly reversed and the matter remanded to the trial court with directions (1) to appoint a special guardian for the infant; (2) to substitute such guardian as party plaintiff; (3) to order the guardian to consent to such blood transfusions as may be required to preserve the lives of the mother and child; and (4) to direct the mother to submit to such blood transfusions and to restrain the defendant husband from interfering therewith.

*Thus the Court placed a higher value on preserving the life of the unborn child than on the constitutional guarantee of freedom of conscience and of religion.*

### The Hospital

In *Doe v. Bellin Memorial Hospital*<sup>76</sup> the plaintiff sought an injunction requiring the hospital to make its facilities available to her for an abortion. The Court upheld the hospital's refusal, saying:

. . . There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the performance of abortions. We think it is also clear that if a state is completely neutral on the question whether private hospitals shall perform abortions, the state may expressly authorize such hospitals to answer that question for themselves.

The Georgia abortion statute which was reviewed in *Doe v. Bolton*, contained such a provision. The Supreme Court did not expressly pass on the validity of that provision, but since it was attacked in one of the amicus briefs, and since the Court reviewed the entire statute in such detail, it is reasonable to infer that it considered such authorization unobjectionable. . . .

Thus, we assume that there is no constitutional objection to a state statute or policy which leaves a private hospital free to decide for itself whether or not it will admit abortion patients or to determine the conditions on which such patients will be accepted.

The hospital was the recipient of funds under the Hill-Burton Act and was subject to detailed regulation by the State of Wisconsin. These facts were disregarded by the Court.

In Indiana, the Attorney General has ruled that public as well as private hospitals may refuse abortion patients.<sup>77</sup>

### Turning Back The Clock

The Abortion Cases have overruled *sub silencio Ferguson v.*

JOSEPH O'MEARA

*Skrupa*, in which, as noted above, Mr. Justice Black, speaking for the Court, said:

We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.<sup>78</sup>

Thus in *Munn v. Illinois* the Court held: "For protection against abuses by legislatures the people must resort to the polls, not to the courts."<sup>79</sup>

*Lochner v. New York*<sup>80</sup> and *Tyson v. Banton*<sup>81</sup> are back in the saddle again. In the latter case Mr. Justice Holmes, dissenting, said:<sup>82</sup>

I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

His dissent, which was joined by Mr. Justice Brandeis, eventually was accepted as the law, and the question became whether or not such laws as those challenged in *Wade* and *Bolton* have a rational relation to a valid state objective.<sup>83</sup> In view of *Wade* and *Bolton*, nobody can say that is still the law.

The statement just made is supported by *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*<sup>84</sup> which reversed *Liggett Co. v. Baldrige*.<sup>85</sup> Both cases involved statutes regulating the ownership and control of drug stores. *Liggett* held the statute there involved unconstitutional. Mr. Justice Douglas, speaking for the Court, upheld the constitutionality of the North Dakota statute, expressly reversing *Liggett*. This confounds the confusion already existing because, in upholding the North Dakota statute, the Court relied, *inter alia*, on cases which were ignored by the majority and concurring Justices in the Abortion Cases, namely, *Ferguson v. Skrupa*,<sup>86</sup> *Munn v. Illinois*<sup>87</sup> and *Williamson v. Lee Optical Co.*<sup>88</sup> What accounts for this yo-yo behavior? Until the Court adopts and adheres to a consistent rule, nobody can say from day to day which end is up.

When it struck down the Texas statute, the Court disregarded the opinion of Mr. Justice Holmes, quoted above,<sup>89</sup> namely, that:

. . . a state legislature can do whatever it sees fit to do unless restrained by some express prohibition in the Constitution of the United States or of the State . . .

#### THE HUMAN LIFE REVIEW

It goes without saying that the Texas statute did not offend any express prohibition in the Constitution of the United States or of Texas. No member of the Court even suggested that it did.

#### An Alternative

It is common knowledge that many people wish to adopt a baby. But the demand exceeds the supply; there aren't enough babies to go around. Hence would-be adoptive parents are put on a waiting list. In view of *Stanley* the consent of the father is now required, if he is known. If he refuses his consent, the baby is placed in a foster home pending the outcome of judicial proceedings. Thus adoptive parents must wait two or three years. If there were fewer abortions, there would be more babies to adopt.

#### Conclusion

The Abortion Cases have settled nothing. They are so full of contradictions and *non sequiturs*, so lacking in any basis in the Constitution or prior cases, that they cannot stand. Even those who, for whatever reason, advocate abortion, must deplore the Court's shoddy performance, devoid of judicial craftsmanship, in those inexcusable cases. Like *Minersville School District v. Gobitis*<sup>90</sup> and *Roth v. United States*,<sup>91</sup> sooner or later they will be reversed, expressly or *sub silencio*.

Indeed, the reversal process already has begun. In *Bolton* the Court held:<sup>92</sup>

Appellants and various *amici* have presented us with a mass of data purporting to demonstrate that some facilities other than hospitals are entirely adequate to perform abortions if they possess these qualifications [that is, all the staffing and services necessary to perform an abortion safely]. *The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient. We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests.* (Emphasis supplied.)

The Chief Justice concurred.

Five months later (on June 21, 1973) that portion of *Bolton* quoted in the next preceding paragraph was reversed *sub silencio* by *Paris Adult Theatre I v. Slayton*.<sup>93</sup> The opinion in that case was written by the Chief Justice, Mr. Justice Blackmun concurring.

JOSEPH O'MEARA

The Court held:<sup>94</sup>

*From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. . . . On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons" and "trading stamps," commanding what they must and may not publish and announce. . . .*

*The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.*

*If we accept the unprovable assumption that a complete education requires the reading of certain books . . . and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? . . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a state from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. (Emphasis supplied.)*

Thus *Bolton* holds that the State has the burden of producing empirical data to support its statutes, while *Slayton* holds that the State need not produce empirical data but may rely on unprovable assumptions. *Slayton* was decided five months after *Wade*. Five months after *Slayton*, on December 5, 1973, *North Dakota State Board of Pharmacy v. Snyder's Drug Stores*<sup>95</sup> was decided. In *Wade* the Court relied on the "compelling state interest" test.<sup>96</sup> In the *North Dakota* case the Court says nothing about a "compelling state interest." What it does is to adopt the position set out in the dissent of Mr. Justice Rehnquist in *Wade*, as follows:<sup>97</sup>

The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v. Lee Optical Co.*, 384 U.S. 483, 491 (1955).

And so on. The Abortion Cases will not last. Sooner or later those monstrous cases will join the long and lengthening list of cases in which the Court has reversed itself. More than forty years ago Mr.

## THE HUMAN LIFE REVIEW

Justice Brandeis, dissenting in *Burnet v. Coronado Oil & Gas Co.*<sup>98</sup> collected a goodly number of cases in which the Court had reversed itself. His list would be longer today and continues to grow. This willingness to correct its mistakes is a tribute to the Court. In time it will correct the mistake it made in the Abortion Cases.<sup>99</sup>

## NOTES

1. From 1868, when the Fourteenth Amendment was adopted, to 1973, when *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) (the Abortion Cases) were decided.

2. 410 U.S. at 174-75.

3. *Id.* at 177.

4. The abortion crusade began about 1966. Its roots no doubt go several years further back. Lader, *Abortion II: Making the Revolution*, Preface and 1 and 2. Beacon Press (1973).

5. Hilgers, *Induced Abortion* 19 (2d ed. 1973). Minnesota Citizens Concerned for Life, Inc., Box 452, Owatonna, Minnesota 55060.

6. The Legal Services Corporation Act of 1974, P.L. 93-355, § 1007 (b) provides: "No funds made available by the Corporation under this title, either by grant or contract, may be used—(8) to provide legal assistance with respect to any proceeding or litigation which seeks to procure a non-therapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution; . . ."

A similar provision is contained in the Health Programs Extension Act of 1973, P.L. 93-45, § 401(c); and the Foreign Assistance Act of 1973, P.L. 93-189, § 114, provides: "None of the funds made available to carry out this part shall be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions."

Moreover, Congress has quietly been passing with little public notice a series of anti-abortion amendments tacked onto other legislation. See, e.g., *Boston Evening Globe*, 26 March 1974, p. 11, col. 1.

In May 1972 the New York Legislature voted to repeal that State's abortion law, passed in 1970, which legalized abortion on demand until the twenty-fourth week of pregnancy. The repealer was vetoed by Governor Rockefeller. *New York Times*, 14 May 1972, p. 1, col. 1. Since then the 1970 law has been amended to provide that (1) after the twelfth week of pregnancy abortions must be performed in a hospital, and only on an in-patient basis, and (2) after the twentieth week a second physician must be present "to take control of and provide immediate medical care for any live birth that is the result of the abortion." *New York Times*, 16 June 1972, p. 1, col. 3.

In August 1974 the Massachusetts legislature voted overwhelmingly to override Governor Sargent's veto of a bill to limit abortions and safeguard the life of the unborn in such procedures performed in that state. Among the provisions of the bill, now law: all abortions must be certified as necessary and done by a physician; minors must have the consent of their parents; after the 13th week an abortion must be performed in a hospital; after the 24th week an abortion may be performed only to save the life or mental health of the mother; life supporting equipment must be provided in the room where an abortion is performed; procedures that would be injurious to or destroy the life of the fetus may not be used unless all other available procedures would create a greater danger and risk of life. *Boston Pilot*, 9 August 1974, p. 1, col. 2.

## JOSEPH O'MEARA

A month later the Pennsylvania legislature, by a wide margin, passed a bill restricting abortions in that State. The bill was vetoed by Governor Shapp. The veto was overridden by a vote of 41 to 8 in the Senate, 157 to 37 in the House; and the bill is now law. Among its provisions: Except for therapeutic abortions (1) a married woman must obtain the consent of her husband, and (2) no abortion may be performed after the fetus is viable; (3) in the case of a therapeutic abortion of a viable fetus, precautions must be taken to insure that it is aborted alive; (4) taking the life of a premature baby aborted alive is second degree murder punishable by life imprisonment; (5) except in emergency situations, before undergoing an abortion a woman must sign a statement affirming that she has been advised, among other things, that "there may be detrimental physical and psychological effects which are not foreseeable"; (6) advertising or soliciting for abortions is forbidden, as are fees for abortion referrals. *Philadelphia Inquirer*, 11 September 1974, p. 1, col. 1.

7. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).
8. 410 U.S. at 152.
9. *Id.* at 160.
10. *Id.* at 163-64.
11. Carroll, *Through the Looking Glass*, c. VI.
12. 410 U.S. 179, 213 (1973).
13. 410 U.S. at 152.
14. *Ibid.*
15. *Id.* at 159.
16. *Id.* at 152-53.
17. 413 U.S. 15, 40 (1973).
18. Note 7. *supra*.
19. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).
20. Mr. Justice Rehnquist, in *Wade*, pointed out that the first state law dealing directly with abortion was enacted by the Connecticut legislature in 1821. 410 U.S. at 174.
21. 372 U.S. 726 (1963).
22. *Id.* at 730.
23. 405 U.S. 438, 453 (1972).
24. 410 U.S. at 169-70.
25. *Id.* at 153. Mr. Justice Douglas likewise sheds a tear. 410 U.S. at 214-16.
26. The pill is better than 98 percent effective. The IUD is better than 96 percent effective. The diaphragm is 95 percent to 97 percent effective. The condom, when used with contraceptive foam, is better than 97 percent effective. These figures are taken from *Basics of Birth Control*, a pamphlet produced and distributed by Planned Parenthood. Documentation of the figures can be obtained from Ralph Woolf, M.D., 810 Seventh Avenue, New York, New York 10019.
27. *United States v. Vuitch*, 402 U.S. 62 (1971).
28. "Constitution of the World Health Organization" in *Yearbook of the United Nations* 1946-47, Annex III, p. 793.
29. 410 U.S. at 192.
30. *Id.* at 164.
31. Note 29, *supra*.
32. "Abortion in Japan after 25 years," 14 *Medical World News* 37 (9 November 1973).
33. 410 U.S. at 207, 208.
34. *Id.* at 189.
35. 347 F. Supp. 496 (E.D. N.Y. 1972). Not all states will pay the bill. See Butler, "The Right to Abortion under Medicaid," 7 *Clearinghouse Review*, 713 (April 1974).
36. 412 U.S. 925, 926 (1973).
37. Grimal, *The Civilization of Rome* 119 Simon & Schuster (1963). See also Carpino, *Daily Life in Ancient Rome* 77. Yale University Press (1940): ". . . until the beginning



## THE HUMAN LIFE REVIEW

of the 3d century, when abandoning a child was considered the equivalent of murder, he [the Roman father] might expose his newborn child to perish of cold and hunger or be devoured by dogs on one of the public refuse dumps unless it was rescued by the pity of some passer-by."

38. Note 32, *supra*. ". . . a growing number of women are turning against abortion. According to a survey conducted by the Prime Minister's Office, more than half of all married women have had at least one abortion. Of these 88 percent were against them. Forty percent said 'they were bad and should not be permitted,' while 48 percent felt that 'abortions were not good but could not be avoided.'

"Women now want something better than abortion. They want reliable means of preventing unwanted pregnancies." Pearce, *Birth Crisis Seen in Japan*, *South Bend Tribune*, 26 July 1974, p. 15, col. 1.

39. "Czechs Tighten Reins on Abortion," 14 *Medical World News* 106H, 106J (12 October, 1973).

40. In Japan "About half the Japanese women who have abortions admit that they did not even try to prevent conception." See note 32, *supra*. The evidence, therefore, is squarely against Dr. Alan F. Guttmacher, president of Planned Parenthood, who said in a recent article: "Those who favor liberalization want to substitute safe abortion for the dangerous, clandestine variety, until contraception is so widely practiced that unwanted pregnancy—and therefore the need for abortion—disappears." (Emphasis supplied). See the November 1973 issue of *Reader's Digest* at 144. Dr. Guttmacher should know it doesn't work that way. Easy abortion *decreases* the use of contraceptives, and this *increases* the demand for abortion and the number of abortions performed.

41. 410 U.S. at 165 n. 67.

42. 405 U.S. 745 (1972).

43. *Id.* at 651.

44. 405 U.S. 1051 (1972).

45. *Ibid.*

46. 405 U.S. at 649. *Cf.* *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) in which the Court held that Massachusetts could not regulate the distribution of contraceptives to the unmarried, saying "the rights must be the same for the unmarried and the married alike." And *cf.* *Weinberger v. Wiesenfeld*, 95 S. Ct. 1225, 1228, 1232 (1975). Under § 402 (g) of the Social Security Act benefits based on the earnings of a deceased husband and father covered by the Act are payable, with some limitations, both to the widow and to the couple's minor children in her care. On the other hand, benefits are payable on the basis of the earnings of a deceased wife and mother covered by the Act only to the minor children *and not to the widower*. The question in the case was whether this gender-based distinction was violative of equal protection under the Fifth Amendment. A three-judge District Court held that the different treatment of men and women mandated by § 402 (g) unjustifiably discriminated against women wage earners by affording them less protection for their survivors than is provided to male employees. The Supreme Court affirmed, holding that the Constitution "forbids the gender-based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is provided by the efforts of men."

48. 278 So.2d 339 (Fla. 1973), *cert. den.* 94 S. Ct. 1486 (1974).

49. *Id.* at 342. The statute is quoted in the opinion and the emphasis was supplied by the court.

50. *Id.* at 342, 344. *Accord*, *Doe v. Doe*, 314 N.E. 2d 128 (1974). A number of states require a father's consent to abortion. See, e.g., Wash. Rev. Code § 9.02.070 (1973 Supp.)

*Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973) concerned Utah Code Annotated Title 76, c. 7. Unlike the Florida statute the Utah Code requires that "[in] all cases, consent must be given by the father of the fetus." The court held "all of the statutes and portions of statutes contested herein *invalid in toto*." It did not discuss the require-

## JOSEPH O'MEARA

ment that "consent must be given by the father of the fetus." No review was sought of the judgment in this case.

In *Doe v. Bellin Memorial Hospital*, 479 F. 2d 756, 59 (7th Cir. 1973) the Court held the putative father not an indispensable party but noted "that the Supreme Court expressly reserved decision on any question relating to rights of the putative father. . . ."

51. Civil Docket No. 766790, Los Angeles Super. Ct., 20 October 1961. For a discussion of this case, see "*The Expectant Father Protected: Tort Action Allowed against Abortions*," 14 *Stanford Law Review*, 901 (1962).

52. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) (Brandeis, J., dissenting).

53. 410 U.S. at 162. But see Rice, "Overruling *Roe v. Wade*: An Analysis of the Proposed Constitutional Amendments," 15 *Boston College Industrial and Commercial L. Rev.* at 314, n. 36 and 37 (1973).

54. Prosser, *Law of Torts* 336 (4th ed. 1971). See also *Wagner v. Finch* 413 F. 2d 267, 268-69 (5th Cir. 1969): ". . . the illegitimate child of a deceased father, conceived before but born after, the father's death is sufficiently 'in being' to be capable of 'living with' the father at the time of his death. The fact that a worker dies before the birth of a child already 'in being' is no legal or equitable reason to prohibit that child from benefits." And see *Kyne v. Kyne*, 38 Cal. App. 2d 122, 127, 100 P. 806, 809 (1940). Held: An unborn child may bring suit by a guardian *ad litem* to compel the father to provide support. The Court said: "Obviously, a child must be supported both before as well as after, birth. It is clearly to the best interests of the child that its father be compelled to support it, if the mother cannot, prior to its birth."

55. 410 U.S. at 157-58.

56. Mr. Justice White, joined by Mr. Justice Rehnquist, dissenting in *Doe v. Bolton*, 410 U.S. at 222. His dissenting opinion applies also to *Wade*.

57. 410 U.S. at 174-77.

58. 273 U.S. 418, 446 (1927). Mr. Justice Brandeis concurred in the dissenting opinion of Mr. Justice Holmes.

59. No. 864, S. Ct. of Ontario, 1 November 1973.

60. *Roe v. Riverside Hospital*, No. 70, S. Ct. of Ontario, 26 January 1972. Information about these two Canadian cases (*Infant Reynolds* and *Infant Roe*) was obtained from plaintiffs' counsel, Mr. David Dehler, barrister and solicitor, 110 York Street, Ottawa 2, Ontario, K1N-5T5, Canada.

61. The *Reynolds* baby suffered a dislocated hip. It is not known whether this happened before, during or after delivery. In any case, a baby's dislocated hip can be corrected with little or no difficulty, provided the condition is detected within three months after birth. The information concerning correction of the dislocation was obtained from Dr. Leslie M. Bodnar, an eminent orthopedic surgeon, 328 North Michigan Street, South Bend, Indiana 46601.

62. Hilgers & Horan, ed., *Abortion and Social Justice* 3, Sheed & Ward (1972).

63. See Rice, Note 53, *supra*.

64. 25 *National Review*, 2 March 1973, 260, 262-63. At page 262 Professor Noonan describes the page after page of history which Mr. Justice Blackmun recounts (but does not rely on) in *Wade* as "undigested," indeed "untasted," and as a "charade." Of the Court's holding he says, at 264, "What it is appropriate for the state to protect is not a human being, but a human being with the 'capability of meaningful life.'" [*Wade* at p. 163] Professor Noonan concludes: "Our old way of looking on all human existence as sacred is to be replaced by a new ethic more discriminating in choosing who shall live and who shall die. The concept of 'meaningful life' is at the core of these decisions."

65. 410 U.S. at 159.

66. *Le Devoir* (Montreal) 6 May 1974, p. 3, col. 1. Translated from the French by Jeanne Rodes, wife of Professor Robert E. Rodes, Jr., of Notre Dame Law School.

67. *Induced Abortion*, 1 (2d ed. 1973). See note 5, *supra*.

## THE HUMAN LIFE REVIEW

68. *Id.* at 9-10.
69. For descriptions of the methods of abortion in general use, see *Id.* at 26-30, and Hilgers & Horan, ed., *Abortion and Social Justice* 291-93 (1972). See note 62, *supra*.
70. Note 67, *supra*, at 21-22.
71. 410 U.S. at 162.
72. 31 N.Y. 2d 194, 286 N.E. 2d 887 (1972), *app. dism.*, 410 U.S. 949 (1973).
73. 347 F. Supp. 496 (E.D.N.Y. 1972).
74. 42 N.J. 421, 201 A. 2d 537 (1964), *cert. den.* 377 U.S. 985 (1964).
75. *Id.* at 423-24. See Rice, Note 53 *supra*.
76. 479 F.2d 756, 759-60 (7th Cir. 1973). *Accord*, *Watkins v. Mercy Medical Center*, 364 F. Supp. 799 (N.D. Idaho, 1973); *Allen v. Sisters of St. Joseph*, 490 F.2d 81 (5th Cir. 1974); *Chrisman v. Sisters of Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974).
77. Official Op. No. 9 (19 April 1974). This ruling is contrary to the cases, which hold that a public hospital must allow abortions in the first trimester of pregnancy. Cf. *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (1st Cir. 1973); *Doe v. Hale Hospital*, 500 F.2d 144 (1st Cir. 1974). There appears to be no absolute duty to allow abortions in the second and third trimesters. *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir. 1974), *cert. den.*, 95 S. Ct. 169 (1974).
78. 372 U.S. at 730.
79. 94 U.S. 113, 134 (1876).
80. 198 U.S. 45 (1905).
81. 273 U.S. 418 (1927).
82. *Id.* at 466.
83. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955).
84. 94 S. Ct. 407 (1973).
85. 278 U.S. 105 (1928).
86. 372 U.S. 726 (1963).
87. 94 U.S. 113 (1876).
88. 348 U.S. 483 (1955).
89. Note 82, *supra*.
90. 310 U.S. 586 (1940).
91. 354 U.S. 476 (1957).
92. 410 U.S. at 195.
93. 93 S. Ct. 2628 (1973).
94. *Id.* at 2637-38.
95. 94 S. Ct. 407 (1973).
96. 410 U.S. at 155, 162-63.
97. *Id.* at 173.
98. 285 U.S. 393, 405 (1932).
99. Senator Hatfield has said: "Abortion is a form of violence. That is the undeniable reality. Like the war in Indochina, it is the destruction of life. It furthers the dehumanization of life. It cheapens life.  
"Abortion is not a Catholic issue. Indeed, as a non-Catholic, I have joined Sen. James L. Buckley (Cons.-N.Y.) and Sen. Harold E. Hughes (D-Iowa) in introducing Senate Joint Resolution 19. This constitutional amendment, cosponsored by five other senators, would restore the fundamental right to parenthood." Hatfield, "On Many Fronts We Have Lost Respect for Human Life," *Los Angeles Times*, 8 August 1973, Part II at 7.

# The Morality of Abortion

*Baruch Brody*

## I. The Woman's Right to Her Body

It is common claim that a woman ought to be in control of what happens to her body to the greatest extent possible, that she ought to be able to use her body in ways that she wants to and refrain from using it in ways that she does not want to. This right is particularly pressed where certain uses of her body have deep and lasting effects upon the character of her life, personal, social, and economic. Therefore, it is argued, a woman should be free either to carry her fetus to term, thereby using her body to support it, or to abort the fetus, thereby not using her body for that purpose.

In some contexts in which this argument is advanced, it is clear that it is not addressed to the issue of the morality of abortion at all. Rather, it is made in opposition to laws against abortion on the ground that the choice to abort or not is a moral decision that should belong only to the mother. . . . For the moment, I am concerned solely with the use of this principle as a putative ground tending to show the permissibility of abortion, with the claim that because it is the woman's body that carries the fetus and upon which the fetus depends, she has certain rights to abort the fetus that no one else may have.

We may begin by remarking that it is obviously correct that, as carrier of the fetus, the mother has it within her power to choose whether or not to abort the fetus. And, as an autonomous and responsible agent, she must make this choice. But let us notice that this in no way entails either that whatever choice she makes is morally right or that no one else has the right to evaluate the decision that she makes . . .

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## THE HUMAN LIFE REVIEW

In short, our sole and appropriate concern is with the following issue: Should we modify the conclusions we reached [in Chapter 1] so as to allow some (or all) abortions as morally permissible, on the ground that a woman ought to be free to do what is necessary to retain control over her body?

At first glance, it would seem that this argument cannot be used by anyone who supposes, as we do for the moment, that there is a point in fetal development from which time on the fetus is a human being. After all, people do not have the right to do anything whatsoever that may be necessary for them to retain control over the uses of their bodies. In particular, it would seem wrong for them to kill another human being in order to do so.

In a recent article,<sup>1</sup> Professor Judith Thomson has, in effect, argued that this simple view is mistaken. How does Professor Thomson defend her claim that the mother has a right to abort the fetus, even if it is a human being, whether or not her life is threatened and whether or not she has consented to the act of intercourse in which the fetus is conceived? At one point,<sup>2</sup> discussing just the case in which the mother's life is threatened, she makes the following suggestion:

In [abortion], there are only two people involved, one whose life is threatened and one who threatens it. Both are innocent: the one who is threatened is not threatened because of any fault, the one who threatens does not threaten because of any fault. For this reason, we may feel that we bystanders cannot intervene. But the person threatened can.

But surely this description is equally applicable to the following case: *A* and *B* are adrift on a life boat, *B* has a disease that he can survive, but *A*, if he contracts it, will die, and the only way that *A* can avoid that is by killing *B* and pushing him overboard. Surely, *A* has no right to do this. So there must be some special reason why the mother has, if she does, the right to abort the fetus.

There is, to be sure, an important difference between our lifeboat case and abortion, one that leads us to the heart of Professor Thomson's argument. In the case that we envisaged, both *A* and *B* have equal rights to be in the lifeboat, but the mother's body is hers and not the fetus's, and she has first rights to its use. The primacy of these rights allow an abortion whether or not her life is threatened. Professor Thomson summarizes this argument in the following way:<sup>3</sup>

I am arguing only that having a right to life does not guarantee having either a right to be given use of, or a right to be allowed continued use of, another person's body—even if one needs it for life itself.

One part of this claim is clearly correct. I have no duty to *X* to

BARUCH BRODY

save *X*'s life by giving him the use of my body (or my life savings, or the only home I have, and so on), and *X* has no right, even to save his life, to any of those things. Thus, the fetus conceived in the laboratory that will perish unless it is implanted into a woman's body has in fact no right to any woman's body. But this portion of the claim is irrelevant to the abortion issue, for in abortion of the fetus that is a human being the mother must kill *X* to get back the sole use of her body, and that is an entirely different matter.

This point can also be put as follows: as we saw in Chapter 1, we must distinguish the taking of *X*'s life from the saving of *X*'s life, even if we assume that one has a duty not to do the former and to do the latter. Now that latter duty, if it exists at all, is much weaker than the first duty; many circumstances may relieve us from the latter duty that will not relieve us from the former one. Thus, I am certainly relieved from my duty to save *X*'s life by the fact that fulfilling it means the loss of my life savings. It may be noble for me to save *X*'s life at the cost of everything I have, but I certainly have no duty to do that. And the same observation may be made about cases in which I can save *X*'s life by giving him the use of my body for an extended period of time. However, I am not relieved of my duty not to take *X*'s life by the fact that fulfilling it means the loss of everything I have and not even by the fact that fulfilling it means the loss of my life. As our discussion in Chapter 1 showed, something more is required before rights like self-defense become applicable. A fortiori, it would seem that I am not relieved of the duty not to take life by the fact that its fulfillment means that some other person, who is innocently occupying my body, continues to do so.

At one point in her paper,<sup>4</sup> Professor Thomson does consider this objection. She has previously imagined the following case: a famous violinist, who is dying from kidney ailment, has been, without your consent, plugged into you for a period of time so that his body can use your kidneys:

Some people are rather stricter about the right to life. In their view, it does not include the right to be given anything, but amounts to, and only to, the right not to be killed by anybody. But here a related difficulty arises. If everybody is to refrain from killing that violinist, then everybody must refrain from doing a great many different sorts of things . . . everybody must refrain from unplugging you from him. But does he have a right against everybody that they shall refrain from unplugging you from him? To refrain from doing this is to allow him to continue to use your kidneys . . . certainly the violinist has no right against you that you shall allow him to use your kidneys.

#### THE HUMAN LIFE REVIEW

Applying this argument to the case of abortion, we can see that Professor Thomson's argument would run as follows:

- a. Assume that the fetus's right to life includes the right not to be killed by the woman carrying him.
- b. But to refrain from killing the fetus is to allow him the continued use of the woman's body.
- c. So our first assumption entails that the fetus's right to life includes the right to the continued use of the woman's body.
- d. But we all grant that the fetus does not have the right to the continued use of the woman's body.
- e. Therefore, the fetus's right to life cannot include the right not to be killed by the woman in question.

And it is also now clear what is wrong with this argument. When we granted that the fetus has no right to the continued use of the woman's body, all that we meant was that he does not have this right merely because the continued use saves his life. But, of course, there may be other reasons why he has this right. One would be that the only way to take the use of the woman's body away from the fetus is by killing him, and that is something that neither she nor we have the right to do. So, I submit, the way in which Assumption d is true is irrelevant, and cannot be used by Professor Thomson, for Assumption d is true only in cases where the saving of the life of the fetus is at stake and not in cases where the taking of his life is at stake.

I conclude therefore that Professor Thomson has not established the truth of her claims about abortion, primarily because she has not sufficiently attended to the distinction between our duty to save *X*'s life and our duty not to take it. Once one attends to that distinction, it would seem that the mother, in order to regain control over her body, has no right to abort the fetus from the point at which it becomes a human being.

It may also be useful to say a few words about the larger and less rigorous context of the argument that the woman has a right to her own body. It is surely true that one way in which women have been oppressed is by their being denied authority over their own bodies. But it seems to me that, as the struggle is carried on for meaningful amelioration of such oppression, it ought not to be carried so far that it violates the steady responsibilities all people have to one another. Parents may not desert their children, one class may not oppress another, one race or nation may not exploit another. For parents, powerful groups in society, races or nations in ascendancy, there are penalties for refraining from these wrong actions, but those penalties can in no way be taken as the justification for such wrong actions.

Similarly, if the fetus is a human being, the penalty of carrying it cannot, I believe, be used as the justification for destroying it.

**The Mother as Creator**

There is a second set of considerations that could be raised in favor of the claim that the mother occupies a special status vis-à-vis the fetus, a status that permits abortion even if the fetus has a full right to life and even when the life of the mother is not at stake. These have to do with the idea that the fetus is an entity that owes its existence to the mother.

One way of stating the argument is the following: the fetus has come into existence only because of the mother's act of intercourse, and it therefore owes its life to the mother. If so, the continued existence of the fetus cannot be allowed to work a hardship upon the mother, and she has a right to terminate its existence by aborting it. What she once gave, she may now withdraw.

There are several reasons for being suspicious about this argument. To begin with, a similar argument could be advanced for infanticide and even for killing one's thirty-year-old child. To be sure, one might modify the principle in question by emphasizing the fact that the continued existence of the fetus, as well as its having come into existence, depends upon the mother. That is, currency of the mother's support may be made a condition of the withdrawal of that support. But even that modified principle would permit infanticide where the infant can survive only by the mother's feeding it (imagine a case in which the mother's feeding it is the only available source of nourishment).

There is, moreover, a second difficulty with this argument, namely, that it presupposes that the mother's bringing the fetus into existence gives her a special right to harm the fetus, so long as her own interest is served, a right that other individuals do not of course have. This assumption is not new in the history of mankind. It is the principle that lay behind all those legal systems that allowed parents to sell the child into slavery or to take its life for financial benefit or convenience. Now we still think that parents have certain special rights over their children (especially their infant children) that others do not have, or do not have in the same way and to the same extent. These include the rights to punish the child, to make decisions about how it is to be educated, about the religious faith in which it is raised, and so forth. But the central assumption is that these rights are exercised for the benefit of the child. Discipline is meant to keep the child from



#### THE HUMAN LIFE REVIEW

harming itself or to socialize it, education to increase its awareness of the world and of itself, religious training to form its moral and religious behavior. As far as I can see, we have given up the idea that parents have the right to punish, educate, or exhort the child in a way that harms it, though they may benefit thereby. But it is just this objectionable type of right that this argument presupposes, so the argument should be rejected.

Is there any element of truth in the argument we are considering? It does suggest one interesting point. Suppose someone has risked his life to bring you into existence or maintain your existence, and suppose that you can now save his life by giving up yours. Do you have an obligation to him to do so? I can imagine an affirmative answer to this question, although I must confess that I would not make it myself. Even, however, if the obligation exists, it cannot be concluded from such a case that the mother has the right to take the life of the fetus since (a) that would be a case of the forcible taking of life as opposed to the voluntary sacrificing of it, and (b) the mother can only rarely be accurately said to have risked her life to bring the fetus into existence or to have risked her life to keep it in existence.

Similar points can be made about a second version of this argument: if the mother had done nothing at all, then the fetus would not have come into existence. If, therefore, she aborts the fetus, he is not going to be in any worse state than he would have been if the mother had done nothing.

Once more, this argument would justify infanticide as well as abortion. Moreover, it is based upon the dubious principle that what one is given (in this case, life) may later be taken on the grounds that it was a gift in the first place. Many gifts, to the contrary, must be regarded as irrevocable, and I suspect that that is all the more so when what is given is something touching central human values.

In short, the mere fact that the mother has brought the fetus into existence and continues to maintain it in its existence gives her no right to abort the fetus. Indeed, quite the opposite argument may be made. It is possible that the mother has a special obligation to preserve rather than to harm the fetus precisely because she has brought the fetus into existence. After all, it is a valid intuition that parents have special obligations to make certain sacrifices for their children. But I propose letting that issue go for now, since considering it would raise all types of issues about our special obligations to our children that lie beyond the scope of this essay.

**Abortions for the Sake of the Child**

There is still a third set of considerations that is often appealed to in support of the claim that abortion is different from the ordinary taking of human life. These considerations have their foundation in what is thought to be the consequences of unwanted birth. Should the mother want an abortion, the fetus, if nevertheless brought to term, would be an unwanted child, and, so the argument goes, it would therefore be better if the fetus were not brought to term but were aborted. Here, presumably, it is the psychological effect upon the child that is the justification. In the same circumstances, the argument may be carried one step further and the effects of the psychologically damaged child upon society may become the rationale for abortion. Presumably, such a child will not be personally stable and that lack of stability will manifest itself in antisocial behavior. Carrying the argument one step further, appeal will be made to the effects upon the physical welfare of the child born into a poor family, perhaps already carrying the burden of several other children, or into no family at all, and to the effects of such a birth upon the family: the other children, the mother, the father. Not only may such a child be denied an adequate provision for its sustenance and shelter, for its training and education, but its existence may deprive, in effect, others of these advantages as well.

There are, then, two sets of arguments, one psychological and the other physical, and in each, one argument focuses on the welfare of the child himself and the other on the welfare of society. As an instance of the first kind of argument, that having to do with the welfare of the child, let me quote the following passage from a letter to the *New York Times*:<sup>5</sup>

If the Right to Life advocates were on a campaign for an improvement in the quality rather than the quantity of life, so that the world might truly be a beautiful place to be born into and it could realistically be assumed that every fetus would want to be born and live, then I would be willing to listen to their arguments on the "right to be born." Until that time, however, I think they should consider the possibility that their actions might impose the "burden of being born" on many unwitting and unwilling fetuses for whom life in the world as it is would be far from a right to be protected.

As the last sentence makes clear, this is an argument based upon considering what is best for the fetus, and, as such, it is comparable to arguments commonly made in favor of euthanasia. That is obviously

THE HUMAN LIFE REVIEW

a comparison that Daniel Callahan<sup>6</sup> had in mind when he raised the following objection to this argument:

While one could easily grant, under a number of circumstances, a "right to die," it becomes a very strangely exercised right when the being in question has it exercised on its behalf by others.

Some distinctions may usefully be made at this point about the "right to die":

A. An individual has the right, in at least some cases (those in which it is for his benefit), to stop others from taking extraordinary measures to keep him alive.

B. An individual has the right, in at least some cases (in which it is for his benefit), to take his own life.

C. An individual has the right, in at least some cases (in which it is for his benefit), to ask others to take his life for him, and they then acquire the right to do so.

D. An individual's life can be taken by others in at least some of the cases covered under C though the individual does not make such a request (because he is unable to do so).

About Claim A, there is a strongly favorable intuitive consensus.<sup>7</sup> Claim B raises the issue of the morality of suicide. Claim C extends that right to commit suicide so that the individual who is, for one reason or another, unable to perform the act, can ask others to do it for him. Claim D is, of course, the most questionable claim.

Returning now to the Callahan objection, we see that it is profoundly ambiguous. Is Callahan, in the first clause conceding Claim A or B? And is he, in the second, challenging Claim C or D? Moreover, whatever he is doing, is he right in challenging the move from the claim he concedes to the claim he challenges?

Let us suppose that he is conceding Claim B. It is difficult, after all, to imagine the grounds for anything but acceptance. Can one justifiably move from Claim B to C and D, or is Callahan right in objecting to either (or both) of these moves?

The following argument would seem to justify the move from Claim B to C: If a man has a right to do something without obtaining the consent of others, then he has a right to ask others to do it for him, and they have the right to do it. After all, why should he be prevented from exercising his rights just because it is inconvenient or impossible for him to exercise them alone? So, given Claim B, Claim C follows.

What about the move from Claim C to D? Let us imagine that a person has a right to do something and that his exercising that right

would be highly advantageous for him. Let us also imagine that he is so incapacitated that he is neither able to exercise that right nor to ask someone else to do it for him. And let us finally imagine that we have certain knowledge that the person would exercise the right or would appoint someone else to do so if he could. Then, although no one may have the obligation to help the person in question by exercising the right for him, it would seem permissible for others to do so as his unappointed agents.<sup>8</sup> So, providing that we may assume that someone else can be sure of the appropriate facts, Claim D seems to follow from C in at least some of the cases that C covers.

In short, then, providing that we are willing to accept the assumptions involved in the preceding arguments, the move from B to D can be justified, and we can reject Callahan's objection. We turn then to a direct consideration of this argument for abortion. It is as follows:

1. Because the mother does not want to bear this fetus, it is to the fetus's advantage that he not be born, that his life be taken by abortion.
2. This case falls under Claim D, and the mother is therefore justified in aborting the fetus.

The question that we must consider is whether this is a good argument.

The truth of the first premise is highly debatable. What we can say for sure about the unwanted fetus is that there is a good probability that he will be an unwanted child (but only a good probability, since the mother may find that her feelings change when he is born) and that there is a good (but lesser) probability that he will consequently suffer. But it is, I think, an excessive reach from these observations to Argument 1, partially because there remains a real possibility that the events described will not materialize and partially because it is very uncertain that the harm that will result will be so great that it would have been to the fetus's advantage that he not be born at all. Argument 1 becomes even more implausible when we keep in mind the possibility of the mother's giving the fetus up for adoption after it is born. When we come to consider Argument 2, the argument fails entirely. If our argument for Claim D is correct, then one could use it to justify an abortion only if one could be sure that the fetus, if it could think the issues out, would elect to be aborted. The unpredictability of an unknown future makes this assumption impossible, and I conclude, therefore, that while Callahan's objection fails, an abortion cannot be justified on the grounds that it is for the benefit of the fetus.

But what about the second kind of argument? What about arguing for abortion on the grounds that the social damage caused by un-

## THE HUMAN LIFE REVIEW

wanted children is sufficient to justify abortions? Though I will consider the effects of the unwanted child on the family in detail later, let me say for now that this argument is even less plausible. To argue this way is to argue for avoiding a possible social problem by taking a life. In an age where we doubt the justice of capital punishment even for very dangerous criminals, killing a fetus who has not done any harm, to avoid a future problem it may pose, seems totally unjust. There are indeed many social problems that could be erased simply by destroying those persons who constitute or cause them, but that is a solution repugnant to the values of society itself.

In short, then, if the fetus is a human being, the appeal to its being unwanted justifies no abortions.

### **The Model Penal Code Cases**

All of the arguments that we have looked at so far are attempts to show that there is something special about abortion that justifies its being treated differently from other cases of the taking of human life. We shall now consider claims that are confined to certain special cases of abortion: the case in which the mother has been raped, the case in which bearing the child would be harmful to her health, and the case in which having the child may cause a problem for the rest of her family (the latter case is a particular case of the societal argument). In addressing these issues, we shall see whether there is any point to the permissibility of abortions in some of the cases covered by the Model Penal Code<sup>9</sup> proposals.

When the expectant mother has conceived after being raped, there are two different sorts of considerations that might support the claim that she has the right to take the life of the fetus. They are the following: (A) the woman in question has already suffered immensely from the act of rape and the physical and/or psychological aftereffects of that act. It would be particularly unjust, the argument runs, for her to have to live through an unwanted pregnancy owing to that act of rape. Therefore, even if we are at a stage at which the fetus is a human being, the mother has the right to abort it; (B) the fetus in question has no right to be in that woman. It was put there as a result of an act of aggression upon her by the rapist, and its continued presence is an act of aggression against the mother. She has a right to repel that aggression by aborting the fetus.

The first argument is very compelling. We can all agree that a terrible injustice has been committed on the woman who is raped. The question that we have to consider, however, is whether it follows that *it is morally permissible* for her to abort the fetus. We must make that

consideration reflecting that, however unjust the act of rape, it was not the fetus who committed or commissioned it. The injustice of the act, then, should in no way impinge upon the rights of the fetus, for it is innocent. What remains is the initial misfortune of the mother (and the injustice of her having to pass through the pregnancy, and, further, to assume responsibility of at least giving the child over for adoption or assuming the burden of its care). However unfortunate that circumstance, however unjust, the misfortune and the injustice are not sufficient cause to justify the taking of the life of an innocent human being as a means of mitigation.

It is at this point that Argument B comes in, for its whole point is that the fetus, by its mere presence in the mother, is committing an act of aggression against her, one over and above the one committed by the rapist, and one that the mother has a right to repel by abortion. But we saw in the previous chapter that (1) the fetus is certainly innocent (in the sense of not responsible) for any act of aggression against the mother and that (2) the mere presence of the fetus in the mother, no matter how unfortunate for her, does not constitute an act of aggression by the fetus against the mother. Argument B fails then at just that point at which Argument A needs its support, and we can therefore conclude that the fact that pregnancy is the result of rape does not give the mother the right to abort the fetus.

We turn next to the case in which the continued existence of the fetus would threaten the mental and/or physical health but not necessarily the life of the mother. Again, we saw in the previous chapter that the fact that the fetus's continued existence poses a threat to the life of the mother does not justify her aborting it. It would seem to be true, a fortiori, that the fact that the fetus's continued existence poses a threat to the mental and/or physical health of the mother does not justify her aborting it either.

We come finally to those cases in which the continuation of the pregnancy would cause serious problems for the rest of the family. There are a variety of cases that we have to consider here together. Perhaps the health of the mother will be affected in such a way that she cannot function effectively as a wife and mother during, or even after, the pregnancy. Or perhaps the expenses incurred as a result of the pregnancy would be utterly beyond the financial resources of the family. The important point is that the continuation of the pregnancy raises a serious problem for other innocent people involved besides the mother and the fetus, and it may be argued that the mother has the right to abort the fetus to avoid that problem.

By now, the difficulties with this argument should be apparent. We

have seen earlier that the mere fact that the continued existence of the fetus threatens to harm the mother does not, by itself, justify the aborting of the fetus. Why should anything be changed by the fact that the threatened harm will accrue to the other members of the family and not to the mother? Of course, it would be different if the fetus were committing an act of aggression against the other members of the family. But, once more, this is certainly not the case.

We conclude, therefore, that none of these special circumstances justifies an abortion from that point at which the fetus is a human being.

#### **Callahan on the Sanctity of Life**

One final set of remarks seems to be in order. Throughout the previous two chapters, we have been arguing that the assumption that the fetus is a human being entails certain moral conclusions prohibiting the performance of abortions. These arguments rest upon certain assumptions about what we may, and may not, do to a human being. These assumptions about the very limited conditions under which we can take the life of a human being are assumptions about the sanctity of human life.

In his recent and fundamental book on this topic, Daniel Callahan has argued that one cannot derive from the assumption of the sanctity of human life any absolute prohibitions against taking the life of the fetus (even assuming the strongest possible assumptions about the humanity of the fetus). He<sup>10</sup> puts his point as follows:

A major objection worth levelling at any rigidly restrictive moral code on abortion is that it is prone to hold that an absolute prohibition of induced abortion is a logical entailment of "the sanctity of life." The logical route leading to this prohibition is that "the sanctity of life" means and can only mean under all circumstances that bodily life is to be preserved, which in turn is taken to entail a prohibition of the taking of fetal life. No room is left, in this deductive chain, for a recognition of other demands of the principle.

The point that Callahan makes is, in outline, sound. He is claiming that there is no way that one can infer an absolute prohibition against the taking of human life from the premise that life is sacred. One cannot infer this because there may be other obligations, obligations that are also part of what we mean by the sanctity of life, that outweigh the obligation not to take a person's life in a given case.

It is not clear how far Callahan's point can be pushed. In the last two chapters, where we have explored the question of the conditions

under which the obligation not to take the life of a human being can be overridden, we found that there are in fact very few cases of that sort. And only one of these cases seemed relevant to the issue of abortion. We found only one case in which an abortion would be permissible. So Callahan's point, while quite right abstractly, sheds very little light on the issue of abortion. It remains for Callahan to suggest cases relevant to the issue of abortion in which this obligation not to take the life of a human being can be overridden.

The closest that Callahan comes to doing so is in the following passage:<sup>11</sup>

As suggested, the claim of the individual's "right to life" as the preeminent rule seems well founded. Yet it is clearly conceivable that this right and the attendant rules protecting it could come into question (as they have on occasion in the past) if the survival of the species or of a whole people or nation were in danger from overpopulation, a scarcity of medical facilities, or in time of war. . . . The abandonment of the elderly in earlier Eskimo culture as well as the practice of infanticide in a variety of earlier societies testify to the extreme pressures which can be placed upon communal survival. To see such practices only as an instance of a primitive insensitivity to human life would be to show a lack of imagination about the desperate straits in which a community could find itself.

Two comments are in order here: (1) Callahan's examples are not to the point. In his two examples, a society was forced, by virtue of a threat to its very existence, to abandon its obligations to care for the helpless. The result of the abandonment of this obligation is, of course, the deaths of the helpless, but it would surely be incorrect to say that the communities in question took the lives of those helpless people. There are, no doubt, cases in which abandoning someone is equivalent to taking his life, but this is so only when there exists an obligation to care for the persons in question that has not been overridden; (2) Far more important, none of the cases in question seems relevant to the issue of abortion. The closest we come to relevance is when Callahan refers to the threat to the survival of a society by overpopulation. But we do have alternative methods (and ones that are surely morally far more preferable) for meeting the problems of overpopulation. Birth control, and not abortion, is surely the solution to those problems.

In short, then, while Callahan is correct in reminding us that the obligation not to take a life may be overridden, he has failed to give us any cases in which it should be overridden that are relevant to the abortion issue. And in our examination of possible cases, we found only one. While that is no ultimate proof—there may be, after all,



cases and considerations that we have not yet thought of—that we found but one such case does suggest that we were right in concluding that this aspect of the sanctity of life is so significant that it leaves an extremely circumscribed field in which abortion is morally permissible.

## II. Abortion and the Supreme Court

On January 22, 1973, the Supreme Court announced its decision in two cases challenging existing abortion laws. These decisions have, at least for the time being, settled many fundamental aspects of the legal status of abortion in the United States. The decisions of the Court are in profound contrast to the position that we have advocated in this book. We shall therefore devote this penultimate chapter to a consideration of the Court's arguments.

### The Decision in *Roe v. Wade*

Two decisions were announced by the Court on January 22. The first (*Roe v. Wade*) involved a challenge to a Texas law prohibiting all abortions not necessary to save the life of the mother. The second (*Doe v. Bolton*) tested a Georgia law incorporating many of the recommendations of the Model Penal Code as to the circumstances under which abortion should be allowed (in the case of rape and of a defective fetus, as well as when the pregnancy threatens the life or health of the mother), together with provisions regulating the place where abortions can be performed, the number of doctors that must concur, and other factors.

Of these two decisions, the more fundamental was *Roe v. Wade*. It was in this case that the Court came to grips with the central legal issue, namely, the extent to which it is legitimate for the state to prohibit or regulate abortion. In *Doe v. Bolton*, the Court was more concerned with subsidiary issues involving the legitimacy of particular types of regulations.

The Court summarized its decision in *Roe v. Wade* as follows:<sup>12</sup>

- (a) For the stage prior to approximately the end of the first trimester/three months/the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the state, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability, the state, in promoting its in-

BARUCH BRODY

terest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

In short, the Court ruled that abortion can be prohibited only after viability and then only if the life or health of the mother is not threatened. Before viability, abortions cannot be prohibited, but they can be regulated after the first trimester if the regulations are reasonably related to maternal health. This last clause is taken very seriously by the Court. In *Doe v. Bolton*, instances of regulation in the Georgia code were found unconstitutional on the ground that they were not reasonably related to maternal health.

How did the Court arrive at this decision? In Sections V and VII of the decision, it set out the claims on both sides. Jane Roe's argument was summarized in these words.<sup>13</sup>

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy.

On the other hand, the Court saw as possible legitimate interests of the state the regulation of abortion, like other medical procedures, so as to ensure maximum safety for the patient and the protection of prenatal life. At this point in the decision, the Court added the following very significant remark:<sup>14</sup>

Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the state's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the state may assert interests beyond the protection of the pregnant woman alone.

In Sections VIII to X, the Court stated its conclusion. It viewed this case as one presenting a conflict of interests, and it saw itself as weighing these interests. It began by agreeing that the woman's right to privacy did encompass her right to decide whether or not to terminate her pregnancy. But it argued that this right is not absolute, since the state's interests must also be considered:<sup>15</sup>

We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

The Court has no hesitation in ruling that the woman's right can be limited after the first trimester because of the state's interest in pre-

## THE HUMAN LIFE REVIEW

serving and protecting maternal health. But the Court was less prepared to agree that the woman's right can be limited because of the state's interest in protecting prenatal life. Indeed, the Court rejected Texas's strong claim that life begins at conception, and that the state therefore has a right to protect such life by prohibiting abortion. The first reason advanced for rejecting that claim was phrased in this way:<sup>16</sup>

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.

Its second reason was that<sup>17</sup>

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.

The Court accepted the weaker claim that the state has an interest in protecting the potential of life. But when does that interest become compelling enough to enable the state to prohibit abortion? The Court said:<sup>18</sup>

. . . the compelling point is at viability. This is so because the fetus then has the capacity of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the state is interested in protecting fetal life after viability, it may go so far as to prescribe abortion during that period except where it is necessary to preserve the life or health of the mother.

### The Court on Potential Life

I want to begin by considering that part of the Court's decision that allows Texas to proscribe abortions after viability so as to protect its interest in potential life. I note that it is difficult to evaluate that important part of the decision because the Court had little to say in defense of it other than the paragraph just quoted.

There are three very dubious elements of this ruling:

1. Why is the state prohibited from proscribing abortions when the life or health of the mother is threatened? Perhaps the following argument may be offered in the case of threat to maternal life: the mother is actually alive but the fetus is only potentially alive, and the protection of actual life takes precedence over the protection of potential

life. Even if we grant this argument, why is the state prevented from prohibiting abortion when only maternal health is threatened? What is the argument against the claim that protecting potential life takes precedence in that case?

2. Why does the interest in potential life become compelling only when the stage of viability is reached? The Court's whole argument for this claim is<sup>19</sup>

This is so because the fetus then presumably has the capacity of meaningful life outside the mother's womb.

There is, no doubt, an important type of potential for life, the capacity of meaningful life outside the mother's womb, that the fetus acquires only at the time of viability. But there are other types of potential for life that it acquires earlier. At conception, for example, the fertilized cell has the potential for life in the sense that it will, in the normal course of events, develop into a human being. A six-week-old fetus has the potential for life in the stronger sense that all of the major organs it needs for life are already functioning. Why then does the state's interest in protecting potential life become compelling only at the point of viability? The Court failed to answer that question.

3. It can fairly be said that those trained in the respective disciplines of medicine, philosophy, and theology are unlikely to be able to arrive at any consensus on the question of when the fetus becomes potentially alive and when the state's interest in protecting this potential life becomes compelling enough to outweigh the rights of the mother. Why then did not the court conclude, as it did when it considered the question of fetal humanity, that the judiciary cannot rule on such a question?

In pursuit of this last point, we approach the Court's more fundamental arguments against prohibiting abortion before viability.

#### **The Court on Actual Life**

The crucial claim in the Court's decision is that laws prohibiting abortion cannot be justified on the ground that the state has an interest in protecting the life of the fetus who is a human being. The Court offered two reasons for this claim: that the law has never yet accorded the fetus this status, and that the matter of fetal humanity is not one about which it is appropriate for the courts to speculate.

The first of the Court's reasons is not particularly strong. Whatever force we want to ascribe to precedent in the law, the Court has in the past modified its previous decisions in light of newer information and insights. In a matter as important as the conflict between the

#### THE HUMAN LIFE REVIEW

fetus's right to life and the rights of the mother, it would have seemed particularly necessary to deal with the issues rather than relying upon precedent.

In its second argument, the Court did deal with those issues by adopting the following principle:

1. It is inappropriate for the Court to speculate about the answer to questions about which relevant professional specialists cannot arrive at a consensus. This principle seems irrelevant. The issue before the Court was whether the Texas legislature could make a determination in light of the best available evidence and legislate on the basis of it. Justice White, in his dissent, raised this point:<sup>20</sup>

The upshot is that the people and legislatures of the fifty states are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against the spectrum of possible impacts on the mother on the other hand.

This objection could be met, however, if we modified the Court's principle in the following way:

2. It is inappropriate for a legislature to write law upon the basis of its best belief when the relevant professional specialists cannot agree that that belief is correct.

On the basis of such a principle, the Court could argue that Texas had no right to protect by law the right of the fetus to life, thereby acknowledging it to be a human being with such a right, because the relevant specialists do not agree that the fetus has that right. As it stands, however, Principle 2 is questionable. In a large number of areas, legislatures regularly do (and must) act upon issues upon which there is a wide diversity of opinion among professional specialists. So Principle 2 has to be modified to deal with only certain cases, and the obvious suggestion is

3. It is inappropriate for the legislature, on the ground of belief, to write law in such a way as to violate the basic rights of some individuals, when professional specialists do not agree that that belief is correct.

This principle could be used to defend the Court's decision. But is there any reason to accept it as true? Two arguments for this principle immediately suggest themselves: (a) If the relevant professional specialists do not agree, then there cannot be any proof that the answer in question is the correct one. But a legislature should not infringe the rights of people on the basis of unproved belief. (b) When the professional specialists do not agree, there must be legitimate and reasonable alternatives of belief, and we ought to respect

the rights of believers in each of these alternatives to act on their own judgments.

We have already discussed [Chapter 3] the principles that lie behind these arguments. We saw there that neither of these arguments, as applied to abortion, is acceptable if the fetus is a human being. To employ these arguments correctly, the Court must presuppose that the fetus is not a human being. And that, of course, it cannot do, since the aim of its logic is the view that courts and legislatures, at least at this juncture, should remain neutral on the issue of fetal humanity.

There is a second point that should be noted about Principles 1 to 3. There are cases in which, by failing to deal with an issue, an implicit, inevitable decision is in fact reached. We have before us such a case. The Court was considering Texas's claim that it had the right to prohibit abortion in order to protect the fetus. The Court conceded that if the fetus had a protectable right to life, Texas could prohibit abortions. But when the Court concluded that it (and, by implication, Texas) could not decide whether the fetus is a human being with the right to life, Texas was compelled to act as if the fetus had no such right that Texas could protect. Why should Principles like 1 to 3 be accepted if the result is the effective endorsement of one disputed claim over another?<sup>21</sup>

There is an alternative to the Court's approach. It is that each of the legislatures should consider the vexing problems surrounding abortions, weigh all of the relevant factors, and write law on the basis of its conclusions. The legislature would, undoubtedly have to consider the question of fetal humanity, but, I submit, the Court is wrong in supposing that there is a way in which that question can be avoided.

#### **Further Considerations**

There is one final set of issues raised by the Court's opinion that should be considered. In an interesting footnote,<sup>22</sup> the Court argued that Texas's law is inconsistent with Texas's announced goal of protecting the fetus's right to life because (a) it makes an exception when the mother's life is threatened, (b) it punishes the abortionist and not the mother, and (c) it provides a lesser penalty than the penalty prescribed for murder. This argument seems to me questionable.

As we learned [Chapter 3] someone committed to the view that abortion is murder is not necessarily committed to the view that the laws prohibiting the murder by abortion should be identical to those

## THE HUMAN LIFE REVIEW

prohibiting murder by other means. Indeed, the law already differentiates among varieties of murder in other areas. There might well be public-policy or human considerations favoring separate, different laws of prohibition of abortion. While I would not necessarily defend all of the provisions of the Texas law, I think that we can identify and appreciate the considerations that might lead to the formulation of such a law.

Two of the provisions the Court specifically notes seem in fact to be reasonable. The woman who obtains an abortion is often operating under extreme stress and is not an appropriate subject of the force of the law. One might well decide to provide only for the punishment of the abortionist. Second, one might well decide that in light of the current public uncertainty about the morality of abortion, the abortionist should receive a lesser penalty than that received by other murderers. One might admit that the guilt of the abortionist may be extenuated by the uncertainty in his mind about the morality of abortion.

I do not want to defend the provision allowing abortion when the mother's life is threatened. We saw [Chapter 1] that the fact that the pregnancy threatens the life of the mother does not usually justify abortion. But I think we can understand why Texas included that exception in its laws. The legislature may well have been under the misapprehension that abortions are permissible in such cases as acts of self-defense.

In short, then, the Court's charge of inconsistency is unsupported. More important, it is not the case that those who believe in fetal humanity are committed to laws prohibiting abortion that are identical to laws prohibiting murder.

### Conclusion

The Supreme Court has ruled, and the principal legal issues in this country are, at least for now, resolved. I have tried to show, however, that the Court's ruling was in error, that it failed to grapple with the crucial issues surrounding the laws prohibiting abortion. The serious public debate about abortion must, and certainly will, continue. I hope this book will contribute to that debate.

### Epilogue

Abortion remains an important issue, though I am aware that there is a group of scholars and lay people who regard further discussion of it as fruitless or even eccentric. They are as certain of the resolutions

they have made as I myself was when I was first asked to deal with the subject. It is easy enough to take the fetus, hidden and unknown, as a being alien from humanity and to give no more thought to its destruction than to drowning of an unwanted kitten. Or, I suppose more correctly, even less thought, for I am aware that those who argue for unrestricted abortion have their own humane convictions, and many of them probably could not bring themselves to kill an animal but would support its life, make room for it, assume the burden of its dependence.

How can this be? Three answers come to mind. The first is that the killing of the fetus seems to be a necessary expedient to human, and particularly feminist, libertarianism. The second is that the killing of the fetus is done by a medical procedure, and the same science that ordinarily preserves life in this case terminates it, and in such an abstract and "sanitary" manner that the real nature of the act can be quite suppressed. The third is that pressing world problems of overpopulation and malnutrition can be used to provide a kind of social certification of the rightness of the act.

We are by this time familiar enough with the method of argument by intuition and analogy used in this book, I hope, to be able to discover for ourselves that all of these answers are flawed. These flaws are not only errors but dangers to us and to all human kind. It is not necessary to prove that the world is now facing a variety of critical problems; the evidence is all around us. It is necessary, however, to point out strongly that in the kinds of remedies adopted, particularly to those problems that touch human life, we may either confirm and fulfill the moral intuitions that perhaps may be the ultimately distinguishing characteristic of humanity or abandon them and, believing we are safeguarding the species, actually set ourselves in the path that can lead only to loss of that characteristic and, in a much more profound sense, to the destruction of what it is we are trying to preserve.

Already the global planners who seek to limit growth are using the word "triage"—a technical term applied to the treatment of battlefield casualties on the basis of a priority established by chance for survival—to describe the tasks ahead of us. Is there famine? Let some starve. Is there overpopulation? Correct it by famine. Do the old and the defective need help to survive? Do not supply it.

We make a mistake if we think this is a new issue. To "decrease the surplus population" is a phrase we all remember, and it contains a motive that is as old as humanity itself. War is nothing but the implementation of that motive by public policy.

Surely the urgent needs I describe require response. But they re-



#### THE HUMAN LIFE REVIEW

quire a response that is consistent with our moral values. We can, of course, free ourselves from those values, but it is a stunted, faltering freedom that is the result. Surely, moreover, as we develop more accurate definitions of our needs, we ought to raise new solutions. But if the character of humanity is to survive, these solutions must be founded in our moral history. The great task before us is to find a better understanding of that history and to make a better application of it.

I cannot imagine a moral argument that is not ultimately founded in intuition. Whatever we do, we act with what we have, and there is no way of getting beyond it. I suppose that is what the psalmist had in mind when he sang, "It is He Who has made us, and not we ourselves." And how we use intuition is to work by analogy, by moving from those circumstances in which our intuition is sure to connected circumstances that are the objects of our inquiry.

The opportunities for the application of this method, are, of course, immense.

#### NOTES

1. J. Thomson, "A Defense of Abortion," *Philosophy and Public Affairs*, Vol. 1 (1971), pp. 47-66.

2. *Ibid.*, p. 53.

3. *Ibid.*, p. 56.

4. *Ibid.*, pp. 55-56. It was, therefore, wrong of me to say, as I did in my article, "Thomson on Abortion," *Philosophy and Public Affairs*, Vol. 1 (1972), pp. 335-340, that "she has not attended to the distinction between our duty to save X's life and our duty not to take it." My argument is rather that she has not sufficiently attended to it, to the point that she could discover that, for example, her whole discussion of Henry Fonda's flying in from the West Coast to save my life is, of course, entirely irrelevant.

5. By a Ms. Andrea Dobrow, of Teaneck, N.J., in the issue of April 26, 1972.

6. Daniel Callahan, *Abortion: Law, Choice, and Morality* (New York: Macmillan, 1970), pp. 453-454.

7. On this point, see *Shulchan Aruch, Yoreh Deah*, Chapter 339; Paul Ramsey, *The Patient as Person* (New Haven: Yale University Press, 1970), Chapter 3; and my "Voluntary Euthanasia and the Law," forthcoming in M. Kohl, *Beneficent Euthanasia* (Buffalo: Prometheus Press, 1975).

8. This idea of viewing a person as an unappointed agent is based upon the standard interpretation of the Talmudic dictum that "one can act to benefit a person without his appointing you." On this principle, see *Encyclopedia Talmudica* (Jerusalem: Talmudica Press, 1967), pp. 135-198.

9. On the Model Penal Code provisions, see American Law Institute, *Model Penal Code: Tentative Draft No. 9* (1959).

10. Callahan, *Abortion*, p. 338.

11. *Ibid.*, p. 336.

12. *Roe v. Wade*, 41 *LW* 4229.

13. *Roe*, 41 *LW* 4218.

14. *Roe*, 41 *LW* 4224.

BARUCH BRODY

15. *Roe*, 41 *LW* 4226.
16. *Roe*, 41 *LW* 4227.
17. *Roe*, 41 *LW* 4228.
18. *Roe*, 41 *LW* 4228-4229.
19. *Ibid.*
20. *Roe*, 41 *LW* 4246.
21. This argument is derived from one used (for very different purposes) by William James in *The Will to Believe*, reprinted in William James, *The Will to Believe and Other Essays on Popular Philosophy* (New York: Dover, 1956), pp. 1-31.
22. P. 54 on 41 *LW* 4227, footnote.

## The Right to Live

C. Everett Koop

I WOULD LIKE to suggest to you that we are a schizophrenic society. We will fly a deformed baby four hundred miles by airplane to perform a series of remarkable operations on such a youngster, knowing full well that the end result will be far less than a complete cure. We will stop a cholera epidemic by vaccine in a country unable to feed itself so that the people can survive cholera in order to die of starvation. While we struggle to save the life of a three-pound baby in a hospital such as mine, next door in the University Hospital obstetricians are destroying infants yet unborn.

So it is not unpredictable in this society that we should be considering the pros and the cons of abortion and euthanasia.

My assignment today is of gigantic proportions. I will assume that you each know bits and pieces of what I have to say but that you will bear with me if I start at square one. It is my intention to tell you of my own credentials to speak on this subject, to give you some background on abortion, to describe the development of an unborn baby, and to briefly acquaint you with the several techniques for performing an abortion. Then I must tell you what the current situation is legally, what this means in practice, and then recount for you—now that the sides are drawn—the arguments you will hear in favor of abortion. I will attempt to answer these briefly. Finally, I would like to assume the role of prophet and outline for you the implications of the Supreme Court's decision on abortion in reference to the future of this country and in reference to your life and mine as well as the lives of our children.

Professionally, I do not speak on this subject in a vacuum. For more than a quarter of a century, I have been engaged in the surgical care of children and perhaps that for which I am best known professionally is the operative procedures on newborn babies who are born

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C. EVERETT KOOP

with defects which are incompatible with life, but nevertheless, can be corrected by the proper surgery at the proper time. These are youngsters who are born with no esophagus with which to swallow, or have their abdominal organs out in the umbilical cord, or up in the chest, or have one of many varieties of intestinal obstruction. Each one of these defects is correctable. Many of them take years of rehabilitation before a youngster is able to return to society, and some of these children, in spite of all that we do for them, are never what society calls normal.

I could not have taken care of thousands of these babies and their families without seeing the joy and the triumph of a life saved, but also the heartbreak of a surgical success somewhat less than perfect. I know the economic burden on the family, I know the problem of chronic illness for the family, for the child, and for the community. I know the psychological burden on such a youngster as he grows up as well as the problems that the family has to face as he goes to school, encounters new friends and tries to achieve a position in the community socially and economically.

Permit me to say that the whole question of the right to live presents anyone who considers it with a number of dilemmas; I have lived through many of them. Let me give you an example; I could have a telephone call any day from an outlying hospital saying that they had just delivered a baby who has no rectum, whose abdominal organs are out in his umbilical cord and who has a cleft spine with an opening in his back so that you can see his spinal cord, and in addition, his legs are in such a position that his feet lie most comfortably next to his ears. Now every one of those things that I have mentioned is correctable. But think of the cost! I am not simply talking about money, but think of the cost in anxiety for the family, for the hospital staff, for me; think of the emotional drain on all the people concerned, think of the emotional problems for that youngster in the six or seven years it will take before these defects are corrected. Now the dilemma that is presented to some people in such a situation is, "Should we operate or should we not? Should we let this baby die, unattended, or should we do the things that we know how to do best and let him live?" Dilemma is defined as, "a perplexing predicament, a necessary choice between two equally undesirable alternatives." I am not sure that everyone here would agree that the two alternatives I have mentioned are equally undesirable. Yet everyone talks about rights these days and I would like to ask you whether you think this baby has the right to live. Does this family have the right of a choice? Do I, as the baby's surgeon, have a right of choice? Do I have the

#### THE HUMAN LIFE REVIEW

right or the privilege to try to influence the family to think the way that I do?

In 1776, in Philadelphia, Thomas Jefferson wrote, "We hold these Truths to be self-evident, that all Men are created equal, . . . that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness." Now think about that for a moment. Think about the baby's right to life. Think about the family's right to happiness. Think about my right to the liberty of choice and think about the baby's right to all of those things.

When I speak to an audience such as this on the right to live, I acknowledge at the outset that God is the author and the giver of life and that you and I as His servants have no right to destroy it. And I am speaking of human life, not animal life, and I am not speaking of that perverted doctrine of Albert Schweitzer of the reverence for life. The Bible tells us that man was made in the image of God and at least one meaning of that statement is that like God each of us is a trinity. I am a soul, I inhabit a body and I have a spirit. Everything I read in the Word of God tells me that my soul is immortal and like it or not, you and I will be conscious beings throughout all eternity.

We are not the first society to wonder about these things. Some ancient societies before the Greeks and the Romans practiced infanticide. This is how they controlled their population, took care of their food problem and their economics. Among the Greeks, a people who have such respect in philosophical circles, many—including great philosophers—believed that society should get rid of the frail, the deformed, and the aged. The Romans considered that infanticide was a prudent form of household economy.

In eighteenth-century Philadelphia it was the practice on Sunday afternoons to go down to 8th and Spruce Streets to the first hospital in our country to see the insane who were chained in dungeons. One could buy for a half-penny a willow wand and poke it through the bars to torment them and see their response. It was only after 1800, with the spread of literacy and the Gospel and the Christian compassion that went with it, that hospitals came into prominence, that people were concerned enough to build orphanages, homes for the aged and for the insane. It is only a little more than a hundred years since the first medical missionary left one land and went to another to carry the Gospel of Jesus Christ along with the healing of men's bodies. I believe that the sanctity of human life is part of that Gospel.

The sanctity of human life begins, as I see it, with the various

### C. EVERETT KOOP

covenants between God and man. The first of these was after Abel had been killed by Cain and Cain was cursed by God. God was very careful to point out that there was to be no blood feud and if there were, His punishment would take place sevenfold. After the flood, God spoke to Noah and told him that whoever sheds man's blood, by man shall his blood be shed. Many believe that was the mandate from God for capital punishment. After that came the Ten Commandments, and one of those was, "Thou shalt not kill." (It is very clear from the context that the commandment, "Thou shalt not kill," had nothing to do with capital punishment or with manslaughter, or with war, but it had to do with murder.) All of these covenants, if you read them carefully, were based upon one thing; man's uniqueness in having been created in the image of God.

It is obvious that Jewish religion held life to be precious to God. Christian doctrine is based upon Judaism plus the teachings of Jesus. Jesus claimed that His teachings were in harmony with the teachings of the Old Testament. He said further that the moral law was immutable and unchanging. He showed how learned men, such as the Pharisees, could misinterpret the law. You will recall on one occasion He said to them, "You are pleased with yourselves because you keep the law and have not murdered anyone, but you have missed the spirit of the law." In the final analysis, as a Christian, I believe in the sanctity of life because I am God's by creation and also God's by redemption through Jesus Christ and His sacrifice on the cross in my behalf.

The liberalization of abortion laws has brought the whole problem of sanctity of life into focus. I am opposed to abortion but let me say that no one has a greater claim on my compassion than an unmarried, pregnant girl. There are other alternatives, particularly Christian alternatives, to that girl's predicament other than abortion. My reasons against abortion are logical as well as theological.

Let me speak first about the logic. It is impossible for anyone to say when a developing fetus or embryo or baby becomes viable; that is, has the ability to exist on its own. The logical approach is to go back to the sperm and the egg. A sperm has 23 chromosomes and no matter what even though it is alive and can fertilize an egg it can never make another sperm. An egg also has 23 chromosomes and it can never make another egg. So we have eggs that cannot reproduce and we have sperm that cannot reproduce unless they get together. Once there is the union of sperm and egg, and the 23 chromosomes of each are brought together into one cell that has 46 chromosomes we have an entirely different story. That one cell with

#### THE HUMAN LIFE REVIEW

its 46 chromosomes has all of the DNA (desoxyribonucleic acid), the whole genetic code, that will if not interrupted, make a human being just like you are with the potential for God-consciousness. I do not know anyone among my medical confrères, no matter how pro-abortion he might be, who would kill a newborn baby the minute he was born. My question to my pro-abortion friend who will not kill a newborn baby is this: "Would you kill this infant a minute before he was born, or a minute before that, or a minute before that, or a minute before that?" You see what I am getting at. At what minute can one consider life to be worthless and the next minute consider that same life to be precious? So much for the logic of permissive abortion.

Although there are ample reasons for the non-religious individual to be frightened about the implications of the Supreme Court's decision on abortion, I do believe that most of those opposed to abortion lean heavily upon religious convictions in coming to their pro-life position. Although I realize that there are others here who will speak today on the theological reasons against abortion, I feel I must say a word so that you will know how I have come theologically to the position I now hold. Two of the Christian doctrines which I cherish most are the sovereignty of God and the infallibility of Scripture. By sovereignty I mean that even though God has apparently given man free will, that free will is nevertheless within the sovereignty of God. God is accountable to no one for His decisions. Even the breath that men use to blaspheme God is a gift from God Himself. As I read the Bible, it seems to say from cover to cover that life is precious to God. I can find no place in the Bible which clearly states when a fetus might be viable but there are some passages which are extremely significant.

In the 139th Psalm, David writing about himself says, "Yea, the darkness hideth not from thee; but the night shineth as the day: the darkness and the light are both alike to thee. For thou hast possessed my inner parts: thou hast covered me in my mother's womb. I will praise thee; for I am fearfully and wonderfully made: marvellous are thy works; and that my soul knoweth right well. My substance was not hid from thee, when I was made in secret, and curiously wrought in the lowest parts of the earth. Thine eyes did see my substance, yet being unperfect; and in thy book all my members were written, which in continuance were fashioned, when as yet there was none of them."

I am also impressed that when the Bible speaks of man in the womb, it also speaks of the whole sweep of the creation and of God's sovereignty from then until the end of time. In the 44th chapter of

C. EVERETT KOOP

Isaiah, we read, "Yet now hear, O Jacob my servant; and Israel, whom I have chosen: Thus saith the Lord that made thee, and formed thee from the womb, which will help thee." And then the prophet goes on to quote Jehovah in reference to the creation, the pouring out of his spirit, his blessing upon Israel, the forgiveness of their transgressions, and then he goes on to say, "Thus saith the Lord, thy redeemer, and he who formed thee from the womb, I am the Lord that maketh all things; that stretcheth forth the heavens alone; that spreadeth abroad the earth by myself."

Having already mentioned the union of sperm and egg to give 46 chromosomes, let me give you a capsule review of the development of a baby. I do not want to get technical, but perhaps you do not know what happens and when. By the time that a baby is 18-25 days old, long before the mother knows that she is pregnant, the heart is already beating. At 45 days after conception, you can pick up electroencephalographic waves from the baby's developing brain. At 8 weeks, there is not only a brain, but the fingerprints on the hands have already formed and except for size, will never change. By 9-10 weeks, the thyroid and the adrenal glands are functioning. The baby can squint, swallow, move his tongue and the sex hormones are already present. By 12-13 weeks, he has fingernails, he sucks his thumb and he can recoil from pain. In the fourth month the growing baby is 8-10 inches in height. In the fifth month there is a time of lengthening and straightening of the developing infant. Skin, hair, and nails grow. Sweat glands arise. Oil glands excrete. This is the month in which the movements of the infant are felt by his mother. It has always seemed extraordinary to me that with the first movements within the uterus that are felt by the pregnant woman, the mother-to-be says, "Today I felt life." In the sixth month the developing baby responds to light and to sound. He can sleep and awake. He gets hiccups and can hear the beat of his mother's heart. Survival outside the womb is now possible. In the seventh month the nervous system becomes much more complex, the infant is 16 inches long and weighs about three pounds. In the final eighth and ninth months there is a time of fattening and of rounding out.

There are three commonly used techniques of abortion; each may have its variations. The technique that is used most commonly for early pregnancies is called the D & C, or dilatation and curettage. In this technique which is carried out between the seventh and twelfth weeks of pregnancy the uterus is approached through the vagina. The cervix is stretched to permit the insertion of instruments. The surgeon then scrapes the wall of the uterus cutting the body to pieces



#### THE HUMAN LIFE REVIEW

and scraping the placenta from its attachments on the uterine wall. Bleeding is profuse. An alternate method to be used at the same time is called suction abortion. The principle is the same as the D & C. A powerful suction tube is inserted through the open cervix. This tears apart the body of the developing baby and his placenta, sucking them into a jar. These smaller parts of the body are recognizable as arms, legs and head. More than 75% of all abortions performed in the United States and Canada are done by this method.

Later in pregnancy when the D & C or suction abortion might produce too great a hemorrhage on the part of the mother the second most common type of abortion comes into being. This is called the salt poisoning abortion, or "salting out." This method is carried out after sixteen weeks of pregnancy when enough fluid has accumulated in the sac around the baby. A rather long needle is inserted through the mother's abdomen directly into the sac surrounding the baby and a solution of concentrated salt is injected into it. The baby breathes in and swallows the salt and is poisoned by it. There are changes in osmotic pressure, the outer layer of skin is burned off by the high concentration of the salt; brain hemorrhages are frequent. It takes about an hour to slowly kill the baby by this method. The mother usually goes into labor about a day later and delivers a dead, shriveled baby.

If abortion is decided upon too late to be accomplished by either the D & C or salting out procedures, there is left a final technique of abortion called hysterotomy. A hysterotomy is exactly a caesarean section with the one difference, namely, that in a caesarean section the operation is being done to save the life of the baby whereas in the hysterotomy the operation is being done to kill the baby. These babies look very much like other babies except that they are small, weighing, for example, about two pounds at the end of a 24 week pregnancy. These babies are truly alive and they are allowed to die through neglect or are deliberately killed by a variety of methods. A Boston jury found a physician guilty of manslaughter for killing the product of this type of abortion.

What is the current legal situation in reference to abortion? The Supreme Court has been making decisions in recent years and months which must be of vital concern to every person. First there was the ruling against prayer in public schools. Now if you are for strong separation of church and state, that might have been to your liking, yet a related decision virtually eliminates Bible reading in schools, *even as literature*, and a generation will now grow up in this country knowing more about the writings of Hemingway and Sartre than of

### C. EVERETT KOOP

St. Paul. Subsequently, the Supreme Court dealt with pornography, or perhaps it would be better to say that they failed to deal with pornography. They sounded such an uncertain note that pornography is still undefined in this country, court cases pile up, but what you and I call pornography, still flourishes throughout the land. Next, the Supreme Court ruled that capital punishment was an extraordinary and cruel punishment. It is not my purpose to debate capital punishment here, but it does seem to me that the Supreme Court was overly concerned about the humane treatment for the three murderers killed in the previous six years and had little thought for the effect upon society made by the 78,000 murders that took place in that same period of time. These three actions of the Supreme Court differ remarkably from each other. The prayer decision is in conformity with the post-Christian spirit of our age, but it sets the stage for the erosion of other things that are dear to you and me. Pornography from the Christian perspective may be lawful, but for the Christian it is not expedient. Capital punishment is thought by many to be a divine precept from the covenant given to Noah in the Old Testament as I have already said, but whether this is your interpretation or not, the abrogation of capital punishment by the Supreme Court may very well endanger your life.

It is not my primary intention to undermine your faith in the Supreme Court, but I would like to examine with you this area where the laws of the United States and the laws of God are not in accord; to sharpen your thinking to be critical of civil authority, and finally to show you some of the natural consequences which I believe will affect your lives in days to come as the morality of this nation is constantly eroded.

In 1959, in the Declaration of Human Rights, the United Nations stated: "The child, by reason of its physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth." That was the United Nations in 1959. On January 22, 1973, the Supreme Court of the United States, *Roe v. Wade* and *Doe v. Bolton* announced that a new personal liberty had been found in the Constitution,—the liberty of a woman to procure the termination of her pregnancy at any time in its course on demand. It is interesting that the Supreme Court was not sure in its decision where the Constitution had provided this right for a woman; indeed, the Supreme Court was very clear that the Constitution did not mention it explicitly. In spite of the fact that the Court was extremely vague as to where this provision is in the Constitution, it was not the least bit unsure that it had the power to pro-

## THE HUMAN LIFE REVIEW

claim a specific constitutional mandate. It propounded a new doctrine on human life. It rendered invalid the existing regulation of abortion in every state of the union. Some of this legislation went back to the middle of the last century. Other legislation which was overthrown was recent and was an indication of the concern of lawmakers in this country for the protection of the fetus. Some of the legislation previously valid had been confirmed by popular referenda as recently as November, 1972, in Michigan and North Dakota.

The Supreme Court rulings went far beyond the most optimistic hopes of the pro-abortionists. In 1963 Glanville Williams, one of the earliest activists in reference to abortion-on-demand, proposed to the Abortion Law Reform Association that abortion be a matter between woman and physician up to the end of the third month. His proposal was voted down by the then most radical advocates of abortion. Yet in fewer than ten years the Supreme Court has written into our laws a far more radical doctrine.

Here are some of the specifics of the Supreme Court's ruling:

1. Until a developing baby is "viable" or "capable of meaningful life" (whatever that means), a state has no "compelling interest" which justifies it in restricting abortion in any way in favor of the fetus. For six or seven months (*not* clearly defined!) the fetus is denied the protection of law explicit in either the 9th or the 14th amendments.

2. Even after viability (still not clear) has been reached the developing baby is not a person "in the whole sense" so that even after viability the growing baby is not protected by the guarantee that you and I have in the 14th amendment that life shall not be taken without due process of law.

3. A state still may not protect a viable human being by preventing an abortion undertaken to preserve the health of the mother despite the fact that the Court recognized that even a developing baby, though not a person in "the whole sense," nevertheless is legally recognizable as having "potential life." By this statement a fetus as old as nine months, that is just before delivery, is placed in a position by the decision of having his right to life subordinated to the demand for abortion predicated on health. Let me digress here and say that up until the Supreme Court's decision in January of 1973, the definition of health had already been expanded to ludicrous proportions. The slightest upset in the emotional state of a woman contemplating the continuation of a pregnancy was defined as an impairment of health.

4. The state may require that all abortions be done by licensed physicians, that after the first trimester of pregnancy they be performed in "licensed facilities" and that after viability (still not defined) of the fetus, abortions may be regulated so long as "health" abortions are not denied. The state was forbidden the previous customary safeguard of requiring review of the abortion decision by a hospital committee or alternatively the concurrence in the decision by two physicians other than the expectant

C. EVERETT KOOP

mother's attending physician. In the lesser known decision, the Court, also prohibits the state from requiring that the abortion be done in a hospital licensed by the Joint Committee on Accreditation of Hospitals or indeed that it be in a hospital at all. In other words a free standing-abortion clinic without any of the safeguards that medicine has built into policing itself need not be required.

Justice Blackmun, who wrote the majority opinion, made it abundantly clear that if any religion was to be a guide to him it would be paganism. He alluded to the practice of the Persians, the Greeks, and of the Romans, but he ignored Christianity. The Hippocratic oath which has been taken by physicians for the past 2,000 years specifically prohibits abortion and the suggestion of it. Justice Blackmun laid this aside as having no relevance today.

The decision takes some comfort in its wording in the fact that the mortality of abortion is even lower than the mortality for live births. The reference, of course, can only apply to the mother; the baby's mortality is 100%. (History may prove these statements to be incorrect in reference to maternal mortality as statistics on abortion are accumulated.)

Here are some of the direct quotations from the majority opinion of the highest court in our land: "If the state is interested in protection of fetal life after viability it may go so far as to proscribe abortion." It is incredible that the Court would have such a low regard for life, state its callousness so crudely, and to do so while exceeding its own constitutional obligation, if not its authority.

It is further absolutely astounding to me that Justice Blackmun could have included the following sentence in his decision. "We need not resolve the question of when life begins." Indeed need we not! Where does this lead? It leads to infanticide and eventually to euthanasia. If the law will not protect the life of a normal unborn child, what chance does a newborn infant have after birth, if in the eyes of a Justice Blackmun, he might be less than normal?

The Chief Justice of the Supreme Court, Justice Burger, said, "The vast majority of physicians . . . act only on the basis of carefully deliberated medical judgments relating to life and health . . ." The simple fact of the matter is that the Chief Justice does not know physicians as well as I do, nor does he appreciate how few physicians it takes to make abortion-on-request equivalent to abortion-on-demand.

Finally in referring to the woman's right of privacy, Justice Blackmun wrote: "This right of privacy . . . is broad enough to encompass a women's decision whether or not to terminate her pregnancy."

#### THE HUMAN LIFE REVIEW

Where does this leave us practically at the moment? At this moment unborn infants have no protection at all anywhere in these United States. There is not the slightest doubt that in the first six to seven months of fetal existence abortion-on-demand is a constitutional right of a woman. There is not the slightest doubt that the value of an embryo or a fetus is absolutely nothing. Abortion-on-demand after the first six or seven months of fetal existence has been effected by the Court because it has denied personhood to the viable fetus on the one hand and through its broad definition of health on the other. If the seven-month-old fetus is not a person (and the Supreme Court has said it cannot be a person as long as it is a fetus), the physician only has one patient, namely the mother. This is in contradistinction to medical understanding throughout the ages. Now when the physician considers the mother's health, he has to do so in reference to the definition of health given by the World Health Organization: "a state of complete physical, mental, and social well-being, not simply the absence of illness and disease." Obviously, this gives any physician complete license to perform an abortion and complete protection under the law because he could always hide under the umbrella of the World Health Organization's definition of health in that he was working for the wellbeing of the mother. In short, unwantedness can be a death sentence for the baby.

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I believe that most people have not thought much about their attitude toward abortion, even those who are vigorously opposed to it sometimes do not have good reasons. Last year I had the privilege of preaching at two Roman Catholic masses at Villanova University. It was a tremendous opportunity to speak to about 1,300 young people. I said to them essentially what I am saying to you. Afterwards, hundreds of those boys and girls came to me and said exactly the same thing: "I have always been against abortion, but now I know why."

The abortion question is argued on four grounds: medical, social, personal and theological. I have already told you some of the medical things you should know about the development of a fetus and the way in which it is killed by abortion. The next thing you should know medically is that the idea that abortion is not killing is a new idea. Five years ago, everybody agreed that abortion was killing an unborn baby. Now we have been brainwashed (and I will have more to say about this brainwashing later) so that words do not mean the same things that they used to mean. For example, you find that the abortionists do not talk about babies in the womb except when they

C. EVERETT KOOP

have a slip of the tongue. They do not even like to refer to them as fetuses. When they call the developing baby "the product of conception" it ceases to have a personality and its destruction could not possibly mean killing. As recently as 1967, at the first international conference on abortion, a purely secular group of people, said, "We can find no point in time between the union of sperm and egg and the birth of an infant at which point we can say that this is not a human life." Now if that had been a theological group it would have been easy to understand the statement. But when one considers that this was a secular group of people, representing thoughts from many cultures all over the world, that doctrine is worth listening to.

In the *Journal of California Medicine* in 1970 the following remarkable quotation appeared: "The result has been a curious avoidance of the scientific fact which everyone really knows that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices." I would add to that that a great many of the medical statements which are pro-abortion come from academically impeccable sources,—a tragic circumstance in American medicine today. In countries that have gone the way of abortion-on-demand that we are now embarked upon, there have been developments from which we can learn. Japan is one of these countries. They liberalized abortions just about the way that we did but they did it twenty years ago. In the first eight years they had 5,000,000 abortions. Their experience indicates that as people became used to abortions, as it no longer was a shocking thing to talk about, as people talked about the products of conception rather than talking about an unborn baby, abortions took place later and later in pregnancy. By 1956 26,000 abortions in Japan were at five months, 20,000 were at six months, and 7,000 were at seven months. In 1972 the Japanese government decided to revise legislation to prevent women from having abortions purely for economic reasons. The prime minister said that something must be done about his country being known as a haven of abortionists.

Poland has had a very liberal abortion law for many years but recently the government reversed itself because they realized they were facing genocide. So many people were having abortions in Poland that the population had fallen well below the "population zero" fertility rate. We reached that same rate two years ago.

The Supreme Court's decision enabling free standing abortion

#### THE HUMAN LIFE REVIEW

clinics to exist has made it very difficult to keep records in the United States on how many abortions are being carried out and what the complications might be. The National Health Service in Great Britain keeps excellent records and they have been in the abortion-on-demand business for about six years. The liberal pro-abortionists in this country in the days before the Supreme Court's decision told us of how there would be a reduction in illegitimacy, prostitution, venereal disease, and other social ills. Unfortunately, the excellent records of the first five years of liberalized abortion under the National Health Service in Great Britain have revealed an increase in incidence of the following: illegitimacy, venereal disease, prostitution, later sterility of the previously aborted mother, pelvic inflammatory disease from gonorrhoea, and subsequent spontaneous abortions or miscarriages. Ectopic pregnancies,—that is where the egg is implanted not in the uterus but up in the fallopian tube requiring an emergency abdominal operation—have doubled since abortion has been liberalized. Prematurity in women who had a previous abortion has increased in Great Britain by 40%. No one has done a study on the emotional reaction or the guilt of the woman who has had an abortion and now desperately wants a baby that she cannot have.

What records we do keep in this country as published in a medical journal in January of 1974 indicate that the maternal mortality rate for saline abortions rose from 9 per 100,000 in the first year to 22.2 per 100,000 in the second year underscoring the greater risks of second trimester terminations of pregnancy. In states like New York before the liberalized abortion laws the mortality rate for mothers was 52 per 100,000 live births. This was not true, however, for states like Rhode Island that do not have the problems of black and Puerto Rican immigration. In the last two years before the liberalized abortion laws there was not a single maternal death at childbirth in the state of Rhode Island and many other states have similar low maternal mortality rates.

The three medical questions that are usually asked of someone in my position who is anti-abortion have to do with rape, suicide and handicapped children.

As horrible a bit of violence as is rape, it very seldom results in pregnancy. A study in Minneapolis of 3,500 rape cases revealed not a single pregnancy. The same is true of maternal suicide. A study over seventeen years in Minneapolis revealed that suicides in reference to pregnancy were part of generalized psychoses and in the rare instance where it did occur did so after pregnancy rather than during. Finally, studies on handicapped children have indicated that their frustrations

C. EVERETT KOOP

are no greater than those experienced by perfectly normal children. To this latter fact I can attest. My life has been spent with children who are less than one would consider totally normal and I have considered it a privilege to be involved with extending life to these youngsters. In the thousands of such circumstances that I have participated in I have never had a parent ask me why I tried so hard to save the life of their defective child. Now that I am seeing children I operated upon years ago bring me their children for care, I have never had an old patient ask me why I worked so hard to save his or her life.

It is in the social arena that the abortion question is most ardently debated. Here a small minority of pro-abortion "liberals" have altered our vocabulary, misrepresented statistics, reprehensibly made false associations—and with such great success that they influenced the Supreme Court to perpetrate on the American People, who are fundamentally pro-life, the legalized murder of millions of babies in the name of progress and social reform. You will be told that the Gallup poll has found that "two out of three Americans now favor legal abortion." Dr. Gallup compared the results of a poll taken in June 1972 with his previous polls on abortion. However, he was not honest enough to state that he had changed the questions. Dr. Gallup polled Americans on abortion in 1962, 1965, 1968, and 1969. In all of these polls, he asked identical questions. The record shows that in the years 1965, 1968 and 1969,—68% to 74% of all Americans opposed abortion done solely for the reason of family economic distress. In similar fashion 79% to 91% of all Americans questioned, disapproved abortion for the reason of pregnancy being unwanted. Then in June 1972, Dr. Gallup changed his question and framed it in terms of abortion being a private matter. He did not ask the same question as in the previous polls but nevertheless proclaims a vast shift in public opinion. I suspect that Dr. Gallup is framing public opinion rather than sampling it. In November of 1972 Michigan citizens voted on a proposal allowing abortion on demand up to twenty weeks (not the much more liberal interpretation of the Supreme Court). This was rejected by a 62% vote. Parenthetically, let me say that just a few weeks before the polls in that state indicated that abortion legalization would win by 25 points. The vote in the opposite direction was probably tremendously influenced by a state-wide educational program undertaken by a coalition of pro-life forces. (A 1975 poll by the Sindlinger organization shows that almost 60% (59.4) of all Americans oppose abortion on demand.)

You will be told that doctors favor abortion on demand. As a back-up to this statement you will be told that the AMA approves



#### THE HUMAN LIFE REVIEW

abortion. Perhaps you do not know that only 42 per cent of our nation's 386,000 doctors pay dues to the AMA.

You will be told that abortion reduces maternal deaths and along the same lines that unwanted pregnancy produces psychoses in pregnant women. The late Dr. Alan Guttmacher, one of the most ardent pro-abortionists, wrote as long ago as 1950s: "Today it is possible for almost any patient to be brought through pregnancy alive, unless she suffers from a fatal illness such as cancer or leukemia, and if so, abortion would be unlikely to prolong, much less save life." And then in reference to psychosis, Guttmacher said: "There is *little* evidence that pregnancy itself worsens a psychosis, either intensifying it or rendering a prognosis for full recovery less likely." Dr. Guttmacher was an obstetrician at Mt. Sinai Hospital in New York City, and president of Planned Parenthood-World Population.

You will be told that already the liberalized abortion laws have reduced infant deaths. This is like suggesting amputation of the leg in normal men to prevent ankle fractures while skiing. It is not possible to save one child's life by killing another. Obviously if one does 1,000,000 abortions, none of those fetuses will ever become infant deaths since none of them will ever live to be infants.

You will be introduced to situational ethics from academic sources considered to be above reproach. Dr. Mary Ellen Avery, professor of pediatrics at Harvard University and physician-in-chief of Boston Children's Hospital writing in the *New England Journal of Medicine*, suggests that if on abortion the infant is large enough to survive with the extraordinary care provided by an intensive care unit, that the physician should decide about caring for the child or not caring for the child on the basis of whether the parents wish the child to survive. In other words, wantedness is the test for survival. Incidentally the Boston Children's Hospital is now in the ludicrous situation of having one of the world's most sophisticated intensive care units for premature babies with an enviable record in survival while across Longwood Avenue, at the equally famous Boston Lying-In Hospital, babies the same age and size are having their lives terminated. One team of doctors is spending fantastic amounts of time, money and energy to save a three-pound life while across the street another team is destroying an almost identical human being.

In all of these social discourses you will be introduced to the war of semantics. In 1974, in December, Donald P. Warwick, chairman of the Department of Sociology and Anthropology of York University, Toronto, wrote on the "Moral Message of Bucharest" which was a report on the International Congress on Population. He called at-

C. EVERETT KOOP

tention to the fact that "population studies" is a euphemism for family planning research; "family planning," a cover for birth control; abortion (itself a euphemism for feticide) is called a "retrospective method of fertility limitation." I would suggest to you that it is much easier to think of killing "the product of conception" rather than destroying an embryo. It would also be easier to kill a fetus than to kill a developing baby. Beware that you do not fall into the trap of thinking of abortion as a method of birth control and thus of population control.

There are countless other social misrepresentations that you may be presented with but the ultimate one will have to do with overpopulation. Overpopulation is certainly a major concern but it is not overpopulation that is our problem; it is the distribution of the world's population. I would suggest that when someone talks to you about this subject that you ask: "What country are you most concerned about?" He will practically always answer: "India." Then you can introduce an interesting statistic. New Jersey is twice as crowded as India and it will take two hundred years of population growth such as the United States was experiencing five years ago before these United States will be as uncomfortably crowded as New Jersey.

I began these remarks by suggesting that our society might be schizophrenic. As further indication that this is not far from the case, remember that the Supreme Court has declared the unborn baby to be a non-person. Yet, a paternity action can be brought by a pregnant woman as soon as she knows she is pregnant; some states have statutes on their books that say that the abortionist must make every effort to resuscitate the baby he has just aborted; an unborn baby can be injured in an accident and at a later date after he is born, can sue the person who injured him, a fetus can inherit an estate and take precedence over a person who is already born as soon as that fetus is himself born.

In any discussion in a social realm concerning abortion you will be exposed to some smoke screens; things that people set up so that they can talk about abortion. One of these will be a discussion of meaningful life. Who can say whose life is meaningful? You must be careful that some critic does not come along and consider our lives to be "without meaning." Think of people such as Franklin Roosevelt, Napoleon, Helen Keller, or perhaps someone in your own family who might have been thought at one time not to have a meaningful life, yet with the passage of time, made a remarkable impact on history. You will be told that restrictive abortion laws work to the detriment of the poor. Yet, in the first year that abortion was liberalized in New

#### THE HUMAN LIFE REVIEW

York City, the majority of women who were aborted were middle class, white women who wanted their abortions for reasons of convenience that were non-medical. The women's liberation movement is frequently wrapped up around the abortion issue and whether you are for or against women's lib, do not get the baby and the bath water mixed up. Eventually the old argument that restrictive laws are merely made to be broken and therefore should be removed will be brought to your attention. There are two answers to that. The first is that we have laws against murder which people break but that does not mean that the laws against murder should be removed. Secondly, if a legal abortion cannot be obtained and it is assumed that a criminal abortion will be substituted for it, the answer is that you do not fight one crime with another crime.

You will recall that the Supreme Court invoked the "right of privacy" as the telling argument in making its decision. Along these lines, the first among the personal arguments that is frequently reiterated is the woman's declaration, "I want the right to my own body." Apart from the obvious suggestion that the right to her body begins considerably before the need for an abortion, there are other concerns. Total sexual freedom leads to the demand for abortion but without consideration of the rights of the product of that freedom, namely the unborn baby. The fact of the matter is that the child in the womb is not a part of the woman's body, subject to her absolute control. She provides the environment and the sustenance but this sustenance does not go to a subhuman creature devoid of human rights. For example, if the baby were part of the mother it would have the same blood type—which it does not.

Abortion is surely the worst choice we can offer to a frightened pregnant woman who for a variety of reasons does not see her way clear to having a baby. Here the challenge lies: especially the Christian challenge as an alternative to abortion. Parenthetically, let me say that since the liberalization of abortion there are countless childless couples who no longer are able to adopt from the pool of unwanted but born human beings that formerly existed.

It is interesting that women claim that they are personally exploited when a man gets them pregnant. Yet these same women do not realize that abortion exploits them still more. Abortion provides a new business in another kind of feminine prostitution. So says Mary R. Joyce, who claims that the sexual revolution is yet to begin. She claims that when women prostitute themselves to what is called the "baby scrambler," the suction machine for abortion, they give the money to men more often than not. She further quotes that in New

C. EVERETT KOOP

York City alone, doctors in hospitals made approximately \$140,000,000 in the first year-and-a-half of New York's liberalized abortion laws (without counting the abortion clinics). Mrs. Joyce is convinced that if women were not so intellectually passive, they would be able to see through their new so-called liberation very clearly.

I have already spoken of the simple theology which leads me to my position. I am distressed that the major denominations in the Protestant faith in our country with the exception of the Missouri Synod Lutherans have been brainwashed along with the rest of our population concerning abortion. The right of privacy has been stressed by the Supreme Court. A United Presbyterian committee said, "Abortion of a non-viable fetus is not a legal matter. A woman, her doctor, her minister or counselor should decide." Now, that is so private that they left the father out of consideration. The Methodists said: "Abortion and sterilization are the decision of those most concerned." But the Methodists forgot the baby.

I have talked of the law and I have certainly talked of life. Now. I would like to say a few things about the days ahead. There are natural consequences of sin, even for the Christian. You may kill your enemy and immediately repent of this act, and ask God's forgiveness on the basis of the sacrifice of Jesus Christ and you will be forgiven. But in the process, the police siren is heard approaching nevertheless. There are natural consequences of sin that cannot be escaped. So it is with the liberalization of abortion. A few months after the Supreme Court decision was made, I was asked to address the graduating class at Wheaton College. I wrote my remarks in early May and gave the commencement talk in early June. In my talk I said there were ten things that you and I would see because of the Supreme Court's decision. Between the time of writing in May and the time of delivery in June, three of these things had happened and since then, I think the other seven have happened as well.

First of all I said that the law would look ridiculous. Several weeks after I wrote that, a young woman boarded an airplane in Pittsburgh and flew to Youngstown, Ohio, a flight of thirty-two minutes. During that time she delivered a baby and left it in the restroom of the airplane. Now, if she had had an abortion in Pittsburgh, before she got on the plane, she would have been the darling of Planned Parenthood. But thirty-two minutes later, with a natural birth of a premature baby in the state of Ohio, she was sought on two charges, child abandonment and attempted murder. Since then it has been ruled that a minor female may have an abortion on demand without the consent of her parents; yet the law also requires that her parents be responsible for

the bill. And even more ridiculous from the point of view of the law is the fact that the unborn baby being a non-person is nevertheless eligible at his mother's request for welfare. A minor may have abortion—parental consent—but not have her ears pierced for earrings!

Second, I said that liberty would lead to license. And within a week of the decision of the Supreme Court, the New York Medical Society took a stand in reference to the patient's right to die but at the discretion of the patient's family, not at the discretion of the patient. Now, you can imagine what that can lead to.

Third, the right to die leads to the right to kill in mercy. In March of 1973, two months after the Supreme Court decision, a Dutch jury found a physician guilty of killing her mother when she had terminal cancer. Now, the victim of the mercy killing was not in pain, but she was just tired of it all. The sentence was a one week suspended sentence in prison. Since that day there have been nine or ten mercy killings that I know of; there have been no convictions for murder to my knowledge.

A fourth effect of the action of the Supreme Court in reference to abortion is that it will contribute first to the process of depersonalization and secondly to the process of dehumanization. There are a number of episodes in the history of man of which we are all ashamed. Indeed, if we had the chance to act otherwise, we would do so if given that opportunity. Yet, at the time, not only were these things legal, but they were accepted by the people and were even proved to be logical to those few who complained. Jews were considered to be non-persons in Nazi Germany. Indians were not thought to be persons in the United States. The same Supreme Court to which I have referred so frequently, in the Dred Scott decision in 1857, declared the Negro to be a piece of chattel property. They would have been more honest if they had said non-people. Lt. Calley expressed the opinion that the Vietnamese were not human beings. Now, the Supreme Court tells us that unborn babies are not persons in our society. So, we regard the unborn baby today in the way we once looked at the Indian and the Negro slave and in the same way that the Nazis saw the Jews. In all of these areas, if persons had treated other persons as persons and if they had stood for the preservation of life, there would have been no slavery, no Dred Scott decision, no Wounded Knee and no Nazi Germany guilty of atrocities against Jews.

Fifth, there will be enormous numbers of abortions. Because we do not keep accurate records, I cannot give you the exact number of abortions that have taken place in this country in thirty months, but using the statistics of the abortionists, it is over 3,000,000.

### C. EVERETT KOOP

Sixth, there has been and there will continue to be a change in sexual attitudes. You cannot have over a million abortions taking place every year without everybody knowing about the process. It seems to me inevitable that the social attitude of the young will change. There will always be a way out if contraception does not work or if it is not used. Already here in our community, the advertising media make pregnancy a loathsome thing. As you leave the airport in Philadelphia and drive into the center of town, you see on billboards and on the tops of taxicabs, the following sign: "Pregnant? For abortion information, call number - - - ." The week after the Supreme Court decision, there appeared this headline in the Philadelphia Bulletin: "Abortion Study to be Included in the New Girl Scout Program." The article went on to say the Girl Scouts were planning a new merit badge, a section of which recommends that the older scouts visit an abortion clinic and familiarize themselves with birth control. The President of the Girl Scouts of Philadelphia said the badge was "relevant and proper education for the youngsters." These were girls in the seventh to tenth grades.

Seventh, I believe the door is open to a number of things that like abortion are disturbing to a large segment of our population. You may not be immediately aware of the fact that it has been the custom in this country when some private activity was repugnant to the moral sensitivity of the American people, there was legislation against it. That is why we have laws against such seemingly private engagements as homosexuality, sodomy, prostitution and adultery. Did you realize that there are also laws prohibiting activities quite lawful in other countries today and in our country in days gone by? I refer to gambling, the taking of addictive drugs, cockfighting and dueling. There are even laws against suicide! Some of these things are done essentially in private. But they are outlawed because they offend other people who know about them.

Eighth, the newborn infant who is not perfect is probably the next target. Remember the Supreme Court left the decision between feticide and infanticide very hazy by refusing to come to grips with the time that life begins. In May of 1973, in the Johns Hopkins magazine, right after the Supreme Court decision, the following was set out in a box in large type for emphasis, "If the family and the medical staff agree not to treat a child, assuming he is going to die anyway, then why not make sure he dies quickly and painlessly as possible. I think there is little difference between euthanasia and passive euthanasia." And later the same month, *Time* magazine reported a quotation by a Nobel Prize winner, James D. Watson, the same man who dis-

#### THE HUMAN LIFE REVIEW

covered the double helix DNA in the genetic code. *Time* quoted Dr. Watson's statement that appeared in *Prism* magazine, a publication of the American Medical Association: "If a child were not declared alive until three days after birth, then all parents could be allowed the choice only a few are given under the present system. The doctor could allow the child to die if the parents so choose and save a lot of misery and suffering. I believe this view is the only rational, compassionate attitude to have."—So said the winner of the Nobel Prize.

Ninth, abortion is back in the hands of the abortionists. The pro-abortionists use, as I said a moment ago, as one of their chief arguments, the terrible plight of those who had abortions at the hand of illegal abortionists in their offices, back rooms, etc. Now the less publicized decision of the two that the Supreme Court made, the Georgia one, threw out the safeguards of having abortions in a hospital that is accredited and in the mainstream of medical practice. Freedom to establish independent abortion clinics now exists. You probably have read in the papers how Philadelphia was rocked with scandals ranging from kickbacks for referral, to the willingness of a free-standing abortion clinic to do an abortion on a reporter from the *Evening Bulletin* who was not even pregnant. It is again inevitable that abortions will largely be done legally by those who recently did them illegally. I recently saw a title in one of the opinion magazines entitled, "Suddenly, I'm a legal abortionist."

Tenth, and finally, the phrase of the pro-abortionists that angers me almost as much as the phrase, "the female's right to her own body," is the term, "meaningful life." It was said that non-viable babies had no meaningful life. Well, they do. For these small living products of abortion that look just like you and me were used for scientific experiments until recent legislation forbid it. Would they have been used if they were "meaningless"? Obviously not.

The implications go far beyond these ten prophecies which have already come true. The trouble begins when there is acceptance of the idea that there is such a thing as life which is "not worthy to be lived." The abortion movement in Germany began about 1900 and it had the significant support of intellectuals in that country by 1911. Then the overpopulation psychology that we are now being exposed to here began to develop there at that time. After the defeat of World War I, there was a collapse of social and moral values in Germany (just as we are experiencing here) and abortion, although still illegal, became rampant and the euthanasia movement was launched about 1920 against "worthless" people, but such "mercy killing" was not performed at that time. By the time Hitler came, the stage was set.

C. EVERETT KOOP

Physicians suggested the value of euthanasia to Hitler. His first program in mass killing was able to take place *only* because abortion had become an accepted thing. Hitler first exterminated 275,000 people, *not* Jews, but the frail, the infirm, and the retarded. Eventually, as World War II approached, even amputees from World War I were eliminated because they were of no service to the Reich! It is significant that it was the medical profession, for “social reasons,” that started the movement, not Hitler.

What can we expect from a society that can rationalize away the most fundamental of human values, the value of life? What will become of us if we permit our society, through our courts, to legalize murder as a solution to a personal problem? Our problems are great because we fight perverted power in high places. The Rockefeller Commission, the Ford Foundation, the Sunnen Foundation, and the Scaife Foundation are all heavily involved in pushing abortion and those things which follow as the night, the day. The Rockefeller Commission, for example, recommended not only abortion but sex education and contraceptives for teenagers without parental consent, widespread sterilization of males and females, and government-subsidized child care centers for all families wishing to make use of them. Is this very far from Hitler’s Germany?

Here is what your children might well read in their college biology textbook (*Life on Earth* by Wilson *et al*): “Abortion is the most effective method of population control. . . . At what point a fetus becomes a human being is a controversial, biological, and ethical question. The moral dilemma is further complicated by the knowledge that in many cases a particular fetus will be seriously defective or unwanted by its parents. Born with such a handicap a child is likely to lead a troubled life and to add a heavy burden on an already overpopulated society . . . abortion has always been one of the most popular methods of birth control throughout the world.” Magnificent misrepresentation spoken with great authority.

Dr. Bernard Nathanson, writing on two separate occasions for the *New England Journal of Medicine* had these things to say: “One feature that distinguishes the center (in which Dr. Nathanson worked) from all other hospitals and abortion facilities is the use of individual pre-abortion counseling. The counselor is a college educated young woman, twenty-one years of age or older who has had at least one induced abortion. She has been carefully screened for qualities of warmth and concern, in addition to intelligence and efficiency.” How delightful that Dr. Nathanson provides not only a woman with the remarkable maturity of twenty-one years who has



#### THE HUMAN LIFE REVIEW

had at least one abortion as the counselor for his disturbed patient. Dr. Nathanson's second quotation: "I am deeply troubled by my own increasing certainty that I had in fact presided over 60,000 deaths. There is no longer serious doubts in my mind that human life exists within the womb from the very onset of pregnancy . . . life . . . is a continuous spectrum that begins in utero and ends at death. The bands of that spectrum are designated by words such as fetus, infant, child, adolescent, and adult." In spite of what Dr. Nathanson wrote remember—he presided over 60,000 deaths in 1974 he still believes that there should be no law regulating abortions.

It is said that social reform seldom moves backward. The only way that the horror I have been recounting can be corrected is by a constitutional amendment which proscribes abortion. It can be done; it will take a tremendous united effort. Remember that it was only the indignant protest of concerned citizens that eliminated the indiscriminate use of the living, unborn and born human fetus in scientific experimentation. The fact that the conscience of American people working through the pro-life movement brought about this change is historically significant and should not only not be minimized or discounted but should be a source of encouragement to us.

It should be obvious that as soon as one questions the value of human life there really is nothing to prevent him from considering what human beings under what circumstances should rightfully be exterminated. It takes almost nothing to move from abortion which is killing of an unborn baby in the uterus to the killing of the retarded, the crippled, the sick, the elderly.

Take heed, you who do not fit into someone's ecological ideal in form and function. That day may not be very far off when a death selection committee declares that you are no longer a person.

# Euthanasia and Abortion: A Catholic View

John A. Hardon

## I. EUTHANASIA

**U**NTIL a few decades ago, euthanasia (easy death) was scarcely understood even as a word, let alone discussed except in a small circle of social theorists. Many people still think of it in terms originally defined by the Euthanasia Society of America as “the termination of human life by painless means for the purpose of ending severe physical suffering.”

But much has happened since the Euthanasia Society was organized, and those concerned with the future of society have suddenly awakened to the implications of so-called “mercy killing.” These implications strike at the most cardinal premises of biblical revelation. They affect every facet of personal and social existence, and they emphasize with stark clarity the need for sound Christian principles if the very foundations of human civilization are to remain intact.

Science has freed man from subjection to many of the forces of nature and, in large measure, brought them under his control. One effect has been to give man a sense of mastery of the universe, which he never enjoyed before. This includes mastery over human life, from planning conception to determining who shall live and for how long. Another effect has been to immerse man in the satisfaction of this world, which his own genius has discovered, with corresponding indifference to whatever lies beyond the experience of man’s life on earth.

Couple these two effects and you have some explanation of why such a practice as euthanasia should have come to the surface in our day, and why its proponents are so logically persuasive in defending what the faith that created civilized human culture considers murder.

It is perfectly reasonable, on secularist grounds, to argue that helpless invalids, bedridden cripples, and the unproductive aged

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#### THE HUMAN LIFE REVIEW

should be quietly but firmly phased out of existence. Why not? They are, on the principles we are examining, useless members of society: useless to themselves, since all they may have facing them is the pain and disability of the future; and useless to others, since what can they contribute to the welfare of society, which measures a person's value by his utility to increase the physical well-being of mankind?

In 1940, the Holy See was asked about the morality of euthanasia. The occasion for the question was the growing specter of legalized murders of those whom the Communists and Nazis considered undesirable.

"Is it permissible," Rome was asked, "upon the mandate of public authority, directly to kill those who, although they have committed no crime deserving of death, are yet, because of psychic or physical defects, unable to be useful to the nation, but rather are considered a burden to its vigor and strength?" The reply was to be expected: "No, because it is contrary to the natural and the divine positive law."<sup>1</sup>

Why does Catholic Christianity condemn euthanasia? Because, no matter what sentimentalists or social engineers may say, it is a grave crime against justice, both human and divine. God alone has the ownership of human life. Those who practice euthanasia assume the right of ownership over life. Therefore the sin committed is either murder or suicide.

There is a built-in respect for human life in the biblical tradition that has created the Judaeo-Christian culture. "You shall not kill" is not only a mandate of the Decalogue. It is the expression of reverence for a human person, no matter how young or old, how strong or weak, and irrespective of his physical, mental, or emotional condition.

What would genocide, under the semantic cloak of euthanasia, do to this reverence for life? It would reduce it to a pious irrelevance and remove it from effective influence on the mores of the people.

Implicit in the Christian value system is the realization that human life is sacred, of and by itself, apart from any profitable function it may serve as a tool of "productivity." A mother who cares for her child, cares in two deeply meaningful ways. She cares because she loves and, out of a mother's love that Scripture cites to symbolize selfless dedication, she cares for the needs of the offspring of her womb. So, too, a devoted son or daughter cares for an aged parent, first in the basic sense that the parent is loved, and then in the consequent sense that, out of love, the parent is provided with whatever he or she may need.

JOHN A. HARDON

Hidden in the revealed mystery of love is the capacity of the human heart to give itself to another person for the sake of that person, to please him, and without thought as to "What will I get out of it?" or "What good will it do for me?"

After all, what do we mean when we speak of the dignity of human life? Do we not mean that a human being is worthy (hence he has the dignity) of being loved just because he is human, no matter how otherwise lacking in dignity he may seem to be, made to the image and likeness of God, redeemed by the blood of Christ, and destined to be with God in heaven for eternity? No wonder the Catholic Church looks upon euthanasia as "infamous, harmful to civilization, and dishonorable to the Creator."<sup>2</sup>

Not only does man have intrinsic dignity, but God has inalienable rights. The divine lordship over human life is an article of the Catholic faith, namely, "I believe in God the Father almighty, Creator of heaven and earth." As a creature of God, to whom man owes every element of his being, man is entrusted only with the stewardship of his earthly existence. He is bound to accept the life that God gave him, with its limitations and powers; to preserve this life as the first condition of his dependence on the Creator; and not deliberately curtail his time of probation on earth, during which he is to work out and thereby merit the happiness of his final destiny.

Another reason why Catholicism reprobates euthanasia is founded on what may be called the principle of "the total good." This postulates a belief in the total and not merely partial reality of human existence. Unless those to whom the care of human beings is confided, believe that man is more than mere animal; unless they further believe that life is not limited to the short span of time between conception and the grave; and unless they believe that man participates marvelously in the very life of God—inevitably their disbelief (or presuppositions) will find expression in what *they* consider "good" for a person.

As the Catholic Church views man's earthly sojourn, it is just that: a pilgrimage on which he has been placed by God during which he is to co-operate with the divine will in order to attain a greater or lesser share in God's infinite beatitude.

The totality of what constitutes man, on Catholic premises, is not body alone, but mortal body joined with immortal spirit. It is not earthly life alone, but a continuum of that life that begins as soon as a child is conceived and bridges the moment called death into eternity. It is not even human life alone, of body and soul, but human life

#### THE HUMAN LIFE REVIEW

elevated to participation in God's life because God became man in the person of Jesus Christ.

Essential to this view of totality is the value of human liberty, by which a person can freely collaborate with divine grace and thus give glory to God, although lying in bed as a "helpless" invalid; the value of enduring the cross by patiently accepting, in oneself and in others, the ravages of disease or the heavy demands of old age; and the value of loving mercy, which does not ask why, but like Christ, sacrifices self for others just because they are others, and knows that the self-oblation is pleasing to God.

Given the premise that only God has absolute mastery of human life, only he may take away what he originally conferred, whenever and under whatever circumstances he wills. Ours is not mastery but only ministry, of our own lives as of the lives of others. We may not, without grave injustice to God, deliberately terminate innocent human life.

The first qualification, then, is that the divine commandment not to kill applies to all innocent persons, whether born, or unborn. Disqualified from the precept are those who are judged (by rightful civil authority) to be a grave menace to society—such as criminals; unjust aggressors from whom we may protect ourselves and others, or the equivalent of unjust aggressors in prosecuting a just war.

Assuming that a person is innocent, not only may we not deliberately take away his life, but we may not even intend to do so. That is one side of the issue.

The other side is that which matters most here, the person's intention. Even in the case of innocent persons, situations can arise where there is no intent to have someone die. Just the opposite. The desire is that he or she might live. But the death of an innocent person may be permitted, in the sense of tolerated, if again (just as in the example of an individual risking his life for the common good) it is in the pursuit of a proportionately good end. Thus where radical surgery is urgently necessary to save a mother's life, a diseased organ like the uterus may be removed although it contains a nonviable fetus that will certainly die as an unwanted side effect of the hysterectomy.

Precise words on this matter are critical. Something is *directly* intended when it is the immediate object of a human act, when it is the specific motive for my action, when it is the guiding purpose I have in view.

We now shift focus from the negative prohibition, that innocent life may not be deliberately terminated, to the positive injunction that

man has an obligation to sustain his own life and the life of those who depend on him.

It is at this point that the developments of modern science, notably of medicine, enter the picture. The discovery of vitamins, hormones, antibiotics, sulfa drugs, penicillin; of genes and chromosomes as hereditary transmitters; of the continuity of germ plasm and the laws of genetic mutation—have all been made by men whose lives spanned the last and present centuries, and whose contributions to longevity have no parallel since the origin of man.

For our purpose, the moral axiom remains that we must use ordinary means to sustain life, and that extraordinary means, as we have seen, are not obligatory except in rare circumstances. What is changing, of course, is the range of possibilities for extending the human lifespan, in some countries by almost 50 per cent since the turn of the century. As a result, what used to be extraordinary may become ordinary means of maintaining life, with prospects for a longer stay on earth for a larger number of people. Christianity views this progress with approval, and the Church encourages its advancement for the service of man. But it must be “man in his entirety, with attention to his material needs and his intellectual, moral, and spiritual demands in the proper order.”<sup>3</sup> Viewed in this light, euthanasia is a misnomer. It should be called “lugrothanasia,” i.e., unhappy death, because it deprives a person who could live longer of the prospect of giving greater glory to God and of gaining more happiness in the life to come.

One aspect of euthanasia seldom referred to in popular writing is its possible connection with the transplanting of vital human organs. It was not by chance that the Catholic hierarchy has issued directives for hospital facilities indicating that a transplant may be done provided the loss of such organ(s) does not deprive the donor of life itself. As specialists in the field are careful to explain, two questions hover like clouds over the transplanting of vital organs. One is to know precisely, on scientific grounds, when a person is dead. The other is how effective a transplant can be if a vital organ, like the heart, is transferred from an authentically dead body. The medical temptation is to anticipate actual death in order to insure an effective transplant.

## II. ABORTION

The Roman Empire into which Christianity was born practiced abortion and infanticide on a wide scale. Chronologically, the exposure of unwanted infants came earlier, and was sanctioned by

Roman law. By the first century B.C., Romans were gradually getting away from exposure, while abortions were on the increase. The distinction they made between infanticide and abortion was due to the difference between the emotional reactions to what they must see and what they could avoid seeing.<sup>4</sup>

From the outset, therefore, the Christian religion was confronted with a society in which abortion was the rule rather than the exception. The Church reacted immediately and vigorously. The *Didache* (composed before A.D. 80) told the faithful what they must not do: "You shall not procure abortion. You shall not destroy a newborn child."<sup>5</sup>

Before the year A.D. 138, the epistle of Barnabas was equally explicit, placing the crime of abortion among the actions of those who walk the Way of Darkness. "There are two Ways of instruction," Christians were told, "as there are two powers, that of Light and that of Darkness. And there is a great difference between the Two Ways. The one is controlled by God's light-bearing angels, the other by the angels of Satan. And as the latter is the Ruler of the present era of lawlessness, so the former is Lord from eternity to eternity." Among the precepts of the Way of Light is this: "Do not murder a child by abortion, or commit infanticide."<sup>6</sup> Significantly, the two operative words in the prohibition are explicitly "murder" (Greek *phoneuō*, bloody slaughter) and "child" (*teknon*).

As the Christian attitude toward abortion began to penetrate Roman society, Christian believers were challenged by the prevalent Stoic theory of human life beginning only at actual birth of the fully developed infant. This would mean that there could be no destruction of a child by abortion. The faithful were therefore reminded that this was not true; rather that the life begun at conception continued essentially unchanged during its whole period of development. Induced abortion at any stage was a homicide.<sup>7</sup>

Two distinctions should be kept in mind regarding this matter: between Catholic morality and canonical penalties, and between the official teaching of the Church and ecclesiastical writers, no matter how celebrated. Clarification here will help dissipate what has become a gray area for many Catholics in today's animated controversy over abortion.

On the level of morality, Roman Catholicism has always held that the direct attack on an unborn fetus, at any time after conception, is a grave sin. The history of this teaching has been consistent and continuous, beginning with the earliest times and up to the present.

The Church's teaching on abortion is just that; it is doctrine the

Church proclaims on the prior assumption that the magisterium is empowered by Christ to proscribe and prescribe in any area of human conduct that touches on the commandments of God, whether derived from nature or from supernatural revelation. Arguments may be given and reasons offered to support the Church's teaching; but the ultimate "reason" why Catholics obey this teaching is the authority given the Church to command obedience in Christ's name. If this seems like "arguments made by an external judge," the Catholic faithful will answer, "We must put aside all judgment of our own, and keep the mind ever ready and prompt to obey in all things the true spouse of Christ and Lord, our holy Mother, the hierarchical Church."<sup>8</sup>

Once this is admitted, that for a Catholic the Church's moral teaching partakes of faith in the Church, it is quite secondary and, in fact, irrelevant, that the doctrine should also be expressed in juridical terms. As a visible society that believes it has the right from God to make laws for its members, the Church encourages what has come to be known as Canon Law. But Canon Law is only an attempt to organize and systematize for prudential reasons the external aspects of what is essentially not juridical: the will of God in its demands on the will of man. It would be a mistake, therefore, to suppose that the Catholic teaching on abortion uses arguments that are based on a juridical model. Quite the contrary. The juridical model is not the basis of Catholic morality; rather, juridical norms are only as valid as they are based on the faith principles of the Church's moral doctrine.

The term "abortion" as understood in Catholic morality means expelling an immature fetus from the mother's womb. The fetus must, first of all, be living; if it is certainly dead, its removal is not only permissible but ordinarily necessary. Moreover, the fetus must be immature or nonviable, by which is meant that it cannot live outside the womb even with the most extraordinary medical care. In ordinary circumstances a fetus is considered viable by the end of the twenty-eighth week of pregnancy, allowing for two or so weeks earlier if the child is to have special medical assistance like an incubator.

Since the modern legalization of abortion, however, the same term is used medically to describe what is more properly a form of feticide, where the living fetus is directly killed by a variety of new sophisticated physical or chemical means. In moral language, this too is abortion, but with the added malice of a direct assault on human life within the womb.

More important, though, from the moral standpoint is the inten-



tion that motivates an abortion. Although the same word “abortion” is used, it has a totally different moral meaning—depending on whether the motive is to directly attack the fetus, no matter what purpose is alleged to excuse the attack; or whether the motive is to save the life of a pregnant mother and, in the process, the unborn child is reluctantly permitted to die.

Consequently, even though pregnancy is involved, it is lawful to extract from the mother a womb that is dangerously diseased (e.g., cancerous). This is not the same as direct abortion, and Catholic morality allows this kind of increasingly rare surgery according to what has come to be known as the principle of the double effect. To be licitly applied, the principle must observe four limiting norms:

1. The action (removal of the diseased womb) is good; it consists in excising an infected part of the human body.

2. The good effect (saving the mother’s life) is not obtained by means of the evil effect (death of the fetus). It would be just the opposite, e.g., if the fetus were killed in order to save the reputation of an unwed mother.

3. There is sufficient reason for permitting the unsought evil effect that unavoidably follows. Here the Church’s guidance is essential in judging that there is sufficient reason.

4. The evil effect is not intended in itself, but is merely allowed as a necessary consequence of the good effect.

Summarily, then, the womb belongs to the mother just as completely after a pregnancy as before. If she were not pregnant, she would clearly be justified to save her life by removing a diseased organ that was threatening her life. The presence of the fetus does not deprive her of this fundamental right.

With the development of modern science, these so-called therapeutic abortions, where the mother’s life is in immediate danger, are becoming increasingly rare. The point has now been reached that more and more doctors come to reject the idea of therapeutic abortion entirely.

In actual practice, of course, numerous abortions had been performed for “therapeutic reasons” that were far removed from any immediate danger to the mother’s life, long before one country after another legalized abortion. Legalizing abortion whenever there is risk “that the continuance of the pregnancy would gravely impair the physical or mental health of the mother, or that the child would be born with grave physical or mental defect” is equivalent to abortion on demand. The “mental health of the mother” is a euphemism to

JOHN A. HARDON

cover every contingency where a woman has an unwanted pregnancy that she is willing to terminate to be relieved of the anxiety of having a child.

Wherein lies the essential sinfulness of abortion? It consists in the homicidal intent to kill innocent life. This factor of intent or willingness to destroy innocent human life is of paramount importance in making a correct assessment of the Catholic attitude toward abortion. It places the controverted question as to precisely when human life begins, outside the ambit of the moral issue; as it also makes the now commonly held Catholic position that human life begins at conception equally outside the heart of the Church's teaching about the grave sinfulness of abortion.

The exact time when the fetus becomes "animated" has no practical significance as far as the morality of abortion is concerned. By any theory of "animation," abortion is gravely wrong. Why so? Because every direct abortion is a sin of murder by intent. It is, to say the least, probable that every developing fetus is a human being. To deliberately kill what is probably human is murder.

If a person does not know for certain that his action is not killing another human being, he must accept the responsibility for doing so. Anyone who is willing to kill what may be human is, by his intention, willing to kill what is human. Consequently, the one who performs or consents to abortion inescapably assumes the guilt of voluntary homicide.

Furthermore, regardless of when the fetus is animated, to directly destroy it is to usurp a right that belongs solely to God, the right over the fruit of man's reproductive act. Man may not interfere with God's rights without seriously offending the Creator.

Already in the early Church the faithful were warned against those who sought to justify their misconduct by resorting to sophistries about "formed" and "unformed" life in the womb. St. Basil the Great, writing in A.D. 375, stated categorically: "A woman who deliberately destroys a fetus is answerable for murder. And any fine distinction as to its being formed or unformed is not admissible among us."<sup>9</sup> If some jurists later on invoked the distinction to assess different canonical penalties, based on the accepted civil codes of their day, the Catholic Church itself never altered its permanent moral judgment that direct abortion is always gravely offensive to God because it is willingly homicidal in intention.

As might be expected, the Church's hierarchy had to condemn the practice of abortion from the earliest years, and it has continued to do so unremittingly to the present day. The reason is twofold. The faith-

#### THE HUMAN LIFE REVIEW

ful had to be warned about the prevalent practices of unbelievers among whom they lived, and they needed motivation as Christians to resist their naturally selfish impulses to destroy unborn human life.

Literally hundreds of documents from the first through the present century testify to the same moral doctrine, with such nuances as time, place, and circumstances indicated. Only a few representative of these statements of the magisterium will be cited, and only in partial quotation or paraphrase. Two features that are common to all of this teaching are that abortion is a grave crime and that it is sinful because of its homicidal intent. One other feature that stands out is the frequent association of three sins in the same context: abortion, contraception, and sterilization, with such implications as the documents themselves clearly reveal.

The acceptance by the hierarchy of the *Didache*, which in the first century condemned abortion along with infanticide, made it the earliest extant authoritative witness to the Church's proscription of taking unborn life.

From the second through the fifth centuries, one after another of the Fathers of the Church condemned abortion in the most stringent language.

The apologist Athenagoras, writing to the Emperor Marcus Aurelius in A.D. 177, said that "all who use abortifacients are homicides and will account to God for their abortions as for the killing of men."<sup>10</sup> Clement of Alexandria, in his work *The Teacher*, attacked abortion on the dual ground that it destroyed what God had created and, in the destruction of the fetus, was an offense to a necessary love of one's neighbor.

Origen directed his words at women who call themselves believers but actually conform to the pagan unbelief around them. "There are some women," he said, "of rank and great wealth, so-called believers, who began by taking drugs to make themselves sterile; and then they bound themselves tightly to procure an abortion because they do not want to have a child born of a slave father or of a man of lower station."<sup>11</sup> Abortion was therefore added to contraceptive sterilization to make absolutely certain that, if pregnant, they would not give birth to an unwanted child.

Epiphanius, bishop of Salamis, published a similar work, *Refutation of All Heresies*, in which he traced the malpractices of some Christians to their infection by pagan ideas. He included the practice of contraception among immoral actions that spring from the erroneous belief that conjugal relations may be indulged without reference

to their God-given purpose. Then, if contraceptives fail, abortion is resorted to.<sup>12</sup>

St. Jerome wrote in a similar vein during the fourth century, but about unmarried women who found the Church's teaching on chastity too demanding. First he cites those who have intercourse out of wedlock, but make sure they do not conceive by taking appropriate drugs. Others become pregnant and then commit abortion to avoid exposure of their guilt.

It becomes wearisome to tell how many virgins fall daily. [They] drink potions to ensure sterility and are guilty of murdering a human being not yet conceived. Some, when they learn they are with child through sin, practice abortion by the use of drugs. Frequently they die themselves and are brought before the rulers of the lower world guilty of three crimes: suicide, adultery against Christ, and murder of an unborn child.<sup>13</sup>

The reference to murder of a human being not yet conceived is typical of the Catholic tradition, which sees in the contraceptive mentality a homicidal willingness to destroy in the womb what attempted sterilization did not prevent. The proscription of adultery against Christ assumes that Christian virginity is somehow consecrated to the Lord.

As we get into the fifth and sixth centuries, the testimony of John Chrysostom and Augustine, of Cyril of Alexandria and Caesarius of Arles merely confirms what, by then, was assumed to be part of the Catholic faith.

Although there was ecclesiastical legislation at an earlier date, the first well-known laws with prescribed penalties for both contraception and abortion were drafted in Spain (A.D. 527), by St. Martin of Braga, at the council of bishops over which he presided.<sup>14</sup>

In this historic legislation, three sins are joined together as of equal gravity, i.e., infanticide, abortion, and contraception. When the law stated that formerly such persons were not to receive Communion even at death, this did not mean that they were not absolved of their sin; but to stress the seriousness of their crime, the early Church in some parts of the Catholic world saw fit to withhold the added privilege of Holy Communion.

In the light of all this, it is not surprising that Post-Reformation Popes like Sixtus V, Gregory XVI, and Innocent XI, and the modern Pontiffs were so outspoken in condemning abortion, and appealed to the unbroken Catholic teaching in support of their condemnation. Pius XI called it a "very serious crime," which attacks the life of the offspring hidden in the mother's womb. He not only stigmatized

#### THE HUMAN LIFE REVIEW

the sin but also isolated the complicity in crime practiced by those in public office who condone the practice or even promote its legalization.

Some wish it [abortion] to be allowed and left to the will of the father or the mother; others say it is unlawful unless there are weighty reasons, which they call by the name of medical, social, or eugenic "indication." Because this matter falls under the penal laws of the State by which the destruction of the offspring begotten but unborn is forbidden, these people demand that the "indication," which in one form or another they defend, be recognized as such by the public law and in no way be penalized. There are those, moreover, who ask that the public authorities provide aid for these death-dealing operations.<sup>15</sup>

Pius XII returned to the sophism that the Church prefers the life of the child over that of the mother. That is not true. "Never and in no case has the Church taught that the life of the child must be preferred to that of the mother. It is erroneous to put the question with this alternative: either the life of the child or that of the mother. No, neither the life of the mother nor that of the child can be subjected to an act of direct suppression. In the one case as in the other, there can be but one obligation: to make every effort to save the lives of both, of the mother and the child."<sup>16</sup>

John XXIII carried forward the same principles, with special insistence on the evil effects of legalized abortion on the whole of society, once its leaders approve the slaying of the unborn. "Human life," he wrote, "is sacred; from its very inception the creative action of God is directly operative. By violating his laws, the divine majesty is offended, the individuals themselves and humanity are degraded, and the bonds by which members of society are united are enervated."<sup>17</sup>

When the Second Vatican Council, in its Constitution regarding today's world, declared that "Life from its very conception must be guarded with the greatest care," and that "Abortion and infanticide are abominable crimes," it rested its case on almost two millennia of Catholic faith and doctrine. Paul VI confirmed this teaching with a special declaration in the clearest possible terms. "Respect for human life," he wrote, "is called for from the time that the process of generation begins. From the time that the ovum is fertilized, a life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth. It would never be made human if it were not human already." Consequently, "Divine law and natural reason exclude all right to the direct killing of an innocent human being."<sup>18</sup>

JOHN A. HARDON

NOTES

1. Pius XII, *Decree of the Holy Office* (Dec. 2, 1940).
2. Second Vatican Council, *Pastoral Constitution on the Church in the Modern World*, II, 27.
3. *Ibid.*, III, 64.
4. Seneca, *De Ira*, I, 15.
5. *Didache*, II, 2.
6. *Epistle of Barnabas*, II, 19.
7. Tertullian, *Apologia*, IX, 6-7.
8. St. Ignatius Loyola, *Spiritual Exercises*, "Rules for Thinking with the Church," Rule 1.
9. St. Basil, *Three Canonical Letters*.
10. Athenagoras, *Presbeia peri Christianon*, 35.
11. Origen, *Contra Haereses*, 9.
12. Epiphanius, *Panarion*, PG 41, 339.
13. St. Jerome, *Letter 22* (to Eustochium), 13.
14. Second Council of Braga, Canon 77.
15. Pius XI, encyclical *Casti Connubii*, I, 63-7 I, 63-67.
16. Pius XII, allocution to the Association of Large Families, *Acta Apostolicae Sedis* (1951), XLIII, p. 855.
17. John XXIII, encyclical *Mater et Magistra*, III, 194.
18. Second Vatican Council, *Pastoral Constitution on the Church in the Modern World*, IV, 51; Paul VI (Congregation for the Doctrine of the Faith), *Declaration on Procured Abortion*, III, 12 (Dec. 5, 1974).

## The Abortion Sect

M. J. Sobran

WE ALL HAVE been warned against the *argumentum ad hominem*. Of course a point can't be settled by reference to the respective characters of the disputants: everybody knows that. Yet such arguments are politically potent. The question of a government energy policy boils down, for many people (including some senators), to whether the heads of oil companies are greedy. A campaign against pornography depends on disgust with pornography itself, no doubt, but it helps if the censorship advocate can excite repugnance against pornographers as a hateful class of men. Popular politics requires villains.

Every controversy, therefore, tends to involve more than incisive discussions of the issue at stake. All sides seem eager to drag in the irrelevant but inflammatory personal defects of their opponents. Where sentiment is divided closely, or undecided, the victory goes to the party that most effectively discredits the other.

I have remarked before in these pages that abortion advocates have devoted a great deal of emphasis to what may appear to be defects in opponents of abortion. The purpose of this strategy is not so much to arouse hatred against anti-abortionists as it is simply to isolate them by making them seem to be the kind of people with whom you would be reluctant to associate yourself: narrow, sectarian (usually Catholic) sorts who are intolerant (they want to "impose" their "personal views" or "values" on the rest of us) and insensitive (abortion being, after all, a "complex" and "sensitive" issue, for which, as we all know, there are no simple or easy answers). This is a subtle strategy, for the gentleness with which it puts down its foes also has the simultaneous effect of making abortion's proponents sound like a higher order of being—educated, low-keyed, alert to the most delicate moral nuance; sympathetic, self-effacing, troubled by the burden of their realization that no slogan will do.

Say what you will: it works. Moreover, I think it is a mistake to sneer at it. This sort of appeal may not be logical, but in its own way I think it is legitimate. As Aristotle points out, the orator's char-

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acter, as it appears to the audience, helps to determine whether he persuades them or not. Sometimes people instinctively mistrust a speaker or writer without being able to meet his argument, and this sort of prejudice, though it may not be laudable, is indispensable for the routine conduct of life. If we present ourselves as reasonable, others are prepared to agree with us. Even the appeal to snobbery can be defended, so long as it is not grounded in falsehood: Americans do not like to admit it, but there are social classes whose business it is to be enlightened. I can't blame members of those classes for trading on the presumption in their favor. My impression is that it is the upper-middle classes—the most powerful and influential stratum, never mind that they are always complaining that they are not powerful and influential enough—who are the social “head-quarters” of pro-abortionism, as of liberal attitudes in general, in this country. Anti-abortionism is, numerically speaking, concentrated further down the social ladder. Let us not shirk the facts: advocacy of abortion is typically found among people who are, by most indices, more enlightened than the average man; opposition, among those nearer the average in income, education, life-style, and all the mannerisms of the working- and lower-middle classes.

To put it a little differently, opposing abortion is now, in strictly worldly terms, *bad manners*, a sign of inferior breeding (vis-a-vis others in the abortion debate). That is not to deny that it is permissible. But note this, that it is one of those issues on which there is a more, and a less, *respectable* side: and that if you take the less respectable, you are expected to take your stand defensively, apologetically, deferentially—not in the sense of abjectly, but at least with consciousness that the weight of enlightened opinion is against you, and with gestures demonstrating that you know it, and are not ignorant of what the enlightened consensus is. Otherwise you look like a fool. (To take a parallel, if bizarre, example: suppose you counted on your fingers and discovered that two and two actually made five. If you wanted to persuade the public, you could not merely *announce* that two and two made five, and leave it at that. You would have to begin by saying the equivalent of “I know this sounds crazy—I wouldn't have believed it myself—but . . .” Having thus anticipated the normal reaction to your position, you would be in a better position to get people to count their own fingers.) The rhetorical principle is this: you cannot persuasively dissent from the consensus unless you first demonstrate your awareness of—and also, preferably, your respect for—that consensus in its present form;



#### THE HUMAN LIFE REVIEW

otherwise your own opinion will be thought to issue from perverseness or naivete.

In other words, there is such a thing as what Peter Berger and Thomas Luckmann call “the social construction of reality,” a body of commonly accepted and more or less “official” truths. Society would be impossible without such a system. The burden of proof is always, therefore, on the dissenter to prove not only that he is right, but also that he has due regard for the social order. A heretic does more than err: he shows a want of social deference. This notion is uncongenial to rationalists who conceive of men as intellectual Robinson Crusoes, and abhorrent to liberals who think society ought to consist of nothing but bold heretics; but it is true anyway. Most of our ideas are, to borrow a phrase of Samuel Johnson’s, “not propagated by reason, but caught by contagion.”

Now all this is only dimly realized by most people. In fact it is widely supposed that the opposite is the case. We tend to think that ideas are current because they are true, when they are often thought true merely because they are current: current, that is, among *socially authoritative people*, “right-thinking,” “enlightened” people. In some cases (e.g. the physical sciences) it is probable that what the experts tell us is true, or at least the best guess available. That is so because in these disciplines it is relatively easy to determine who is, and who is not, an expert. It is different, of course, in the humanities, where there are abysses between rival schools of thought. Nonetheless, though both of two rival schools cannot be equally right, they can be equally respectable—and one may gain a derivative respectability by associating himself with one of the major schools, adopting its catch phrases, and so forth, even if he cannot defend it rationally.

What I am getting at is simply this: even in a relatively open and tolerant society, where nobody is burned, hanged, or jailed merely for his opinion, there are very definitely social rewards and penalties (rank, ridicule, ostracism, in some cases money) attached to some opinions as against others. Again, this is a painful fact for some people to admit. There is irony in the way political liberals, for instance, like to think of themselves as having forged their views independently, each in the fiery furnace of his own intellect, when any outsider is struck by the way they all sound alike; and a further irony in the way each of them supposes that his fellow liberals share his views, and even express them in the same phrases, simply because they are all as independent-minded as he.

Pro-abortionists tend to be people of generally liberal attitudes, because pro-abortionism meshes comfortably with a number of other

liberal views, which I will discuss later. For the moment I merely note that pro-abortionists have found ways of subtly pulling rank in the abortion discussion. The most explicit example I know of was a column by Harriet Van Horne in which she charged that anti-abortionists were hypocritical in their defense of prenatal life, because most of them supported the Vietnam war; she reasoned (if that is the word for it) that they were therefore an obviously atavistic class of people. This is an odd line of argument, coming from people who regard class distinctions as inherently invidious, and ideas as having the right to be taken on their merits—to say nothing of their views on guilt by association.

I find it odd that anti-abortionists have not seen all this more clearly, when they might have taken advantage of it. If anti-abortionism is a class attitude, then so is pro-abortionism. Yet anti-abortionists have tried to argue their case strictly on its merits, without taking advantage of any of the auxiliary rhetorical tactics the pro-abortionists have exploited so skilfully. The reason the advocates of abortion have been so successful is not so much the way they have characterized their opponents as the fact that they have characterized them at all. To suggest that abortion foes are mostly Catholics is to enlist a certain amount of anti-Catholic feeling, it is true, but it also has a more generalized effect: it suggests that opposition to abortion can be dismissed, explained away, accounted for as a state of mind confined to people of a peculiar background (it hardly matters what that background is), whose arguments can be safely ignored. Even more important—and here is the really crucial point—this whole way of depicting the anti-abortion side, while not obviously invidious, promotes the impression that “normal” people—rational people, people without sectarian hangups or superstitions—just naturally tend to favor abortion.

To favor abortion? No. To favor *tolerating* abortion. Corner the pro-abortionist (as I have persisted in calling him), and you get a statement something like this: “I neither endorse nor condemn abortion as such. That would be simplistic and presumptuous, when it is a complex and sensitive issue that every woman must confront for herself, in accordance with her own deepest values. Far be it from me to impose my personal views,” etc. And here is the self-portrait of the abortion advocate, as it has been allowed by his opponents, who have been too civil to attack him or even to call into question his delineation of his own finer qualities.

In forbearing uncharitable attacks they have been praiseworthy. But in forbearing criticism, especially of the kind that deflates large

claims and pretentious self-images, they have neglected a key strategic opportunity. For the surest way to discredit the pro-abortion movement requires nothing in the way of vilification; in fact abuse would be self-defeating. What *is* effective is to *place* the opposition, to *localize* it, to point out that its own slogans are not emanations of pure reason, but rather proceed from a specific—and, in its own way, provincial—set of presuppositions which are themselves controversial. Controversial in the abstract, that is: for the habit of social deference toward the intellectual classes has allowed these notions to hover in the air almost unchallenged, and, in time, unnoticed.

The first thing to remark is that abortion has long been regarded with horror. The very word “abortionist” was a by-word for the vilest specimen of humanity, the man who capitalized on the misery of young women by killing the innocent within their bodies. One would think there had been some violent revolution in the realm of sentiments when such a function came to be thought of as beneficial, and was assigned to men not only legally authorized to perform it, but socially prestigious for doing so. In fact, however, the reversal on abortion appeared a natural extension of already existing tendencies, and appeared so even to those who hated it.

What are these tendencies? They issue from a concerted attempt to reform the world in accordance with a perception of man’s nature that has become the orthodoxy of Western intellectuals. It has no explicit creed, though it has many slogans and platitudes. Those who hold this view of things would, in many cases, resist putting it into words, because the moment you do it appears base and shameful. Still, that need not deter us from attempting to analyze it. For, as Bernard Shaw said, what a man believes may be ascertained, not from his creed, but from the assumptions on which he habitually acts.

Abortionism, then, is part of an integral world-view that sees man as an animal; an animal whose destiny is a life of pleasure and comfort. Those who view things in this light tend to believe that this destiny can be achieved by means of enlightened governmental direction in removing (and discrediting) old taboos, and in establishing a new economic order wherein wealth will be distributed more evenly. It is interesting to note that they describe such a redistribution as being “more equitable,” because it suggests they ascribe inequalities of wealth to differences in circumstances rather than ambition, intelligence, fortitude, or any of the myriad other moral virtues that may lead to fortune: they do not understand production as the result of human effort and providence, and want to locate it either in the machine or the laborer who executes the mechanical function. It is in-

teresting to note, too, as a percipient friend of mine has lately done, that they never deride or censure human behavior as “bestial” or “animal,” because they see man himself as an animal in essence, and cannot be indignant about behavior proper to an animal. They *are* indignant about suffering, which is to say animal suffering—pain, hunger, physical discomfort, and the frustration of animal appetites in general; and they speak of the cruelty or indifference that causes such misery, whether in animals or in humans, as “inhuman.”

This is a morally passive view of man. Although it asserts the obligation of those who are well off to share their abundance with the “less fortunate,” they can never make demands of the less fortunate themselves; and indeed, are quick to ascribe the misbehavior of those they see as victims to victimization itself. If the poor rob, it is because they are, through no fault of their own (but assuredly through somebody *else's* fault), desperately needy. Never mind that crime rates increase along with the general prosperity, or that the truly needy—heads of poor households—commit relatively few of the armed robberies, most being perpetrated by young, single men. If the poor breed indiscriminately, it is because they have been “denied” (by whom?) proper sex education and adequate birth control facilities, and can’t afford a decent abortion.

People who hold this view of things are broadly what we term “liberals,” and it is characteristic of them to invoke the poor early in any public discussion. And what it is vital to notice is, not only do they not hold the poor responsible for their poverty (which might be excusable as a charitable presumption), but they cannot bring themselves to hold the poor responsible for anything else either. As James Burnham has penetratingly put it, the liberal feels himself morally disarmed before anyone he regards as less well off than himself. Our public manners now make it appear a sign of priggishness bordering on “inhumanity” (or at least amounting to “insensitivity”) to blame the poor for their imperfections. The middle-class virtues are assumed to blossom spontaneously under the right material conditions; progress comes inevitably, so long as there are not reactionaries “impeding” it; “new” and “change” are terms of approbation, for time itself ushers in improvements and progress is not a human achievement (except in the realm of government), but a self-propelling process. One establishes one’s moral credentials by publicly exhibiting compassion for the poor, and indignation at their plight. It is safer to attack motherhood than to question the claims of (or claims in the name of) the poor; especially if motherhood can be shown to be somehow detrimental to the poor.

## THE HUMAN LIFE REVIEW

That, in fact, is approximately the position of pro-abortionists. If pleasure is man's destiny, it is his right. Nobody should have to endure any avoidable hardship, not even if he brings it on himself. Parenthood, when it comes unlooked for, is cruel and unusual punishment, and people who fornicate no more deserve to be assigned its duties than a man who kills somebody deserves to be hanged. Man is good, and pleasure is innocent. Birth control is therefore more than a convenience; it is a fundamental human right. For sexual ecstasy, with no strings attached, is our birthright. There is no special virtue in restraint; restraint is "repression." Nor is there anything sacred about monogamy or the family; these indeed are often "barriers" to full self-expression, self-fulfillment, self-discovery, self-period. Role "stereotypes" similarly impede the natural development that would occur if we indulged ourselves unstintingly. What is wrong with homosexuality? lesbianism? group sex? serial polygamy? incest? Nothing is wrong with them. Sample every exotic delicacy on the sensual smorgasbord. Sex is free.

How cruel, then, that some people—quite a few, really—should get stuck with the bill, when there isn't supposed to *be* any bill. In such cases what we want is some form of retroactive birth control. Abortion.

This whole view is sentimentalism, and it sentimentalizes abortion. Pro-abortionists seldom take the view that deliberately killing human beings can be justified. Abortion, of course, has to be presented as something else. They tell us that the question when life begins is a "religious" question. It is not, of course; biological science is not a legacy of the Buddha or the popes. It is a scientific question, and it has received an answer: at conception. The question when it is permissible to *take* life is of course an ethical question, as such of interest to more than just religious people.

Pro-abortionists as a rule cannot even bring themselves to use the word "kill." The embryonic child may be growing and taking form, but he is evidently not alive. I recently read Planned Parenthood's handbook on abortion, combining information and pro-abortion propaganda ("written with unusual insight and compassion," according to a *Time* reviewer cited on the paper cover), in which the word "kill" occurred twice: once to mention how pregnant women used to kill themselves in the dark ages before the Supreme Court spoke, and again in describing the operation of contraceptives that kill sperm (before they cause mischief). Not once was it used with reference to the child in the womb (the "fetus," of course). Instead there were the Orwellian evasions: "terminating a pregnancy," "termination of

potential life,” and so forth. You can kill yourself, you see, and you can kill a little tiny sperm; you can kill an elephant, and you can kill a bacterium; we even speak of killing cancerous cells. But you can’t kill a fetus. You can only “terminate” it. (And some of those little buggers can be pretty hard to terminate! That one in Boston toughed out two saline scorchers before Dr. Edelin reached in and did it right.)

One exception to my generality is a philosopher named Michael Tooley, who uses the word “kill” forthrightly in his advocacy of abortion. He is not much help to his fellow pro-abortionists, however, inasmuch as he also favors infanticide, and for the same reasons he favors abortion.

Abortionism, then, is best seen—and rhetorically portrayed—as a tentacle of those secularistic and anti-traditional creeds that are usually grouped together under the (inadequate) heading “liberalism,” which affirms the claims of man’s animal nature against the kind of restraints and responsibilities inherent in his distinctive humanity. Discrediting it requires at least two main lines of attack. First, abortion foes must point out that abortionism is indeed an “ism,” a creed quite as specific and aggressive as any creed its proponents denounce, demanding not only tolerance but legitimization, complete with tax dollars to pay for human death. Its local habitation must be pointed out, and it should be given its own name, preferably a non-opprobrious and convenient label that may be used by people who do not necessarily oppose abortion (e.g., newsmen).

Second, and more important, perhaps, the public must be encouraged to see clearly what most of them dimly and confusedly believe already: that a healthy society, however tolerant at the margins, must be based on the perception that sex is essentially procreative, with its proper locus in a loving family. This is not a sentimentalized view but a rigorous and realistic one, because love must be sustained by the will, with charity, patience, fidelity, devotion; a marriage vow is not a prediction that the flames will never die down, but a mutual consecration which humanizes sexuality by absorbing it, in the solemnest way, into the system of social responsibility. It is based on the most fundamental sexual truth of all, yet one that requires a little courage to reaffirm in our day: that the purpose of sex is not fun—it is life. And this truth, harsh as it will sound to many, means that those who employ sexuality in frivolous ways may not demand that somebody else take the consequences of their doing so.

## Fetal Research I

### A Bias For Life

#### Abortion Does Not Justify Harmful Research

*Rabbi Seymour Siegal*

**I**N ANALYZING the ethical dimensions of the problem before the National Commission for the Protection of the Human Subjects, it is necessary to affirm certain basic principles:

#### I. A Bias for Life

The most general principle which should inform our decisions in these crucial matters is a *bias for life*. This “bias” is the foundation of the Judeo-Christian world view as well as the motivating force which undergirds medical research and practice. It flows, for most people, from a theistic belief. However, it has been and can be affirmed by those whose views of reality do not include the existence of God.<sup>1</sup> The “bias for life” requires that all individuals—most especially those involved in the healing arts—should direct their efforts toward the sustaining of life where it exists; that means and procedures which tend to terminate life or to harm it are unethical; and that where there is a doubt, the benefit of that doubt should always be on the side of life. Another implication of this “bias” is that any individual life which claims our efforts and attention, and which is before us at this moment, has precedence over life that might come afterwards. In certain situations, individuals are called upon to sacrifice their lives or their comfort for future generations. This is part of our character as members of the human race tied to those who came before us and to those who will come after us. However, the burden of proof is always upon those who wish to subordinate the interests of the individual presently before us for the sake of those who will

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come later. Experiments for the “good of medicine” or for the sake of the “progress of knowledge” are not automatically legitimated, if they cause harm to people now, because someone in the future might benefit. What comes in the future is what the Talmudic literature calls “the secrets of the Almighty.” This does not mean that we have *no* responsibility toward the future. However, we have a greater responsibility to those who are now in our care. These reflections do not, of course, preclude the scientist’s search. These are intended to make him more cautious in his search.

This “bias for life” is exercised whatever the status of the life before us is. The fact that the life is certainly to be terminated, that it is flawed, or doomed, does not preclude the activation of the “bias.” This idea is expressed in the 1973 U. S. Guidelines published by the Department of Health, Education and Welfare: “Respect for the dignity of human life must not be compromised whatever the age, circumstance, or *life expectation of the individual.*” (Emphasis mine.)

## II. The Indeterminacy of the Future

Even the most expert scientific intelligence cannot predict the future with certainty. This is especially true of medical science. Medical science is replete with instances where certain experiments and treatments were administered to human subjects with the expectation that these procedures would be positive in their effect—only to turn out to be harmful. That means that when a decision is made to permit experimentation on human subjects, there must be present the utmost caution. Some of the experiments proposed would involve the mother as well as the fetus. It is not impossible to predict that these very procedures would have so changed the mother’s organism as to preclude further births or to have other untoward effects.

In speaking of the future effects of experimentations, we should not overlook the social consequences of policies in this area. Already the public is beginning to believe that physicians are not merely the saviors of human life—but also its destroyers. While this allegation is, of course, unfair, it is still important to keep the social effects in mind when making policy in this very sensitive field. This century has seen the consequences of the breach of the notion of the sanctity of life. The Nazi horrors began with the legitimation of the destruction of “useless” life and concluded with the most horrible phenomenon of this or any other century. The ethicist, Leroy Walters, has stated: “An unexamined premise of both the British and the American policy-statements on fetal experimentation is that the consequences of such research will be *medical* and that they will be *good*.”



## THE HUMAN LIFE REVIEW

It is equally plausible to argue that serious *social* consequences will follow such experimentation and that these consequences will be mixed, at best.”<sup>2</sup>

### III. The Nub of the Problem—The Fetus

In approaching our problem, the nub of the issue is the status of the fetus. This problem can be approached medically, metaphysically and ethically.<sup>3</sup> It would seem that the two extreme positions which have been expressed in the literature and public debate on this issue—though having much to commend them—do not seem plausible.

The fetus does not seem to be identical with an infant. This is the view of many religious and ethical traditions—including the rabbinic tradition. It is supported also by common sense. The fetus has no independent life-system and is literally tied to the mother. It has not developed the social and personal qualities generally assumed to be part of being a full human being. This is not a self-evident principle. B. A. Brody in a recent article says: “the status of the fetus and of whether destroying the fetus constitutes the taking of human life . . . seems difficult, if not impossible to resolve upon rational grounds.”<sup>4</sup> Yet, it would seem that the weight of common sense is on the side of those who wish to distinguish ontologically and ethically between a born infant and a fetus. This means that *feticide* is not the same as *homicide*—that is before viability.<sup>5</sup>

However, this does not mean that from an ethical standpoint there is no difference between a fetus and a tooth or a fingernail of the mother—to be disposed of as the mother wishes. It is indeed part of the mother’s body—but a unique part of the mother’s body. It is the only part of the mother’s body which is destined to leave the mother’s body in order to take upon itself individual and independent existence as a human being. This special status gives the fetus certain rights that other organs of the mother do not possess. This is expressed in the fact that Western religious thought has “ascribed a high value to pre-natal human life.”<sup>6</sup> Nor should we forget that even if we were to conceive of the fetus as merely a limb of the mother, this does not imply that society has no responsibility for what the mother does with her limbs. No civilized community would allow individuals to capriciously cut off limbs from their own bodies—even if they wished to do so. Of course, limbs can be amputated for the sake of the whole individual. But this must be justified by the “interests” of the individual, and this “interest” must stand the test of common sense as well as medical opinion.

What then is the status of the fetus, if it is not a whole individual or mere tissue. The answer must be that the status of the fetus is that of “potential human life.” Both Aristotle and Thomas Aquinas and many medieval thinkers saw human life as a developing process from step to step. In the case of the ancients it was from vegetative to animal to rational levels. However, it is clear that successive stages of human ontogeny contain within themselves the future stages.<sup>7</sup> That is to say, that all “higher” stages are present *in potentia* in the “lower” stages.

The character of the fetus as “potentially human” raises it above the level of “mere tissue.” It therefore evokes within us a sense of responsibility for its welfare as well as the welfare of the mother. Because it is not yet fully human, the fetus has less rights than it would have if it were fully born. When the fetus presents a threat to the mother’s life or to the lives of its potential siblings, then the mother has a right to protect herself against the fetus. That is why most religious traditions permit abortion under some circumstances. When one harms the fetus, however, “potential life is being thwarted.”<sup>8</sup>

#### **IV. The Rights of the Fetus**

The fetus, then, has potential human qualities, and therefore it has rights. These rights are encapsulated in the demand it can make upon us to benefit from our “bias toward life,” this “bias” which makes us responsible to guard and preserve life where it exists. This responsibility to preserve the life of the fetus is not an *absolute* responsibility. In most civilized societies war is legitimate even though it means the inevitable loss of life. But it is used to serve a larger and more comprehensive aim of the society—its self-protection. In the same way the fetus’ right to our concern for its life is mitigated when the fetus threatens someone else’s life or health—his mother’s or his prospective siblings.<sup>9</sup> However, when there is no threat, then the fetus’ potential humanity and his present life-signs entitle him to benefit from the ethical imperative to protect and revere life. This means that even before viability and even when *in utero* the fetus has a right to expect those who interfere with his own life-system to do so out of a consideration for the fetus’ well-being or the health of his mother. Those who do interfere with his life-system; physicians, experimenters, or others—are ethically permitted to do so only to help the fetus sustain his life-system (unless, of course, he is a threat to the mother or his prospective family). It must be stressed that this consideration involves all fetuses—whether viable or not. To declare

#### THE HUMAN LIFE REVIEW

that a fetus or abortus is not viable is never the same thing as to declare that a living pre-viable fetus/abortus has died.<sup>10</sup>

This does not mean that any kind of experimentation is prohibited. Experiments, even when non-therapeutic, could be carried on which present no discernible harm to either the mother or the fetus. Though the fetus can hardly give consent to such experiments, those who are his guardians can give consent. André Hellegers<sup>11</sup> has described the many important experiments which could be carried on within these guidelines, especially those related to amniocentesis.

It would be most unfortunate if the respect for the life of the fetus were related to the fact that he is soon to be aborted. Both the British and the American guidelines<sup>12</sup> are insistent that a fetus *in utero* should not be the subject of procedures which can cause him harm even when he is destined to oblivion through abortion. Paul Ramsey warns against skewing the medical ethical issue involved here by the abortion issue.<sup>13</sup> It is possible to be against fetal research in utero even when favoring abortion. The analogy has been drawn to a condemned prisoner who is facing execution, or someone who is *in extremis*. Medical ethical practice would condemn experiments on such individuals, even if they were to redound to the benefit of scientific progress, unless such experiments or procedures were designed to help the patient in some way. "Still I suggest that someone who believes that it would be wrong to do non-therapeutic research on children, on the unconscious or the dying patient, or on the condemned, may have settled negatively the question of the morality of fetal research."<sup>14</sup>

#### V. The Fetus "In Utero"

Therefore the interventions that would be sanctioned when the fetus is *in utero* would be those which 1) help the mother 2) are harmless to the fetus or which 3) are designed to help the fetus in his own life-system. The latter would be licit if it resulted in negative outcomes—for it is ethical to undergo procedures which have a good chance of success even when some risk is involved.

The view expressed here reflects the prevailing opinion that "no procedures be carried out during pregnancy with the deliberate intent of ascertaining the harm they might do to the fetus." (Peel Commission.)

Furthermore, it has been suggested that permission to initiate procedures which will harm the fetus, even when there is an announced intention of abortion, makes it impossible for the parent to change his or her mind about the fate of the fetus. The possibility of reversal

of decision about abortion should remain to the last possible moment. This is a convincing argument to my mind.

The assertion that there might be a different ethical consideration in reference to experiments carried out in the course of the abortion does not, in my mind, merit approval. The circumstances of life do not mitigate the right to benefit from our bias for life. To cite the analogy used above—even when the rope is around the neck of the condemned prisoner he cannot be used for any procedure except that which is designed to bring him comfort or well-being.

#### VI. The Fetus “Ex Utero”

The living fetus *ex utero*, even when not viable, would seem to have more rights than the fetus *in utero*. When the fetus has been severed from his mother’s body, he can no longer pose a threat to her. There is no issue of the woman doing with her body as she wishes, or the right of privacy, or the consideration of the mother’s health. It would seem, therefore, that the fetus’ right to enjoy our bias for life would be enhanced when he passes out of the mother’s uterus. Life is valuable wherever it exists. As such it evokes our responsibility. The fact that the abortus is sure to die—it is, after all, non-viable—does not mean that our concern for the life is diminished. Because it will never be a real child, it is not, nevertheless, right to consider it “nothing more than a piece of tissue.”

We should understand “live” to include the presence of a heartbeat or any other discernible sign of life. For example, the Louisiana statute on the matter reads: “A human being is live born, or there is a live birth, when there is the complete expulsion or extraction from the mother of a human embryo or fetus, irrespective of the duration of the pregnancy, which after such separation breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord or movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.”<sup>15</sup>

The prohibition against experimental procedures on live abortuses should, as the published guidelines suggest, concern both the artificial prolongation of life systems such as heart beats for the purpose of observation or the stopping of any of the life signs. This does not mean that all experiments are prohibited. Only those should be prohibited that do discernible harm to the abortus. However, any procedure which breaches the dignity of the abortus; such as prolongation of life-systems or destruction of existing life systems, should be prohibited. These considerations are in line with the guidelines suggested

by both the Peel Commission and the regulations proposed by the Department of Health, Education and Welfare.

### VII. Fetal Death

The question of when can an abortus be presumed to be dead is a crucial issue. There are those, cited above, who believe that in regard to pre-humans, the only meaningful distinction is viability or non-viability. For the reasons cited above, this approach is against the ethical canons of medicine—which make no distinction of the prospects of the subject in regard to his right to be treated with dignity and concern. While the dividing line between viability and non-viability is crucial, the dividing line between death and life is even more crucial. It is life—real and potential as well as being part of the human species that has an ethical claim upon us.

The best approach to this problem is that suggested by Professor Paul Ramsey<sup>16</sup> “the difference between life and death of a human fetus/abortus should be determined substantially in the same way physicians use in making other pronouncements of death.” He quotes Doctor Bernard Nathanson, who gave the only intellectually coherent reply that can be given to the question put to us by the Commission.

The Harvard Criteria for the pronouncement of death assert that if the subject is unresponsive to external stimuli (e.g. pain), if the deep reflexes are absent, if there are no spontaneous movements or respiratory efforts, if the electroencephalogram reveals no activity of the brain, one may conclude that the patient is dead. If any or all of these criteria are absent—and the fetus does respond to pain, makes respiratory efforts, moves spontaneously and has electroencephalographic activity—life must be present.

These signs of life do not make the abortus into a viable infant. But they do make it possible for the abortus to enjoy the fruits of our “bias for life.” It is interesting that the proposed HEW guidelines do not present criteria for fetal death. The Peel Commission defines death as “the state in which the fetus shows none of the signs of life and is incapable of being made to function as a self-sustaining whole.” These criteria have been criticized by Leroy Walters<sup>17</sup> as being too vague. The last criterion, for example “being made to function as a self-sustaining whole” might determine that infants are dead. The idea of “signs of life” without designating what these “signs” are also are too vague. Leroy Walters writes: “As a general formal requirement for defining fetal death, I would suggest that any criteria developed for determining death in human adults should be applied, insofar as it is technically feasible, to the fetus. This requirement of

RABBI SEYMOUR SIEGAL

simple biological consistency would rule out in advance the special pleading contained in hypothetical claims that the fetus is dead because it is about to die or that the fetus was never really alive.”<sup>18</sup>

**VIII. Consent**

The concept of informed consent is essential in formulating guidelines for experiments on human subjects. In the case of fetuses, this concept has doubtful application. The fetus obviously cannot give consent. The consent of the parents is made questionable by the fact that they have decided to terminate their relationship to the fetus by consenting to an abortion. The concept of consent is related to the concept of responsibility. Those who give consent must in some way be ready to bear the consequences of their decision. In the case of abortuses and fetuses this has doubtful applicability. Therefore, it would seem that for the experiments that are legitimated, a special board should give the requisite consent. This board would closely scrutinize the proposed procedure and determine that there is no real risk in carrying it out, that all precautions had been taken, and that there be strict separation between the physician doing the abortion and the researcher.

**IX. Proposed Guidelines**

In light of the above it is recommended that 1) Research and experimentation on fetuses be limited to procedures which will present no harm or which have as their aim the enhancement of the life-systems of the subjects.

2) No procedures be permitted which are likely to harm the fetus, even when the abortion decision has already been made, and even where the abortion procedure has been initiated or is in progress.

3) When the fetus is *ex utero* and alive, no procedures should be permitted which do not have as their primary aim the enhancement of the life-systems of the fetus, unless such procedures present no risk to the subject. This prohibition would also apply to the artificial sustaining of life-systems for the sole reason of experimentation.

4) Criteria for determining death in the fetus be the same as the criteria applied to viable fetuses and other human individuals.

**NOTES**

1. The literature on this subject is enormous. For a summary of the views of the Judaic tradition see Agus, Jacob B.: *The Vision and the Way*, an interpretation of Jewish Ethics, (New York: Frederic Ungar Publishing Co., New York, 1966), and the bibliography cited there. It would, of course, be a mistake to believe that this principle is so obvious

## THE HUMAN LIFE REVIEW

- as to be banal. We have seen in our century whole societies based on opposite suppositions such as to "kill is good."
2. Walters, Leroy: "Ethical Issues in Experimentation on the Human Fetus," *Journal of Religious Ethics* 2 (1974), p.42.
  3. For an interesting summary of the issues involved in the status of the fetus see the work cited above by Leroy Walters; Englehardt, H. Tristram, Jr., "The Ontology of Abortion," *Ethics*, 84, no. 3, (April 1974), pp.217 ff.; Reback, Gary L., "Fetal Experimentation: Moral, Legal, and Medical Implications," *Standard Law Review*, (May 1974). For the Jewish views on the matter see Feldman, David M., *Birth Control in Jewish Law* (New York: New York University Press, 1968); Jakobovitz, Immanuel, *Jewish Medical Ethics*, (New York: Bloch 1959); and Aptowitz, V. "Observations on the Criminal Law of the Jews," *Jewish Quarterly Review*, (Philadelphia 1924), 111 ff.
  4. Cited by Englehardt, *op. cit.*
  5. See especially the book by Feldman, *op. cit.*, and the discussion from a philosophical point of view by Englehardt, *op. cit.*
  6. Walters, *op. cit.*, p.48, and the literature cited here. Walters believes that the religious opposition to abortion is based on theories of ensoulment. Though this is certainly a factor, it would seem that the intuitive feeling that we are dealing with a potential human being gave birth to the religious attitude toward abortion.
  7. Englehardt, *op. cit.*, while citing and generally approving the Aristotelean and Thomistic approach, however draws the conclusion that it is not ontologically correct to say that the *future* effect is present in the present. He believes that each is independent and ontologically self-contained. Thus the fetus is really like a vegetable until it develops the quality of movement. Then it is an animal until it shows signs of rationality. This argument is not convincing to me. Potentiality has an ontological status. That is what I am to become is present in what I am, for the simple reason, it seems to me, that I cannot become what I will become unless I am what I am now. Therefore, there is an organic relationship between what I am now and what I will be later.
  8. Feldman, *op. cit.*, pp.268 ff.
  9. *Ibid.*
  10. See Ramsey, Paul, *The Ethics of Fetal Research*, New Haven and London, Yale University Press, 1975. This new work will be a standard in the field of fetal research.
  11. Statement by André E. Hellegers, M.D. before Senate Health Subcommittee, Senator Edward M. Kennedy, Chairman, July 19, 1974. Doctor Hellegers is, of course, a distinguished physician as well as one who is concerned with the ethical dimensions of the problems before this Commission.
  12. These guidelines were formulated after the Supreme Court decision about abortion.
  13. Ramsey, *op. cit.*
  14. Ramsey, *op. cit.*, p.30.
  15. Cited in Reback, *op. cit.*, p.1199.
  16. Paul Ramsey, Statement submitted to National Commission for the Protection of Human Subjects. pp.2 and ff.
  17. Walters, *op. cit.*
  18. *Ibid.*

## The Ethical Questions

*Harold O. J. Brown*

ON JULY 29, 1975, Caspar W. Weinberger, then Secretary of Health, Education, and Welfare, approved a new set of rules and regulations pertaining to research on human subjects, specifically, to fetuses, pregnant women, and *in vitro* fertilization. The 26-page excerpt from the *Federal Register* is detailed, complex, and contains a variety of disparate material, including a descriptive history of some fetal experimentation, arguments for and against fetal research, the text of the report and recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, and dissenting opinions of commissioners David W. Louisell and Karen A. Lebacoz.<sup>1</sup> Despite this complexity, the document does clearly state its purpose as being “to provide additional safeguards in reviewing activities . . . to assure that they conform to appropriate ethical standards and relate to appropriate societal needs.”<sup>2</sup>

The very existence of the National Commission, as well as the report it produced and the regulations issuing from it, reflects what the report calls Congress’ “concern that unconscionable acts involving the fetus may have been performed in the name of scientific inquiry.”<sup>3</sup> Among the clear and unequivocal provisions of the complex regulations is one establishing two “Ethical Advisory Boards.” Unfortunately, while the concern of Congress for ethical questions involved in research on human subjects is evident, and while this concern is acknowledged in the new rules and regulations, from the beginning the document Dr. Weinberger approved attests a basic confusion which makes it impossible to view it as anything like a substantial contribution to ethical discourse—much less as a guide for action.

The new regulations would appear to impose a “clear” ban on the funding of projects involving human *in vitro* fertilization, but only “until the application or proposal has been reviewed by the Ethical Advisory Board and the Board has rendered advice as to its acceptability from an ethical standpoint.”<sup>4</sup> *Clearly*, the impact of such a ban

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#### THE HUMAN LIFE REVIEW

depends entirely on the character of the Ethical Advisory Board, specifically on its composition and on the framework of ethical norms within which it operates; unfortunately there is complete obscurity as to the ethical presuppositions or principles on which the Advisory Board's work is to be based, while the provisions for its composition appear to give little weight to securing qualified advice in precisely the field in which the board is supposed to operate, namely, ethics.

The regulations provide that the board may be composed of "research scientists, physicians, psychologists, sociologists, educators, lawyers, and ethicists, as well as representatives of the general public."<sup>5</sup> With the exception of the "ethicists," it appears that no special background in ethics is required or desired for membership on the advisory board. This creates a rather odd situation, analogous to having a "medical advisory board" composed of "research scientists, ethicists, psychologists, sociologists, educators, lawyers, and physicians, as well as members of the general public." The fact that the "professionals" in the field of ethics figure only in the seventh place among those named to the Ethical Advisory Board is indicative of how awkward HEW is in attempting to address itself to the question of ethical values. Yet the question is imposed, not merely by congressional mandate, but by the nature of the issue itself.

Any decisions concerning the utilization of and experimentation with human "material" inevitably involve the most *fundamental* ethical questions, so that, however fragmentary and ultimately unsatisfactory the efforts, of the National Commission may be, at least they represent a step in the right direction, for they do acknowledge the fact that the field of fetal research involves experimentation on human "subjects," (or at least human "objects"). But if the starting-point of the commission's inquiry is correct, the detailed results it presents unfortunately leave much to be desired. This is true both from the perspective of a systematic approach as well as with respect to specific provisions. Systematically, the commission seems to operate very largely within a framework of pragmatic or utilitarian moral reasoning.

In the historical section,<sup>6</sup> it is made abundantly clear that much fetal research—including, in all probability, procedures which the American Congress, in the document's words, would have found "unconscionable"—has led to "beneficial" results ("beneficial," at least, for other beings, as distinguished from those *subjected* to the research). Although it is not stated *expressis verbis*, one gets the strong impression that "beneficial" results justify the antecedent experiments and overcome the stigma of being found unconscionable.

HAROLD O. J. BROWN

It is remarkable that a document that purports to be an *ethical* inquiry spends so much time on a merely descriptive presentation of the very procedures concerning which the gravest ethical questions were raised, or ought to be raised, without *itself* raising them.

From this perspective, the HEW document aptly illustrates what Bordeaux University law professor (and Protestant ethicist) Jacques Ellul has said about the way in which technology overrides ethical norms and reduces the human role to that of merely reporting rather than choosing procedures and courses of action:

A surgical operation which was formerly not feasible but can now be performed is not an object of choice. It simply is. Here we see the prime aspect of technical automatism. Technique itself, *ipso facto* and without indulgence or possible discussion, selects among the means to be employed. The human being is no longer in any sense the agent of choice. Let no one say that man is the agent of technical progress (a question I shall discuss later) and that it is he who chooses among possible techniques. In reality, he neither is nor does anything of the sort. He is a device for recording effects and results obtained by various techniques."<sup>7</sup>

A striking, and indeed disquieting, illustration of Ellul's contention that human beings are now reduced to merely describing, rather than deciding, technical developments is furnished in the following passage from the HEW document. The fact that it was published without comment in a report aimed explicitly at setting forth ethical norms is striking testimony to the evident inability of the national commission even to *identify* the ethical questions it was supposed to face:

Four fetuses from hysterotomy abortion at 16-20 weeks gestation were perfused via the umbilical vessels in a study in Scotland which demonstrated that the fetus could synthesize estriol independent of the placenta. A similar study by the same investigators involving six fetuses demonstrated that the 16-20 week fetus could synthesize testosterone from progesterone. To learn whether the human fetal brain could metabolize ketone bodies as an alternative to glucose, brain metabolism was isolated in eight human fetuses (12-17 weeks gestation) after hysterotomy abortion by perfusing the head separated from the rest of the body. This study, conducted in Finland, demonstrated that the human fetus, like previously studied animal fetuses, could modify metabolic processes to utilize ketone bodies."<sup>8</sup>

Note that the third study described involved the *decapitation* of well-developed human fetuses and the artificial maintenance of the severed heads for a certain period by attaching them to an apparatus that perfused them with blood containing the necessary oxygen and nutrients. It should be evident to even the most inattentive reader

#### THE HUMAN LIFE REVIEW

that this description could be published in the *Federal Register* without outcry only because we are now thoroughly habituated to the use of the Latin loan-word *fetus* as a kind of *terminus technicus* free of ethical or emotional connotations. To publish this so naturally would be impossible, of course, if instead of the Latin *fetus* we consistently used its English equivalent, “young” or “offspring”—not to mention “unborn child”!

From a systematic perspective, then, it may fairly be stated that the *Federal Register's* text merely describes procedures rather than evaluating them ethically. Although it is never stated explicitly, the description without comment, or evaluation of procedures such as that just cited, followed by a presentation of the increase in knowledge and/or valuable new medical techniques gained from the research, obviously suggests that the moral reasoning of the commission is based on the principle that the end justifies the means. However, if that is in fact the basis on which the commission and indeed HEW and the Congress propose to set policy, then the whole discussion of “appropriate ethical standards” is superfluous—unless, of course, its primary purpose is merely to give an appearance of ethical concern for values to which a significant number of Americans are still strongly attached, in order to forestall widespread hostility to plans and programs completely indifferent to those values. It would scarcely be accurate to ascribe such contrived behavior to the government bodies in question; it is far more likely that the situation reflects not moral hypocrisy but a genuine inability even to *frame* the ethical-moral problem.

Against the background of such a defective systematic approach, it is not to be expected that the detailed provisions of the regulations would reflect a high degree of ethical awareness, and this is indeed the case: they do *not*. Thus § 46.209 (a) permits experimentation on the fetus *ex utero* if only two conditions are satisfied: (1) that there be no “added risk” to the fetus, and (2) that the purpose of the activity be to obtain important biomedical knowledge “not otherwise obtainable.” In the case of a non-viable fetus, or a fetus doomed to death by abortion, it is not clear what might be meant by “added risk.” This concept is discussed at some length with reference to procedures that will accelerate or retard the death of the non-viable fetus [a non-viable fetus is one that is alive but too immature to have a realistic chance of survival outside the womb with presently available medical technology], as well as to the infliction of pain and discomfort. There is nevertheless no statement of what constitutes “added risk,” and hence it is not at all clear that this stipulation

would in practice, restrict experimentation, other than that evidently causing marked pain to the fetus. (In the light of the research described in preceding paragraphs, involving, among other things, decapitation of living fetuses, it is certainly *difficult* to imagine that this stipulation will have much effect.) With respect to stipulation (2), it is *precisely* in order to obtain knowledge not available elsewhere that fetal experimentation and other experimentation on human and non-human subjects is generally undertaken. *This* was true even of many if not all of the gruesome experiments the Nazis performed on concentration camp inmates. To restrict experimentation to such as is necessary to secure information not available by other means is hardly to restrict it at all; such a restriction would affect only gratuitous and superfluous procedures, such as are unlikely to be performed in any case due to the expense of the human "material."

One curious note is the recurrent provision that there must be "no intrusion into the fetus . . . which alters the duration of life."<sup>9</sup> Nevertheless, the commission did not recommend adoption of the prohibition contained in the Peel Report (in England) of "procedures carried out with the deliberate intent of ascertaining the harm they might do to the fetus."<sup>10</sup> What we have before us, then, is a very fragmentary effort that stops far short of its stated goal of assuring "conformity" to appropriate ethical standards." In view of the arcane nature of some of the experiments reported, it is not even realistic to contend that they met the collateral requirement of conformity to "important societal needs."

#### Sources of Uncertainty

Thus the federally-appointed National Commission, as well as the HEW Secretary to whom it reported, have evidently accomplished little towards achieving their goal of ascertaining and enforcing ethical standards for research on human subjects insofar as fetal life is concerned. This failure to arrive, even approximately, at "appropriate" standards can be attributed to two sources: first, failure to establish the *criteria* according to which ethical standards are to be deemed "appropriate"; second, reluctance to define the unborn either as *persons* (a legal concept not necessarily totally applicable to the unborn) or even as *human beings* (a philosophical concept which the ordinary rules of logic and discourse would seem to make *entirely* applicable to the unborn, in that they are evidently both *human* and *in being*). If a policy-making board is unable to define the value framework within which it intends to formulate policy, and also seems incapable of assimilating the subject on which it is deliberating,

#### THE HUMAN LIFE REVIEW

namely the fetus, to a category such as “human being,” on which there is at least a measure of recognizable ethical consensus, then it can be expected to accomplish little or nothing. Yet—without coming to ethical conclusions or setting forth any concrete ethical standards—the activity of the commission has given the *impression* of ethical seriousness and concern. By so doing its chief effect may be to disarm the suspicions of those who fear that unethical medical and scientific research is and *has* been going on, without in fact *doing* anything to regulate such research.

As Malcolm Muggeridge pointed out in an earlier issue of the *Human Life Review*, the abortion issue is *not* dying out, as other issues have because it “raises questions of the very destiny and purpose of life itself; of whether our human society is to be seen in Christian terms as a family with a loving father who is God, or as a factory-farm whose primary consideration must be the physical well-being of the livestock and the material well-being of the collectivity.”<sup>11</sup> The same is true of fetal research. The concern of Congress to establish appropriate ethical standards is indicative of the general feeling of uneasiness about research on live but doomed fetuses removed from their mothers’ wombs, even among those who reluctantly or gladly accept the legalization of abortion. “Why is this,” Muggeridge asks, “if the fetus is just a lump of jelly, as the pro-abortionists have claimed, and not to be considered a human child until it emerges from its mother’s womb?”<sup>12</sup> The answer of course lies in the fact that despite the ruling of the United States Supreme Court on abortion and the fact that perhaps a million (possibly many *more*) abortions are now performed in this country yearly, there is a widespread awareness of the undeniable fact that the fetus is after all human. Even if it is permitted to be sacrificed at the wish of the mother, as *Roe v. Wade* allows, there is a strong underlying feeling that it should not be subjected to the further inhumanity of utilization for medical research—research, incidentally, that would not be performed if it were *not* for the humanity of the fetus, the very reality that is implicitly denied in the abortion decision. There is widespread revulsion at the possibility—and now the practice—of “utilizing” such “material” in the same way that we would utilize animal tissue.

The prevailing uncertainty with regard both to theoretical norms and to practical guidelines with respect to fetal research will be overcome only when we once again attain to a certain clarity of conviction concerning the fundamental nature of man: whether he is indeed a creature of God, made in His image, or simply the product of naturalistic evolution in a closed universe ruled only by chance and

necessity. Very few people in America are willing to embrace the second possibility with all its implications for the significance and meaningfulness of human beings. This is the source of the general uneasiness at the mentality that seems to underlie the view that human beings, including the unborn fetus, may be treated as mere objects of scientific research and utilization.

There are two factors that seem to prevent American society from making the admission necessary to assert a satisfactory social policy with regard to the dignity and inviolability of human beings, namely that, in our society and intellectual tradition, that dignity and inviolability are *in fact* based on a religious conviction that man is made in the image of God. The first of these factors is the general—and mistaken—assumption that the First Amendment prohibits the formulation or expression at the governmental level of any views or axioms that have religious implications. In fact, the First Amendment forbids only the establishment of a religion (as an official state church). Certainly the Declaration of Independence, although it is *pre-constitutional*, is not to be considered *unconstitutional* in proclaiming as a “self-evident truth” that all men are *created* equal. If the First Amendment is understood (as the Court now seems to understand it)—as a prohibition of any governmental recognition of fundamental convictions of a religious origin, then it means something it surely never was intended to mean: the cutting off of American society from its spiritual and cultural roots in the Judaeo-Christian tradition. Unless we are willing to concede that we can discuss what is fundamentally a religious question—the nature and destiny of man—in at least somewhat religious terms, then we will not be able to discuss it at all within the universe of discourse that we have inherited with our European, Judaeo-Christian culture. And unless we can address ourselves to the question of the nature and destiny of man, we shall never be able to find or preserve “appropriate ethical standards” for dealing with human beings, but will ultimately be reduced to what Ellul foresaw (and the HEW study documents): man will be nothing more than “a device for recording effects and results obtained by various techniques.”

The second factor that inhibits us, in the American political context, from openly dealing with the traditional, biblical or Judaeo-Christian view of the nature of man and accepting it as the starting point not only for our religious and philosophical discourse, but for our legal system, is what we may call the canonization of pluralism. This view, represented among others by U.S. Senators Birch Bayh and Charles Mathias in recent discussions of proposed anti-abortion

#### THE HUMAN LIFE REVIEW

constitutional amendments, seems to imply that as long as there is any substantial difference of opinion on a principle or policy within the American public, it is inappropriate for government to impose conformity to "one particular view."<sup>13</sup> It was expressed by these two Senators, in addition to others, despite their personal professions of awareness that unborn life is indeed human life (Senator Mathias explicitly stated that it begins at conception). Their curious conclusion, then, that although life in the womb is human life, it would be wrong to expect the state to protect it as it does life after birth, is based on the widespread but erroneous view that to define the unborn fetus as human life is to express a *religious* opinion, and hence one that the principle of pluralism prohibits from being reflected in public law. Very few legislators and other public officials would accept the existence of differing views as grounds for not legislating with regard to taxes or traffic control; the reason that many of them do so in this one issue is apparently because of their conviction that questions involving the nature of man are necessarily religious in nature, and hence may not be taken into account in the framing of laws for an open society in which there is a plurality of religious views.

We can propose two ways to alleviate the legislative paralysis with regard to life-related issues caused by this unfortunate complex of opinions. It would be possible—and not false—to argue that the question of the nature of man is not specifically a religious question, at least not in the sense meant by the Constitution in referring to "an establishment of religion," but a *human* question, one that cannot be avoided or evaded by human beings as they come to self-awareness in a world not of their own making. And certainly the question of what to do about abortion and euthanasia is no more specifically religious than the question of what to do about capital punishment, or indeed about punishment of any kind; about war (imagine a senator saying that while he is "personally opposed" to a war, he would not of course vote against it!); about racism and racial integration, or about any of the other laws that derive from and influence the way human beings see themselves.

However, it would be more honest—and probably healthier for public discourse—to acknowledge that the question of the nature of man is indeed a religious question, and that it is not inappropriate in America, in view of or despite the First Amendment, to face it honestly in public policy debate. To avoid facing it and dealing with it in religious terms is not, of course, to escape it, but merely to guarantee that it will be discussed and answered in "secularistic" terms, which are by common consent still "religious" although not

Christian.<sup>14</sup> Alternatives to the biblical view of man—such as the “scientific” view of dialectical materialism, that man is a product of nature and “makes himself” in the historical process—are also religious and it merely confuses the issue and prejudices the outcome to ban from public discussion all views based on the conviction that man is a creature of God on the grounds that they are “religious” while admitting equally “arbitrary” views to the effect that man is a product of “nature” seen as impersonal process.

If issues such as the justness of abortion and the lawfulness of exploitation of undelivered, unwanted human “material” in fetal research will in fact refuse to subside, then it will be impossible to do justice to the concern expressed in the Congressional mandate that established the National Commission without taking the question of the nature of man—and the “religious” answers to it—off the “Index of Federally Prohibited Questions and Answers.”

Fundamentally, it is failure to face the question of the nature of man that makes it impossible for National Commissions and Ethical Advisory Boards ever to deal honestly or adequately with the self-evident ethical issues posed by the utilization, mutilation, and disposal of human “material” in fetal research. And failure to face these questions when dealing with fetal research will only make it easier to avoid facing them when they arise with respect to other human material—living infants, children, adults, prisoners, the sick, the retarded, and the aged.

To exclude from the realm of public discourse in America the insights and orientation derived from the Judaeo-Christian intellectual and spiritual heritage involves a strange kind of intellectual amputation. If public discourse in America can recognize and deal with views derived, for example, from Marxism—and of course it does and should—then it is absurd to refuse to consider those derived from Judaism and Christianity. After all, Marx is no less Jewish than Moses, and while Marx’s views may have the apparent advantage of greater contemporaneity, those of Moses have given evidence of greater vitality, workability, and *durability*. By admitting to public discussion not only Marx, whose views are not widely represented, but also other thinkers, less controversial but no less fundamentally secularistic, such as Bentham, Dewey, and Benjamin Spock, we should automatically free ourselves of any lingering inhibitions about admitting Moses, and his successors and elaborators such as Augustine and Aquinas, Luther and Calvin. To fail to do so is to impose on ourselves an altogether illogical and crippling meanness of spirit and



#### THE HUMAN LIFE REVIEW

to close the door on the riches of our own spiritual, cultural, literary and philosophical heritage.

The continuing controversy engendered by abortion, fetal research, and the related problems infringing on the absoluteness of the right to life will force us, even on the governmental and legislative levels, to face the fundamental question concerning our working view of the nature of man. Is man to be seen “in the image of God,” with all that that implies, or—to use Muggeridge’s analogy—in the image of the stock-farm? Since the image of God *motif* is so strongly rooted in our civilization, not to recognize it, i.e. to act as though it were not there or could innocuously be ignored, is really to deny it. As man cannot define himself absolutely, in the abstract, but only in terms of contrast and comparison with other beings, it makes a great deal of difference whether we draw the comparison in one direction only, in terms of our kinship with the animals, or in the other direction as well, in terms of our relationship to the Creator.

Since virtually all of the participants in the HEW decision-making process, including the members of the National Commission, are to some extent products of the Judaeo-Christian civilization, there is something artificial and forced about their attempts to arrive at a definition of ethical standards without being willing to draw upon the dominant heritage of that civilization. It is rather like a group of men attempting to set forth an ethos for feminism, or of whites attempting to establish a philosophy of *négritude*.

#### The Utilitarian Lowest Common Denominator

As indicated, the HEW paper on the protection of human subjects really operates within a framework of utilitarian assumptions. The end justifies the means. If useful techniques and information for some, presumably a larger number, of individuals can be obtained by utilizing—even to the point of using up—others, particularly if such others are unwanted, what need is there to agonize on the moral and ethical justifiability of such utilization? As we have noted, this argument is not presented *expressis verbis*, no doubt in part because in those terms it would be found too cruel to accept, and in part because even those who in fact act as though they believed it are not conscious that it is the basis of their motivation.

A utilitarian reasoning that accepts “the greatest good of the greatest number” as *per se* justification for doing great harm to a smaller number has reverted to the lowest common denominator in ethics. There is no general, universal, impartial, “scientific” set of ethical standards and values to which individuals or society can take re-

HAROLD O. J. BROWN

course in order to escape from this lowest common denominator level: we can only move off it by moving in the direction of a specific ethic, based on some fundamental definitions and decisions about the nature of man.

If we are willing to accept the utilitarian system of moral reasoning—which is little different from that of the stock-farm—then we can spare ourselves the time-consuming and laborious effort of setting ethical standards by which to measure our utilization of the stock. If we are not willing to do this, however—and this is indeed what the mandate of Congress and the labors of the commission and the boards with respect to fetal research are all about—then we will have to bring the fundamental philosophical question out of the closet. There is no way to act on Parmenides' axiom, "Man: the measure of all things," unless we know the answer to the question, "What is man, that Thou art mindful of him?"

NOTES

1. *Federal Register*, Vol. XL, No. 154 (Friday, August 8, 1975), pp. 33526-33552. Dr. Louisell's dissent is also published in this issue.
2. *Ibid.*, p. 33529, col. 1.
3. *Ibid.*, p. 33520, col. 3.
4. *Ibid.*, p. 33529, col. 2.
5. *Ibid.*, col. 1.
6. *Ibid.*, pp. 33531-33536.
7. Jacques Ellul, *The Technological Society*, tr. John Wilkinson (New York: Vintage, 1964), p. 80.
8. *Federal Register*, *loc. cit.*, p. 33534, col. 1.
9. *Ibid.*, p. 33538, col. 1.
10. *Ibid.*, pl. 33539, col. 1.
11. Malcolm Muggeridge, "What the Abortion Argument is About," *The Human Life Review*, I:3 (Summer, 1975), p. 4.
12. *Ibid.*
13. Cf. *Congressional Record*, Sept. 17 and 18, 1975.
14. This question is too substantial to discuss at length here. If we accept the idea that a "religious" view is any view that transcends the limits of what can be known empirically, then the "secularist" view, holding as it does that man exists only in this *saeculum*, in this physical-spatial-temporal world and there there is no transcendence, is itself *religious*. One cannot deny transcendence without *transcending* the limits of what can be known empirically. Hence secularism, to the extent that it is practically atheistic, that it proceeds *etsi Deus non daretur*, as though God were not there, is also "religious."

## Fetal Research III:

### **A Dissenting Statement**

*David W. Louisell*

I AM COMPELLED to disagree with the Commission's recommendations (and the reasoning and definitions on which they are based) insofar as they succumb to the error of sacrificing the interests of innocent human life to a postulated social need. I fear this is the inevitable result of Recommendations 5 and 6. These would permit non-therapeutic research on the fetus in anticipation of abortion and during the abortion procedure, and on a living infant after abortion when the infant is considered nonviable, even though such research is precluded by recognized norms governing human research in general. Although the Commission uses adroit language to minimize the appearance of violating standard norms, no facile verbal formula can avoid the reality that under these recommendations the fetus and non-viable infant will be subjected to non-therapeutic research from which other humans are protected.

I disagree with regret, not only because of the Commission's zealous efforts, but also because there is significant good in its report, especially its showing that much of the research in this area is therapeutic for the individuals involved, both born and unborn, and hence of unquestioned morality when based on prudent medical judgment. The report also makes clear that some research, even though non-therapeutic, is merely observational or otherwise without significant risk to the subject, and therefore is within standard human research norms and as unexceptional morally as it is useful scientifically.

But the good in much of the report cannot blind me to its departure from our society's most basic moral commitment: the essential equality of all human beings. For me the lessons of history are too poignant, and those of this century too fresh, to ignore another violation of human integrity and autonomy by subjecting unconsenting human

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**David W. Louisell** is a member of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research; we herewith reprint the major part of his dissent to the Commission's recommendations (as presented to the Secretary of the U.S. Department of Health, Education and Welfare on May 21, 1975). The full text of Dr. Louisell's statement, as well as the Commission's report and recommendations, is available in the *Federal Register* (Vol. 40, No. 154), August 8, 1975.

beings, whether or not viable, to harmful research even for laudable scientific purposes.

Admittedly, the Supreme Court's rationale in its abortion decisions of 1973—*Roe v. Wade* and *Doe v. Bolton*,— has given this Commission an all but impossible task. For many see in that rationale a total negation of fetal rights, absolutely so for the first two trimesters and substantially so for the third. The confusion is understandable, rooted as it is in the court's invocation of the specially constructed legal fiction of "potential" human life, its acceptance of the notion that human life must be "meaningful" in order to be deserving of legal protection, and its resuscitation of the concept of partial human personhood, which had been thought dead in American society since the demise of the *Dred Scott* decision. Little wonder that intelligent people are asking: how can one who has no right to life itself have the lesser right of precluding experimentation on his or her person?

It seems to me that there are at least two compelling answers to the notion that *Roe* and *Doe* have placed fetal experimentation, and experimentation on nonviable infants, altogether outside the established protections for human experimentation. First, while we must abide the court's mandate in a particular case on the issues actually decided even though the decision is wrong and in fact only an exercise of "raw judicial power" (White J., dissenting in *Roe* and *Doe*), this does not mean we should extend an erroneous rationale to other situations. To the contrary, while seeking to have the wrong corrected by the court itself, or by the public, the citizen should resist its extension to other contexts. As Abraham Lincoln, discussing the *Dred Scott* decision, put it:

"(T)he candid citizen must confess that if the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant that they are made, in ordinary litigation between parties in personal actions, the people will cease to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal." (4 Basler, *The Collected Works of Abraham Lincoln* 262, 268, 1963.)

Thus even if the court had intended by its *Roe* and *Doe* rationale to exclude the unborn, and newly born nonviable infants, from all legal protection including that against harmful experimentation, I can see no legal principle which would justify, let alone require, passive submission to such a breach of our moral tradition and commitment.

#### THE HUMAN LIFE REVIEW

Secondly, the court in *Roe* and *Doe* did not have before it, and presumably did not intend to pass upon and did not in fact pass upon, the question of experimentation on the fetus or born infant. Certainly that question was not directly involved in those cases. Granting the fullest intendment to those decisions possibly arguable, it seems to me that the woman's new-found constitutional right of privacy is fulfilled upon having the fetus aborted. If an infant survives the abortion, there is hardly an additional right of privacy to then have him or her killed or harmed in any way, including harm by experimentation impermissible under standard norms. At least *Roe* and *Doe* should not be assumed to recognize such a right. And while the court's unfortunate language respecting "potential" and "meaningful" life is thought by some to imply a total abandonment of *in utero* life for all legal purposes, at least for the first two trimesters, such a conclusion would so starkly confront our social, legal, and moral traditions that I think we should not assume it. To the contrary we should assume that the language was limited by the abortion context in which used and was not intended to effect a departure from the limits on human experimentation universally recognized at least in principle.

A shorthand way, developed during the Commission's deliberations, of stating the principle that would adhere to recognized human experimentation norms and that should be recommended in place of Recommendation 5 is: No research should be permitted on a fetus to be aborted that would not be permitted on one to go to term. This principle is essential if all of the unborn are to have the protection of recognized limits on human experimentation. Any lesser protection violates the autonomy and integrity of the fetus, and even a decision to have an abortion cannot justify ignoring this fact. There is not only the practical problem of a possible change of mind by the pregnant woman. For me, the chief vice of Recommendation 5 is that it permits an escape hatch from human experimentation principles merely by decision of a national ethical review body. No principled basis for an exception has been, nor in my judgment can be, formulated. The argument that the fetus to be aborted "will die anyway" proves too much. All of us "will die anyway." A woman's decision to have an abortion, however protected by *Roe* and *Doe* in the interests of her privacy or freedom of her own body, does not change the nature or quality of fetal life.

Recommendation 6 concerns what is now called the "nonviable fetus *ex utero*" but which up to now has been known by the law, and I think by society generally, as an infant, however premature. This recommendation is unacceptable to me because, on approval of a

DAVID W. LOISELL

national review body, it makes certain infants up to five months' gestational age potential research material provided the mother, who has of course consented to the abortion, also consents to the experimentation and the father has not objected. In my judgment all infants, however premature or inevitable their death, are within the norms governing human experimentation generally. We do not subject the aged dying to unconsented experimentation, nor should we the youthful dying.

Both Recommendations 5 and 6 have the additional vice of giving the researcher a vested interest in the actual effectuation of a particular abortion, and society a vested interest in permissive abortion in general.

I would, therefore, turn aside any approval, even in science's name, that would by euphemism or other verbal device, subject any unconsenting human being, born or unborn, to harmful research, even that intended to be good for society. Scientific purposes might be served by non-therapeutic research on retarded children, or brain dissection of the old who have ceased to lead "meaningful" lives, but such research is not proposed—at least not yet. As George Bernard Shaw put it in *The Doctor's Dilemma*: "No man is allowed to put his mother in the stove because he desires to know how long an adult woman will survive at the temperature of 500 degrees Fahrenheit, no matter how important or interesting that particular addition to the store of human knowledge may be." Is it the mere youth of the fetus that is thought to foreclose the full protection of established human experimentation norms? Such reasoning would imply that a child is less deserving of protection than an adult. But reason, our tradition, and the U. N. Declaration of Human Rights all speak to the contrary, emphasizing the need of special protection for the young.

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As noted at the outset, the Commission's work has achieved some good results in reducing the possibilities of manifest abuses and thereby according a measure of protection to humans at risk by reason of research. That it has not been more successful is in my judgment not due so much to the Commission's failings as to the harsh and pervasive reality that American society is itself at risk—the risk of losing its dedication "to the proposition that all men are created equal." We may have to learn once again that when the bell tolls for the lost rights of any human being, even the politically weakest, it tolls for all.

## **The Living Fetus and the Law: the State's Role**

*Charles P. Kindregan*

**I**N RECENT MONTHS much attention has been given to the role of the federal government in fetal research issues. This is understandable since the federal government has assumed a role as the primary funder of much medical research since the creation of the National Institute of Health in 1930.<sup>1</sup>

Little attention has been paid to the use of fetal tissue for medical experimentation until the legalization of abortion by the Supreme Court raised questions about the use of aborted (or about-to-be aborted) fetuses. The same sequence occurred in Great Britain after the adoption of the Abortion Act of 1967, which made "fetal tissue" generally available to researchers following large numbers of legal abortions. In both the United States and Great Britain thoughtful persons began immediately to challenge the proposition that because an unborn child is about to be or has been aborted it is fair subject matter for his medical research. In Great Britain a national commission was created to examine the issue.<sup>2</sup> Movement at the national level came slightly before the legalization of abortion in the U.S. with the secret reports and recommendations of the National Advisory Child Health and Development Council<sup>3</sup> which allowed "scientific studies of the human fetus" as an "integral and necessary part of research concerned with the health of women and children."<sup>4</sup> Subsequently, the Department of Health, Education, and Welfare (HEW) published a set of proposed guidelines for the "Protection of Human Subjects"<sup>5</sup> dealing with federally-funded research involving fetuses. Meanwhile the House Interstate and Foreign Commerce and the Senate Labor and Public Welfare Committees were holding hearings on House Bill 7724 which was designed to establish a national program of medical research.<sup>6</sup> The result was the adoption of the National Research Service Award Act of 1974<sup>7</sup> which established

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CHARLES P. KINDREGAN

the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.<sup>8</sup>

The Act specifically prohibited HEW from conducting or supporting research on a living human fetus until the Secretary received the recommendation of the Commission. The Commission subsequently held public hearings on February 14, 1975. At this hearing proponents of fetal research cited the values of fetal tissue in research on a variety of diseases and birth defects. Opponents of such research stressed that human life should be respected at all stages and not subjected to pragmatic experimentation merely because a mother has elected to have an abortion. On May 10, 1975, the Commission issued its report. The report would permit non-therapeutic research on the fetus in anticipation of abortion if approved by a national ethical review body,<sup>9</sup> and would permit non-therapeutic research on a fetus during the abortion procedure and on the non-viable fetus *in utero*.<sup>10</sup>

**The Position of the State**

While these events were the object of national concern, little attention was given to the role of the state in controlling research on living fetuses. This lack of interest in the role of the state is paradoxical, given the fact that whatever federal regulations allow in terms of funded research, state law can still more narrowly define the kinds of things a researcher is permitted to do on a human subject within its jurisdiction. An argument can be made for the proposition that the state is much better suited than a remote federal bureaucracy to examine into the sensitive ethical-medical-legal issues which are inherent in this controversy. In an issue so sensitive to the very touchstone of human existence as non-therapeutic research on a living human being<sup>11</sup> a state legislature should be much better able to serve as a laboratory of the national conscience. States will move at various levels, respond to the peculiar problems of local research, be less swayed by those who believe that "anything goes" as long as it's done by a scientist and produces "good" results.

**The Massachusetts Experience**

In this respect Massachusetts has led the way. In 1974 Massachusetts became the first state to create a Special Commission of the Legislature on Human Experimentation and Clinical Investigation. In addition to members from both the House and the Senate, the Commission has "public" members who are lawyers and physicians appointed by the Governor. Public members include both researchers



#### THE HUMAN LIFE REVIEW

who do (or have done) fetal research, and those who oppose such research. The Commission covers the whole range of experimental uses of human subjects, including genetic problems, bone marrow and kidney transplants, consent issues, experiments on children, incompetents and prisoners, *etc.* But a good part of its focus to date has been on fetal experimentation. Since Boston is one of the main centers of bio-medical research in the United States the creation of such a legislative committee is one of considerable significance. In addition, the adoption of the following fetal research law by Massachusetts on June 26, 1974, shows the ability of the state to act in this area quite outside federally imposed guidelines:

#### MASSACHUSETTS GENERAL LAWS, Ch. 112, § 12 J

No person shall use any live human fetus, whether before or after expulsion from its mother's womb, for scientific, laboratory research or other kind of experimentation. This section shall not prohibit procedures incident to the study of a human fetus while it is in its mother's womb, provided that in the best medical judgment of the physician, made at the time of the study said procedures do not substantially jeopardize the life or health of the fetus, and provided said fetus is not the subject of a planned abortion. In any criminal proceeding the fetus shall be conclusively presumed not to be the subject of a planned abortion if the mother signed a written statement at the time of the study, that she was not planning an abortion.

This section shall not prohibit or regulate diagnostic or remedial procedures the purpose of which is to determine the life or health of the fetus involved or to preserve the life or health of the fetus involved or the mother involved.

A fetus is a live fetus for purposes of this section when, in the best medical judgment of a physician it shows evidence of life as determined by the same medical standards as are used in determining evidence of life in a spontaneously aborted fetus at approximately the same stage of gestational development.

No experimentation may knowingly be performed upon a dead fetus unless the consent of the mother has first been obtained, provided however that such consent shall not be required in the case of a routine pathological study. In any criminal proceeding, consent shall be conclusively presumed to have been granted for the purposes of this section by a written statement, signed by the mother who is at least 18 years of age, to the effect that she consents to the use of her fetus for scientific, laboratory, research or other kind of experimentation or study; such written consent shall constitute lawful authorization for the transfer of the dead fetus.

No person shall perform or offer to perform an abortion where part or all of the consideration for said performance is that the fetal remains may be used for experimentation or other kinds of research or study.

No person shall knowingly sell, transfer, distribute or give away any fetus for a use which is in violation of the provisions of this section. For

CHARLES P. KINDREGAN

purposes of this section, the word, "fetus" shall include an embryo or neonate.

Whoever violates the provisions of this section shall be punished by imprisonment in a jail or house of correction for not less than one year nor more than two and one half years or by imprisonment in the state prison for not more than five years.

Members of the Special Legislative Commission on Human Experimentation and Clinical Investigation were concerned about the operation of this new law. Rumors abounded that medical research was being hampered by the law, that a climate of "fear" prevailed in the bio-medical research community. A lawyer with a background in legal-medicine charged that "Massachusetts madness" was destroying much needed medical research. With this background a Sub-Committee on Fetal Research of the Special Legislative Commission on Human Experimentation and Clinical Investigation called for a public hearing on the issue of fetal research.<sup>12</sup> A full day of testimony revealed to the commissioners that there indeed existed a climate of fear and confusion in the medical community, but that it was almost entirely attributable to a misunderstanding of the new law. Many of the commissioners who heard testimony from leading medical researchers began to question if perhaps the threat of a heavy criminal penalty, requiring the researcher to act at his peril, might not be too strong a weapon. Others felt that only a strong criminal penalty could force researchers to account for the value of a human life in their desire to find "suitable" research subjects. It is not likely that Massachusetts will retreat from the substance of its restrictions in fetal research. However, it is possible that some civil procedure, such as enabling the attorney general, or a researcher, to obtain a declaratory judgment on the legality of a proposed project, may be considered. This would have the advantage of leaving in effect the criminal penalties, but not requiring a researcher to discover *ex post facto* that his conduct was criminal.

**The Other States**

Massachusetts has not been alone in enacting restrictions on fetal research. On June 13, 1975, Arizona adopted a prohibition on experimentation with a dead or alive aborted fetus, unless the experiment is necessary to diagnose a condition in the mother.<sup>13</sup> On October 1, 1973, California made it unlawful to use an aborted living fetus for scientific research (a fetus is considered lifeless if there is no discernible heartbeat).<sup>14</sup> On July 19, 1973, Illinois adopted a stringent prohibition of all "exploration of and experimentation with the aborted

#### THE HUMAN LIFE REVIEW

tissue.”<sup>15</sup> Indiana had previously adopted a similar flat prohibition on the use of aborted fetuses for “experiments” and also prohibited the transportation of aborted fetuses out of the state for experimentation.<sup>16</sup> A Kentucky statute adopted on March 29, 1974, makes it a crime punishable by a minimum of 10 years in jail, to sell, transfer, distribute or give away a “live or viable aborted child” or permit such child to be “used for any form of experimentation.”<sup>17</sup> Louisiana previously prohibited experimentation on a child *in utero* or any child born live except to preserve its life or improve its health.<sup>18</sup>

Maine prohibits any form, use, transfer, distribution or gifts of any intrauterine or extrauterine fetus for “any form of experimentation.”<sup>19</sup> Minnesota makes it a gross misdemeanor to use a living “human conception for any type of scientific, laboratory research or other experimentation” unless to protect the life or health of the child or unless the experimentation has been shown to be harmless by “verifiable scientific evidence.”<sup>20</sup> Missouri’s 1974 abortion law includes a prohibition on use of a fetus or primitive infant “aborted alive” for experimentation unless “necessary to protect or preserve the life and health” of the infant.<sup>21</sup> Nebraska requires a physician to use “the commonly accepted means of medical care” on any child aborted alive<sup>22</sup> and prohibits the sale, transfer, distribution or gift of any live or viable aborted child for experimentation.<sup>23</sup>

New York requires “immediate legal protection” for any child born alive after an abortion.<sup>24</sup> Ohio prohibits experimentation on or sale of “the product of human conception which is aborted.”<sup>25</sup> Pennsylvania prohibits all experimentation on a “primitive infant aborted alive.”<sup>26</sup> South Dakota prohibits “experimentation with fetuses without the written consent of the woman.”<sup>27</sup> Vermont requires disposition of “fetal remains” by burial or cremation unless released to “an educational institution for scientific purpose.”<sup>28</sup> North Dakota recently adopted a statute prohibiting experimentation on a live human fetus in or out of the womb, but permits non-harmful study of a fetus *in utero* if the child is not the subject of a planned abortion.<sup>29</sup>

A Rhode Island statute related to fetal protection was recently declared unconstitutional. The statute<sup>30</sup> prohibited the “wilfull killing” of an unborn quick child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernibly moving and is mature enough to survive the trauma of birth with the aid of usual medical care. While this is not *per se* a fetal experimentation statute, no researcher would engage in any act which could arguably effect death for fear of prosecution under it. However, on June 10, 1975 the United States District Court for Rhode Island

declared the statute unconstitutional for failing to distinguish between viable and non-viable fetuses under *Roe v. Wade*, *Rodus v. Michaelson* (1 F.L.R. 2557, 1975).

#### **The State's Right to Legislate**

What are the concerns which should control state regulation of fetal experimentation? The states have traditionally left details of medical research largely unregulated and in the hands of the scientist. In the area of patient-care one finds a plethora of regulations governing hospital and clinic licensing, dispensation of drugs, and professional requirements for those who extend such care. But, research has only rarely been limited or controlled by state action. Such regulation as exists is found only in the professional structure of the research institution, where a research project must be formulated and carried out by a researcher acting under procedures imposed by his peer group. It might be argued that the state should allow this same process to work in fetal experimentation. However, there are conditions associated with fetal research not usually found with other forms of human experimentation, and which create a need for state regulation:

1. The subject of the experiment cannot provide an informed consent.
2. Most fetal experiments will use an aborted or about-to-be aborted fetus; this creates an "it will die anyway" attitude which can easily become a callous disregard of the subject's right to dignity and integrity.
3. The existence of thousands of potential aborted fetuses of itself creates a kind of super-laboratory mentality which may cause researchers to prefer the human subject to the animal subject which has been the traditional subject of preclinical experiments.

In developing legislation the state must consider the abortion guidelines laid down by the Supreme Court in *Roe v. Wade*:<sup>31</sup>

1. A state criminal abortion statute of the current Texas type, that excerpts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
  - (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
  - (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

#### THE HUMAN LIFE REVIEW

- (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.
2. The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.<sup>32</sup>

Thus, a state may not enact a fetal experimentation statute which in any way restricts or unduly burdens abortion during the first trimester,<sup>33</sup> or prohibits abortion between the end of the first trimester and the onset of viability except to reasonably protect maternal health.<sup>34</sup> Thus, the state could not prohibit the use of a pre-viability experimental procedure affecting the fetus which in the best judgment of the aborting physician is necessary to the termination of the pregnancy.

However, in most cases, the state's efforts to legislate regarding fetal experimentation will not run contrary to the Supreme Court decision. The value on which *Roe v. Wade* was premised was the asserted right of the woman to "terminate her pregnancy,"<sup>35</sup> and "a woman's decision whether or not to terminate her pregnancy."<sup>36</sup> This right to terminate pregnancy is grounded in the privacy of the woman.<sup>37</sup> The value of unborn life is not rejected absolutely by the Court, although it is made subordinate to or less compelling than the right of the woman to end her pregnancy. The Court said that "the unborn have never been recognized in the law as persons in the whole sense"<sup>38</sup> but it did not *pre-empt* any role for the state in protecting the dignity and value of unborn life. Simply stated, *Roe v. Wade* expresses the view that the value of unborn pre-viable life does not outweigh the pregnant woman's constitutional right of privacy. Thus, a fair reading of *Roe v. Wade* does not displace the power of the state to concern itself with protection of fetal life from use as a research specimen. When a court is confronted with the issue of the validity of a state statute regulating fetal research it is much more likely to be concerned with issues such as scientific freedom under the First Amendment than with privacy under the Fourteenth Amendment. This argument would stress freedom of inquiry according to "accepted" scientific norms, excluding state power except to the extent that the state acts to prevent "unnecessary, wanton or callous research."<sup>39</sup> A second line of argument might be as to whether a state can prohibit research on fetal "tissue" which is designed to

CHARLES P. KINDREGAN

help post-natal children. The example of such an argument is as follows:

Prior to the advent of rubella vaccine, congenital rubella was thought to account for between 5% and 10% of all birth defects. The 1964 rubella epidemic in the United States is estimated to have caused the birth of some 30,000 infants with significant congenital malformations. In addition to the anguish of the parents and the suffering of the affected children who survived, the total cost of medical services, rehabilitation and special education for these 30,000 children is estimated to be in excess of 2 billion dollars. The development and wide application of rubella vaccine appears to have greatly reduced the incidence of congenital rubella.

An important problem with rubella vaccine illustrates the critical need for one type of fetal research which is specifically prohibited by the present Massachusetts Law. When rubella vaccine was first developed, an important question was its safety for the fetus—in other words, would the vaccine virus behave like the natural “wild” rubella virus and, after infecting the mother, cross the placenta to infect and damage the fetus? Tests were done in pregnant monkeys and whereas the “wild” rubella virus did cross the placenta and did infect the monkey fetus, just as it does in the human, the vaccine virus did not. This suggested that administration of rubella vaccine to pregnant women might not be hazardous to the fetus. Fortunately, however, physicians in several medical centers then performed the same study in women scheduled for therapeutic abortions. After a full explanation of what was involved, a number of women volunteered and received rubella vaccine 11 to 30 days prior to their abortion. Subsequent examination of the aborted fetal tissues showed that, in contrast to the results in the monkey, the vaccine virus did cross the human placenta and did infect the human fetus. On the basis of this information, the administration of rubella vaccine to pregnant women or to women who might become pregnant within 60 days of vaccination is prohibited.<sup>40</sup>

Cases in which courts have allowed a transplant from a donor who is incapable of consenting seem to employ such “benefit over detriment” reasoning.<sup>41</sup> But the reasoning in these private declaratory judgment cases may have little relevance to the question of whether a state has the power to prohibit research which may have benefit to living “persons.”

**The Need for State Action**

A society which allows the misuse of some of its subjects for the betterment of others finds it difficult to evolve and preserve any foundation for due process of law. “The concept of human ‘dignity’ reflects our society’s esteem for the status of human beings. This esteem is evidenced by the protections society provides, and to which

## THE HUMAN LIFE REVIEW

each individual is entitled solely because of his status as a human.”<sup>42</sup> The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research has concluded that the fetus should be treated “respectfully and with dignity,”<sup>43</sup> and has defined a fetus as a “human from the time of implantation.”<sup>44</sup> But it refused to address “directly the issues of the personhood and the civil status of the fetus.”<sup>45</sup> As a result, the Commission recommended to allow non-therapeutic research directed toward the fetus in anticipation of abortion if the research is approved by a “national ethical review body,”<sup>46</sup> and non-therapeutic research directed toward the fetus during the abortion procedure and non-therapeutic research directed toward the non-viable fetus *ex utero*.<sup>47</sup> There now appears no likelihood that this gap in reasoning will be closed at the federal level. It is time for the state to act.

### The “Abortion Burdening” Issue

An argument might be made that in adopting regulations requiring dignified treatment of an aborted fetus the state is in some way depriving a woman of her full choice in regard to abortion, or burdening the abortion process with improper restrictions. The choice issue doesn’t appear overly serious since the right stated by the Supreme Court relates to terminating the pregnancy—not control of fetal materials in matters not related to the abortion. But the burden issue must be thought out by legislators drafting fetal experimentation statutes. In *Planned Parenthood Assn. v. Fitzpatrick*<sup>48</sup> the court rejected an attack against a Pennsylvania law<sup>49</sup> requiring the state health department to make humane disposition of dead fetuses. The court refused to rule that the law was an over-broad invasion of the pregnant woman’s right of privacy. But the court implied that if the health department adopted a regulation which requires expensive burial of fetuses it might well find an unconstitutional burdening of the abortion decision.

An abortion-burdening issue was raised in objection to the Kentucky fetal experimentation statute in *Wolfe v. Schroering*,<sup>50</sup> but was rejected by the federal court:

Section 13. This section provides for a term of imprisonment for any person who sells or otherwise transfers or permits any form of experimentation on a viable aborted child. The Court finds no objection with the regulation. As held in *Roe*, the state’s interest in preserving potential human life becomes compelling at viability. Here, the regulation is in terms of viable aborted child; thus, there is no conflict. Again, as to the argument that viability is not stated in terms of weeks, the Supreme Court did not

CHARLES P. KINDREGAN

put a definite point in the term of pregnancy at which viability occurs. The Court stated in *Roe* only that viability is usually placed at 28 weeks but could occur earlier at 24 weeks. The Court said nothing to indicate that 24 weeks was the earliest at which viability could occur.<sup>51</sup>

**Conclusion**

Others have written with compassion and concern for the right of unborn children to be free from indiscriminate use as tools of research.<sup>52</sup> The fact that abortion has now become a "common medical procedure" should not harden us to the reality of its effect. In the effort to limit that effect and promote the dignity of human life, the role of the state should not be minimized. It is perhaps surprising that so few states have so far acted, but as consciousness grows more states will confront the issue and attempt to resolve it.

**NOTES**

1. The N.I.H. was created by the Ransdell Act, P.L. 71-251.
2. The English Commission, popularly called the Peel Commission, after its chairman, produced a report in 1972 titled "The Use of Fetuses and Fetal Material for Research." The report recommended a prohibition on research using living viable fetuses, which it defines as a fetus over 20 weeks in gestational age, unless the experiment is connected with treatment necessary for the life of the fetus.
3. A summary of these developments is found in 1972-1973 RPTR. H.R.L. I-A-46.
4. "Guidelines for Review of Research Grant Applications: Studies Involving the Human Fetus." (March, 1973). The "Guidelines" did not become public knowledge until April, 1973. A letter to the author from Storm Whaley, dated May 14, 1973, indicated that the Guidelines had been received but not approved by the Secretary of HEW.
5. *Federal Register*, November 16, 1973, 31738-48. A revised set of proposals was also published, *Federal Register*, August 23, 1974, 30648-57.
6. House Report 93-224, May 23, 1973; Senate Report 93-381, August 3, 1973; House Conference Report 93-1148; June 25, 1974; Senate Conference Report 93-960, June 24, 1974.
7. P.L. 93-348. (June, 1974).
8. P.L. 93-348 §§ 201-205.
9. Recommendation 5, Report of the Commission.
10. Recommendation 6, Report of the Commission. This requires that the research be "the development of important biomedical knowledge, animal research having preceded it, the mother consents, the father does not object, the fetus is less than 20 weeks, no intrusion into the fetus alters the duration of life, and a national ethical review body approve the research." The Commission's vote was 8-1, Commissioner David W. Louisell dissenting.
11. There is a great deal of confusion arising from the U.S. Supreme Court decision in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed. 2d 147 (1973) that a non-viable fetus is not a person within the meaning of the Constitution. This technically means that such fetus is not entitled to Fourteenth Amendment protection. But it does not mean that the fetus is not human. In fact, the Court specifically declined to "resolve the difficult issue of when life begins," 410 U.S. at 159. The court later used the unprecedented term "meaningful life" in reference to viable fetuses. The Commission



## THE HUMAN LIFE REVIEW

report expressly treats all fetal life as human: "Fetus refers to the human from the time of implantation . . ." Deliberations and Conclusions, p. 2 (May 10, 1975).

12. This atmosphere may have been caused in part by the conviction of a Boston physician for manslaughter in the death of a recently-aborted baby, *Commonwealth v. Edelin*, Superior Court of Mass., Docket No. 81-823-Criminal, in February, 1975. The issue in this case involved the duty of a physician to a child, not the mother's right to an abortion or fetal research. But press reports and rumors seemed to make the prosecution represent something else. In addition, the indictments of four research physicians for unlawful removal of fetal remains in April, 1974 was in some way misunderstood as being related to the subsequently adopted ban on fetal research.

13. Arizona Rev. Stat. §§ 36-2301, 36-2303.

14. California Health and Safety Code § 25956 (Oct. 1, 1973).

15. Illinois Ann. Stat. ch. 38 § 81-18 (1973).

16. Indiana Code § 35-1-58.5 (April 24, 1973).

17. Kentucky Rev. Stat. ch. 436 (March 29, 1974).

18. Louisiana Rev. Stat. § 14.87.1 (June 18, 1973).

19. Maine Rev. Stat. Tit. 22 § 1574 (June 14, 1973).

20. Minnesota Statutes § 145.422 (May 23, 1973). This statute was not part of the Minnesota Abortion Act (§§ 145.411-145.416) declared unconstitutional in *Hodgson v. Anderson* (D. Minn., 1974) 378 F. Supp. 1008, *app. dismissal* 95 S. Ct. 819 (1975).

21. Missouri 1974 Laws, Page 239 § 6 (3). This part of the statute was not challenged in *Planned Parenthood v. Danforth*, 392 F. Supp. 1362. (Dist. Ct. E. D. Mo. 1975) in which the Court upheld the constitutionality of the Missouri Abortion statute.

22. Nebraska Laws 1973, Page 1007-1017, § 7 (1973).

23. *Id.* § 19.

24. New York Public Health Law, Tit. V-A § 4164(2) (June 15, 1974).

25. Ohio Rev. Code § 2919.14 (A).

26. Pennsylvania Abortion Control Act § 5(a) (1974).

27. 1973 South Dakota Laws Page 313 § 6 (March 27, 1973).

28. Vermont Stat. Ch. 107 § 5224 (April 24, 1973).

29. North Dakota House Bill 1294 (1975).

30. Rhode Island Senate Bill 83, adopted May 5, 1975.

31. 410 U.S. 113 (1973).

32. *Id.* at 164-165.

33. See *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah, 1973, extensive abortion regulations amount to undue burden on abortion decision), *Orr v. Koefoot*, 377 F. Supp. 673 (D. Neb., 1974, state cannot restrict abortion services in early term at student health center), *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir., 1973, public hospital cannot prohibit abortion in first trimester).

34. See *Friendship Medical Center, Ltd. v. Chicago Board of Health*, 505 F.2d 1141, *Cert Denied* 95 S. Ct. 1438 (1975) (7th Cir., 1974, unreasonable health regulations) reversing 367 F. Supp. 594 (N.D. Ill., 1973), *Hallmark Clinic v. North Carolina Dept. of Human Resources*, 380 F. Supp. 1153 (E.D. N.C., 1974 unreasonable patient transfer agreement policy).

35. 410 U.S. at 129.

36. 410 U.S. at 153.

37. 410 U.S. at 153, 154, 155.

38. 410 U.S. at 162.

39. Statement of Prof. Charles Fried, Harvard Law School to the Massachusetts Special Legislative Committee on Human Experimentation and Clinical Investigation, p.3, March 7, 1975.

40. Statement of Michael N. Oxman, M.D., Harvard Medical School, *Id.*

41. *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1966, donor of kidney was mentally incompetent adult); *Nathan v. Farinelli*, Equity 74-87, Supreme Judicial Court of Mass.

CHARLES P. KINDREGAN

(July 3, 1974). But see *Guardian's Memorandum in Nathan v. Cruz*, 75-96 Civ., Supreme Judicial Court of Mass. (April, 1975) and *In Re Pescinski*, 1 F.L.R. 2350 (Sup. Ct. Wisc., 1975).

42. Martin, "Ethical Standards for Fetal Experimentation," XLIII *Fordham L. Rev.* 547, 555 (1975).

43. Commission Report of May 21, 1975, p.4.

44. Commission Report of May 21, 1975, p.2.

45. Commission Report of May 21, 1975, p.4.

46. Commission Recommendation #5.

47. Commission Recommendation #6, subject to the restrictions stated in footnote 10, *supra*.

48. U.S. Dist. Court, E.D. Penn., No. C.A. 74-2440 (Sept. 4, 1975).

49. Penn. Abortion Control Act, 35 P.S. 6601-5(d).

50. 338 F. Supp. 631 (W.D. Kentucky, 1974).

51. *Id.* at 638.

52. See, for example, Paul Ramsey, *The Ethics of Fetal Research*, New Haven: Yale University Press, 1975; Haley, "Haunting Shadows from the Rubble of *Roe's* Right of Privacy," IX *Suffolk Univ. L. Rev.* 145 (1974).

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