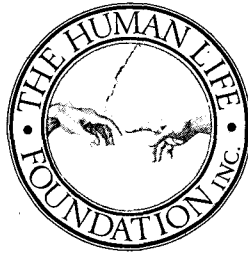


the HUMAN LIFE REVIEW



SPRING 1975

Featured in this issue:

Prof. C. Eric Lincoln on Laissez-Faire Abortion

Harold O. J. Brown on What the Court Didn't
Know

Prof. J. Philip Wogaman on A Return to
Absolutism?

Prof. John Warwick Montgomery on The Fetus
as a Person

Prof. Robert M. Byrn on What a Human Life
Amendment Would Mean

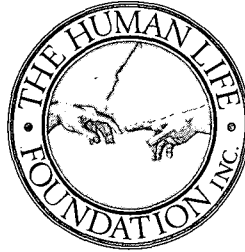
Margot Hentoff on How We're Deceiving
Ourselves

M. J. Sobran on Abortion: Cui Bono?

Published by:

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Vol. I, No. 2^o 1975 by THE HUMAN LIFE FOUNDATION, INC. Printed in the U.S.A.

. . . about THE HUMAN LIFE REVIEW

We are happy to report that the first issue of this review (Winter, 1975) has been widely circulated and warmly received, both in this country and abroad. This is all the more gratifying to us, for it would seem to show that we were right in thinking that there is a place (and a need as well) for a journal devoted solely to the discussion of the several "life" issues that face Americans today. We are encouraged, therefore, not only to continue our efforts, but also to expand them if possible. Thus we intend to publish this review regularly hereafter, on a quarterly basis.

We also announce two additions to our staff. Dr. John Warwick Montgomery (currently professor of Theology and Law at the International School of Law in Washington, D.C.) is the latest member of our editorial advisory board, and Dr. Harold O. J. Brown, also a theologian and recently an editor of Christianity Today (which is perhaps the most widely-known Protestant opinion journal in this country) joins THE HUMAN LIFE REVIEW as associate editor.

Originally we had expected to devote much of this current issue to the discussion of euthanasia, but response to our first issue (which was largely about abortion and related subjects) was so great that we decided to continue with our exploration of that subject. Without question, there are many interesting views readily available, and we hope we have been able (as we think we have) to provide the reader with a broad spectrum of current opinion, as well as some very interesting material on abortion as an historical issue. We still expect to get to euthanasia (and other life issues) in due course.

The editors would like to thank the impressively large number of people who have written in response to our first issue, and we regret that it has not been possible to answer all their letters and comments. We assure our correspondents that we have taken careful note of all suggestions sent us, and will continue to welcome all future ones.

INTRODUCTION

A RECENT story in *The Wall Street Journal* seems to us to state the problem very well:

It probably won't happen very soon . . . but eventually the White House and Congress must come to grips with the emotion-charged problem of abortion.

Clearly, the problem isn't going to fade away quietly. Across the country, opposing lobbies mobilize and build strength . . . Congress is already swamped with proposed constitutional amendments to outlaw abortion, and with narrower bill riders to deny the use of tax moneys for abortion. State legislatures are under similar pressure to restrict the practice.

Thus far, though, the issue is being handled not with sober discussion but with bitterness and acrimony . . . Yet if any issue ever needed calm deliberation, it's this one. (—*Alan L. Otten*, March 20, 1975.)

In this issue, we hope to contribute a good deal of very serious (and, in the main, calm) deliberation on the vexed question of abortion.

It is frequently alleged that abortion is a "Catholic issue," by which it is meant, evidently, that abortion is offensive mainly to Roman Catholics who, in turn, make up the majority of those who oppose it. Others point out that Catholics comprise less than a quarter of our population, and recent polls indicate that only about 80% of them actually oppose abortion. The same polls show that a majority of *all* Americans generally oppose abortion (a *Sindlinger & Co.* study, for example, shows that some 60% oppose, while only 36% approve). By such mathematics, then, Catholics could not make up more than a third of all those opposed to abortion.

Who are the others? To many the answer seems obvious: Catholics who oppose abortion really do so as *Christians*, and seem prominent only because they are the largest single *Christian* minority; the rest belong to *Protestant* Christian minorities which, taken together, do in fact comprise the majority (both of the anti-abortion movement and the nation as well).

If this be so, then why has Protestant opinion on abortion received so much less attention than Catholic opinion? We have no answer; we *can* say that specifically Protestant opinions are not hard to find, as the major part of what follows should demonstrate.

Thus we begin with Dr. C. Eric Lincoln, a widely-known Protestant theologian (and probably one of the best-known black Americans in any academic field), who has changed his opinions on the abortion question. Next comes Dr. Harold O. J. Brown, also a theologian, who feels strongly that

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the *Supreme Court* should change its opinions on the issue. Then we reprint an article in support of the Court's decisions by Dr. J. Philip Wogaman, who gave the article, originally published as a pamphlet, to Oregon's U.S. Senator Mark O. Hatfield (no doubt because Hatfield is well-known for his anti-abortion views); the Senator in turn gave it to Dr. Brown, who replies to Wogaman's arguments here. Finally, Dr. John Warwick Montgomery, yet another theologian, provides a Protestant viewpoint on several of the more troubling questions involved in abortion *vis à vis* traditional Christian values. Altogether, we believe that this interlocking series of "Protestant" articles makes both fascinating and enlightening reading.

The Congress too continues to wrestle with a solution to the abortion issue. Hearings on the several "Human Life" amendments continue in the Senate, and the recent testimony of Prof. Robert M. Byrn is not only a striking example of the learned arguments being made, but also, it seems to us, answers a number of questions of general concern that should make interesting and informative reading even to laymen in such matters.

A number of readers remind us that abortion is of international concern today. We agree, and present here two European viewpoints. We asked Mr. Erik von Kuehnelt-Leddihn to write his own opinions about the current situation. His long reply seemed to us so impressively informative that, although it was a personal letter, we have published it here (with his permission) almost in its entirety. And, in *Appendix B*, you will find the recent statement of a prominent Norwegian Protestant bishop, which adds not only another European view but also serves to complement our earlier American views.

So much for our "expert" witnesses. We conclude this issue with two impressive offerings that, taken together, demonstrate the incredible length and breadth of the abortion issue, and the wide range of *other* questions it raises. If abortion is frequently labelled (inaccurately, it would seem) a "Catholic" issue, it is almost as often called a "conservative" one: i.e., your average social and/or political "liberal" is generally pro-abortion, his conservative counterpart generally against. Margot Hentoff, who has impeccable credentials as a liberal intellectual spokesperson, may indeed accept abortion-on-demand, but she is not exactly *for* it, and has some very provocative social commentary on the whole subject. And once again, M. J. Sobran gives us his own very different views, which are not without humor, something most of us will welcome heartily while pondering these weighty arguments on so serious a subject.

J. P. McFadden
Editor

Why I Reversed My Stand on Laissez-Faire Abortion

C. Eric Lincoln

IN SEPTEMBER 1967, I was invited to Washington to join in an international discussion on "the terrible choice," abortion. The seminars were sponsored by the Joseph P. Kennedy Foundation, and the featured speakers were some very learned clergymen and scholars from all over the world. Mine was by no means a major voice in the proceedings, but somewhere in the footnotes of the record there may be some notation of what I said at the time.

I took the position that in America, at least, the notion of a woman's complete personal autonomy over her body is, or should be, so elementary as to preclude debate, and that to require a woman to be an incubator for a child she does not want is barbaric and tyrannical and in violation of the most basic expectations of a civilized society. But I also insisted that "any liberalization of the abortion laws [should] serve a constructive interest of those who are particularly disadvantaged by the consequences of isolation and poverty," and that "their economic and social vulnerability should not be . . . exploited by other interests masquerading as abortion reform." I have never been an advocate of abortion on demand, but as things have turned out, the fact that I am somewhat on record as standing for what could be interpreted as a laissez-faire approach to the issue humbles my self-esteem and roils my conscience as well. My mind has changed. I have had some second thoughts on the matter.

The issues have been debated pro and con in the press for years

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now, but I am not aware that any of the sub-issues I am about to raise has received the attention that seems due it. To be sure, having taken the "logical" position in the early years of the debate, I made no attempt to keep up with it, awaiting only the confirmation of the courts—which did occur in due time, to my increasing apprehension and dismay. For, as I said, my mind has changed. So, although belatedly and after the fact, I feel compelled to raise the following issues.

(1) Marriage is a civil contract. The partners to that contract are required by law to assume certain derivative responsibilities to each other, to the state (society) and to any children born to their marriage. A married person's control over his or her body is modified by the contract of marriage, which, among other things, presupposes sexual ("bodily") love and exclusive access.

Now, a marriage that is not "consummated" by bodily union is customarily considered null and void. If consummation results in pregnancy, that pregnancy is the consequence of *two people's acting in concert*; and if that pregnancy reaches its natural consummation, a child is born. A child is the natural product of *two* people who have had sexual intercourse, and by law and by custom both share responsibility for the child. No woman gets pregnant all by herself. The child, born or unborn, belongs equally to its progenitors. How then can the decision to terminate—to abort—be limited to one partner to the marriage contract and a physician?

(2) An unmarried woman may accept or refuse sexual intercourse. If she consents, a contractual relationship is implied, for if a child is born of that union, the male partner may be assigned the responsibilities of support of the child and/or its mother. In a just and reasonable society, rights and responsibilities occur in tandem. Has not a man who is legally liable for the consequences of his participation in sexual intercourse by mutual consent, an equal right in the determination of whether the natural consequences of that act shall be terminated by abortion? A child has a mother *and* a father. A fetus is a child *in utero*. We need not debate the question of at what point it becomes "human"; we know by experience that it becomes human at *some* point, and that after nine months, more or less, a child will be born of every pregnancy if it is not interrupted. Can a decision so vital to at least two people be justly made by one?

Stress is put on the fact that the woman must carry the child in her body, to her possible inconvenience in one way or another. But "incubation" is in some sense only the counterpart of "procreation." Both require the instrumentation of the body and its processes and

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resources. One of these processes requires more time. But society evens out the responsibilities by placing the subsequent burden of primary liability upon the male.

The state (society) is a party to every marriage contract and to every *implied* contract of marriage. It must be, because the state is *in loco parentis* to every child whose father and/or mother cannot or will not accept responsibility for it. If the state (in the absence of father or mother) must assume liability should pregnancy run its natural course, does not the state also have something to say about the interruption of pregnancy?

The state is the guardian of public welfare and public policy. In that capacity, it exercises some degree of control over our use (or abuse) of our bodies in many other areas. For example, it requires the conversion of some (male) bodies to military tasks; it confines some bodies in jails or other institutions, thereby drastically reducing the options for personal decisions regarding those bodies. It forbids suicide and restricts the use of certain beverages or drugs, and even of some medical practices (e.g., acupuncture), which might have a deleterious effect upon the body. The state requires, on occasion, the use of seat belts, helmets, protective shoes, water treatment, various inoculations, among myriads of other practices which modify the individual's right to make autonomous decisions about his body. Even the right not to clothe it is a regulated right. Probably the state would prohibit branding of the body as practiced in the days of slavery, and would hold scarification as a beauty technique to be against public policy. Does the state have an interest in abortion that it may have overlooked in the heat of the controversy?

Despite the fact that the issue has been settled, at least for the time being, by the Supreme Court, the questions I have raised are in no sense intended to be academic, but they did figure prominently in my own descent from what now seems an impossible idealism. My original position was largely motivated by an interpretation of sectarian dogma which seemed at the time anachronistic and repressive. My vision was of an occasional individual caught up in circumstances so overwhelming and so devastating in potential as to warrant so drastic a procedure as the interruption of life. I considered abortion a draconian measure of last resort for a limited class of people who, after having considered the vast implications of what they were about to do, would proceed with fear and trembling and a prayer for forgiveness. I was not prepared for the bloodletting which has, in fact, ensued.

I, for one, am sick of blood and bloodletting—in the streets, on

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the battlefields and in the safe aseptic privacy of a doctor's office. In our continuing retreat from responsibility, we are too ready to wipe out the consequences of our private and public acts with a shrug and a resort to blood. But there are consequences to human behavior—economic, political, social, psychological and sexual; and neither the bayonet nor the scalpel is the ideal means of setting things straight. They are instruments after the fact. In a sophisticated society with a vaunted technology based on the common understanding of cause and effect, we seem to be operating more and more from the premise that so long as the effect is no more than a small unpleasantness which can be conveniently removed before it becomes burdensome, the cause is reduced to inconsequence. The police, the army, the medical profession are there to extricate us from the consequences of our folly and our lack of restraint. We do not need to care much about what we do, or to whom.

There are few to challenge the permissive sophistry behind which we slither our way into this "new" wasteland of unaccountability. Our newest cultural "inventions" and "discoveries" are in fact ancient experiments long since discarded by ascendant civilizations. To my present way of thinking, unrestricted abortion—"left up to the woman and her doctor"—is but one more example of the retreat from responsibility which seems characteristic of the times. A decision about abortion is not properly the doctor's responsibility unless a medical problem is involved, and most abortions currently demanded are not even remotely "medical." Since the physician was not a party to the procreative act, his role in determining the consequences of that act is questionable. We have made of medicine a convenient facade. We have made of the doctor a mere functionary and accessory—a scapegoat for the clergy, the judiciary, the pregnant woman and her partner in the act, and for all the rest of us who turn away from personal and social accountability. This is social progress? Somehow I remain unconvinced.

What the Supreme Court Didn't Know

Ancient and Early Christian Views on Abortion

Harold O. J. Brown

The fact that the 1973 decision of the United States Supreme Court on abortion (Supreme Court of the United States, *Syllabus Roe et al. v. Wade*) represented a deliberate and drastic break with the tradition of ethics in the Western world was immediately obvious to anyone familiar with the literature of the sources of that tradition, i.e. the literature of Judaism and Christianity. And virtually everyone was aware of the fact that the Hippocratic Oath, which does not originate in Judaism or Christianity, also categorically condemns the practice of abortion. The Court took note of this strong, virtually unanimous moral consensus within Christendom, and of the concurrence of the paramount pre-Christian text relating to medical ethics, only to dismiss it. In its presentation in *Roe v. Wade*, the Court explicitly reverted to the ethical and legal attitudes of pre-Christian paganism, disregarding the Oath on the grounds of the fact that it originated, not as the universal agreement of the ancient world, but as a product of the reformist thinking of the Pythagorean school. That it later gained almost universal acceptance as the fundamental standard of medical ethics the Court felt it could properly ignore, on the grounds that this acceptance was due to the spread of Christian convictions. The fact that this appears to mean that an ethical norm, no matter how widely accepted, becomes irrelevant in the Court's view if it happens to be that of Christianity, has been noted by many observers. Up to this point, however, little critical attention has been given to the Court's parallel argument in favor of abortion: that it was generally accepted and practiced throughout pagan antiquity.

If it were true that pre-Christian, non-Jewish antiquity did altogether accept abortion in principle and in practice, that would not be a strong argument in favor of our doing likewise; the ancient world accepted quite a number of things that we rightly reject: e.g., the absolute right of the father to decide upon the death of his children, the practice of slavery, torture, and mutilation, and the custom of gladiatorial combat. But the

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curious thing is that the Court's appreciation of even the moral standards of pagan antiquity is partial and defective. This is all the more surprising in the light of the fact that the Court has so explicitly cited ancient precedents to justify its decision in the face of the almost universal condemnation of that decision by later, i.e. Hippocratic, Jewish, and Christian thought. It is particularly puzzling in the light of the fact that sources are readily available, often in English translation, to show that even in pagan antiquity, abortion, although widely practiced, was by no means universally approved, and was indeed explicitly condemned as immoral, dangerous, and harmful to the general welfare, by the most important pre-Mosaic law codes and by some of the most celebrated thinkers, philosophers, and moralists of pagan Greece and Rome.

THE PRACTICE of exposing defective or unwanted infants was common in antiquity, particularly among the Greeks, Romans, and other Indo-Germanic peoples. In view of the legality of infanticide in antiquity, combined with the primitive and dangerous nature of abortifacient drugs and methods, it is not surprising that there is very little documentation concerning deliberately caused abortion from pre-Christian times. (A reference in *Roe v. Wade* to abortion among the ancient Persians is based on a misreading of Arturo Castiglioni's general work on the history of medicine and refers to a medieval Persian document dated 999 A.D.)¹ The earliest laws bearing on abortion come from the ancient Near East, specifically from the Code of Hammurabi (ca. 1727 B.C.), the Middle Assyrian laws of Tiglath-Pileser I (twelfth century B.C.), and from the Mosaic legislation in Exodus 21:22-25 (part of the so-called "Book of the Covenant," Exodus 20:22-23:33, generally accepted as the oldest codification of Hebrew law and undoubtedly of very early origin; scholars vary as to the date of the Exodus from Egypt, but most scholars would place it before 1250 B.C.)².

In the Code of Hammurabi, there are several paragraphs concerning penalties for injuring a pregnant woman in such a way that she miscarries. In general it requires financial compensation for the accidentally-caused death of a fetus, the amount depending on whether the woman is the wife of a seignior (10 shekels of silver), a commoner (5 shekels) or a female slave (2 shekels). Causing an abortion is thus not considered a capital crime, but, we must note, neither is accidentally causing the death of the woman, unless she is the wife or daughter of a seignior, in which case the culprit must give life for life by giving his own daughter to be put to death. In the case of a commoner's daughter, there is a payment of half a mina (30 shekels), and of a female slave, one-third of a mina (20 shekels). It is evident

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that the concept of the personhood of the victim (whether an unborn child, or the daughter of an aristocrat, a commoner, or a slave) is not a consideration; the degree of the penalty varies with the social status of the victim. Similarly, the penalty for killing a seignior or a commoner in a brawl is also the payment of financial compensation (one-half and one-third of a mina, respectively).³ Hence the fact that causing a miscarriage is punishable only by a financial penalty (except in the case where the injured woman is a seignior's daughter and also dies) does not imply that the unborn child is considered less than human or less than a person, inasmuch as similar pecuniary penalties also apply for clear cases of manslaughter, even for some involving the death of an aristocrat. This Mesopotamian background is of interest in connection with the interpretation of Exodus 21:22, to the effect that the possibility of a provision for making financial compensation for the death of a fetus (cf. the more detailed discussion of this passage below) allows one to conclude that the Mosaic Law does not consider the fetus a human being. We see that ancient legislation frequently permitted the payment of a ransom or financial compensation for manslaughter under various circumstances.

The Middle Assyrian laws of Tiglath-Pileser I (1112-1074 B.C.), which are probably older than the stele erected by that king recording them, require "life for life" for the accidentally-caused death of a fetus if the mother is of seigniorial rank (i.e., the culprit must provide a family member to be put to death). If the woman's husband has no son, the culprit himself must die, even if the fetus was a girl. If the woman who miscarries is of seigniorial rank but has not reared her own children in her family, a fine is imposed. If she is a prostitute, the seignior who injured her shall be beaten as she was beaten and in addition give a life in compensation for the fetus. These Assyrian laws, like those of Hammurabi, all refer to unintentionally but culpably caused miscarriages. Although differing values are placed on human life, depending on the social and family situation of the injured parties, it is evident that causing a miscarriage was considered a serious crime. The fact that the death of a prostitute's unborn child is punished more severely than that of the fetus of an aristocrat who disdained rearing her own children is curious. It certainly indicates that the offense was not seen simply as a form of property damage, becoming graver with the rising social status of the injured party.

Unlike the Code of Hammurabi, the laws of Tiglath-Pileser I specifically treat the case of a woman who causes herself to miscarry, providing as her penalty death by impaling, and ordering the impalement and public exhibition of her corpse if she has lost her life in the

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abortion. Further penalties are provided for accessories to her act, but the text is defective at this point and their details cannot be determined.⁴ Curiously, the Hittite Laws of the second millennium B.C. from Boghazköy require, in addition to the usual penalties for causing a woman to miscarry, substantial financial penalties for causing the miscarriage of a cow or a mare.⁵ There is no death penalty for causing miscarriage in the Hittite legislation, which is typical of the Indo-Germanic family to which the Hittites belong: their law is based not on retaliation but on compensation, except in cases, such as flagrant adultery, that appear to threaten the basis of human social existence.⁶

It is evident that causing a woman to miscarry, even accidentally, was regarded as a criminal act, although rarely one carrying the death penalty. Against this background, we should consider the Old Testament laws involving a similar offense, Exodus 21:22-25:

- 22 If men strive, and hurt a woman with child, so that her fruit
depart from her, and yet no mischief follow: he shall
surely be punished, according as the woman's husband will
lay upon him; and he shall pay as the judges determine.
23 And if any mischief follow, then thou shalt give life for life,
24 Eye for eye, tooth for tooth, hand for hand, foot for foot,
25 Burning for burning, wound for wound, stripe for stripe.

(Authorized Version)

The so-called A.V. or King James text follows the original Hebrew very closely. The more modern Revised Standard Version renders v. 22 thus: "When men strive together, and hurt a woman with child, so that there is a miscarriage, and yet no harm follows . . ." In other words, "no mischief" is translated to mean "no further mischief apart from the death of the fetus." This is the interpretation of the Latin Vulgate, translated by Jerome, of Martin Luther's German Bible translation, and of modern interpreters such as J. Coert Rylaarsdaam in *The Interpreter's Bible*.⁷ It differs from the commentary of Philo of Alexandria, based on the Hellenistic Greek translation of the Old Testament, the Septuagint, which renders "and yet no mischief follow" as "and yet unformed," and continues in v. 23, "And if formed, then thou shalt give life for life . . ."

If we accept Philo's interpretation, following the Septuagint translation, we observe that the accidentally caused abortion of a formed fetus is considered equivalent to murder and requires a death penalty, whereas the abortion of an unformed fetus, although an atrocious crime, the prevention of the formation of a human being, is not so

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serious that it requires capital punishment.⁸ It is evident that early feticide, even though accidental, is considered as a serious offense against the law of God.

Turning for our understanding of the Exodus passage from Philo (early 1st century A.D.) to the first Christian commentators, we find that they read “her fruit depart from her” to mean a premature birth, not necessarily a (fatal) miscarriage. Thus Tertullian (ca. 155-223) writes: “The embryo, therefore, becomes a human being in the womb from the moment that its form [Lat. *forma* = essential character] is completed. The law of Moses, indeed, punishes with due penalties the man who shall cause abortion, inasmuch as there exists already the rudiment of a human being, which has imputed to it even now the conditions of life and death, since it is already liable to the issues of both, although, by living still in the mother, it for the most part shares its own state with the mother.”⁹ Tertullian, a Latin-speaking African with a legal background, was one of the earliest Christian writers to produce substantial works of a systematic nature.

The most gifted and productive of early Christian writers was the Greek-speaking Egyptian Origen (ca. 185-254), who spent thirty years preparing the *Hexapla*, a tremendous work placing the Hebrew original of the Old Testament alongside a transliteration in Greek characters and the various Greek translations in six parallel columns. He devoted a homily to the question of a provoked abortion, and understands the expression “life for life, eye for eye . . .” (the *lex talionis*) to refer to injury done to a formed embryo. Origen continues to develop an allegorical exegesis of the meaning of the passage with scant relevance for our inquiry, but it is significant that the greatest of all the early Christian Hebrew scholars understood the Exodus passage to require penalties according to the *lex talionis* for injuries done to an unborn but formed fetus. If the fetus is not yet formed, then the penalties for deforming it do not apply, and monetary compensation is to be made.¹⁰

Although Luther read Exodus 21:22 to refer to a miscarriage, his younger contemporary Calvin did not. He comments, “This passage at first sight is ambiguous, for if the word death [A.V., mischief] only applies to the pregnant woman, it would not have been a capital crime to put an end to the fetus, which would be a great absurdity, for the fetus, though enclosed in the womb of its mother, is already a human being, and it is almost a monstrous crime to rob it of the life which it has not yet begun to enjoy. If it seems more horrible to kill a man in his own house than in a field, because a man’s house is his place of most secure refuge, it ought surely to be deemed more atro-

cious to destroy a fetus in the womb before it has come to light. On these grounds I am led to conclude, without hesitation, that the words 'if death should follow' must be applied to the fetus as well as to the mother."¹¹ Post-Reformation Puritan exegete Matthew Henry, without going into detail, understands the law as intended to prevent injury that might cause miscarriage, i.e., to protect the unborn.¹²

Among Protestant Bible commentaries, the classical commentary is the nineteenth-century work known as Keil-Delitzsch. The authors go into some detail to reject the distinction introduced by the Septuagint translation between a formed and unformed fetus. Keil and Delitzsch explain that the Hebrew phrase *w'yatz' u y'ladheyha* can only mean "and her children come out into the world," with no injury either to the woman or to the child that was born, in which case monetary damages only were to be paid, namely for the pain and suffering caused the mother.¹³ The preeminent Jewish commentator of our century, the late Umberto Cassuto, gives the same interpretation in his *Commentary on Exodus*, "*But if any mischief happen*, that is, if the woman dies or the children die, *then you shall give life for life, eye for eye*, etc." Whereas Origen understands the rather puzzling continuation "eye for eye, tooth for tooth, hand for hand . . ." to refer to a well-formed fetus, inasmuch as it would be difficult to imagine its application to the woman under the circumstances, Cassuto explains its inclusion at this point merely as the completion of the traditional formula of the *lex talionis*, repeated in full merely for the sake of emphasis and authority.¹⁴ The Hebrew *y'lad*, child, both Keil-Delitzsch and Cassuto emphasize, cannot be used of an unformed embryo.

Modern exegetes continue to differ on the issue, some following Rylaarsdaam in understanding the expression "mischief" to refer only to the death of, or injury to, the woman, not the fetus, while others agree with Keil-Delitzsch and Cassuto in what would seem, especially in the light of the Mesopotamian parallels, the more likely interpretation.¹⁵ In any event, all texts concur in treating the accidental causing of a miscarriage as a punishable injury, and the only text (the non-biblical Middle Assyrian laws) that deals with *deliberately* caused abortion treats it as a heinous crime punishable by death. It should be evident that it is impossible to judge, because the Code of Hammurabi and the Middle Assyrian laws generally punish the causing of miscarriage with damages payable to the injured family, that the ancient Mesopotamians did not regard the unborn child as a human life, for the taking of human life was frequently not punished by death. Similarly, even if we follow the R.S.V. and commentators such as

Rylaarsdaam to understand that the causing of a miscarriage is not punishable by anything more than the requirement of damages unless the woman also is injured or dies, we cannot conclude from this that the Old Testament did not regard the unborn child as human life. Several other factors are considered in the context, such as the social condition of the person injured or killed (cf. vv. 18-21), and the degree of negligence involved (cf. vv. 28-29). The interpretation of the Septuagint and Philo does have in its favor the fact that if the fetus were still unformed, the woman would not have been obviously pregnant, and the responsibility for accidentally injuring her in a brawl might be thought to be correspondingly less. Finally, it must be noted that in Exodus 21, as in most of the similar legislation from the ancient Near East, we are dealing with the accidental and unintended consequence of a culpable act, not with deliberate intent.

There are no other Old Testament passages that bear on the issue of miscarriage or abortion, but there are a number of passages that indicate that the unborn child is a person in the sight of God. Thus the Psalmist says to God, referring to the time he was in the womb, "Thou knowest me right well; my frame was not hidden from thee, when I was being made in secret" (Psalm 139:15, R.S.V.; cf. preceding and following verses). God calls Jeremiah as a prophet in the following terms: "Before I formed you in the womb, I knew you, and before you were born I consecrated you; I appointed you a prophet to the nations" (Jeremiah 1:5, R.S.V.). Although Psalms and the Prophets were written later than Exodus, it is evident that at least at some point in Hebrew history the unborn child was considered to be a person in his own right, more than a piece of property or part of his mother.

Passing from the ancient Near East, we turn to Greece and Rome. (As noted above, the reference in *Roe v. Wade* to ancient Persia is an anachronism based on the misreading of a secondary general work). It is recorded in an early text ascribed to the second-century Roman physician Galen, *An animal sit id, quod in utero est?* ("Does that which is in the uterus have a soul?") that Lycurgus, the legendary Spartan law-giver, and Solon, his better-documented Athenian counterpart from the sixth century B.C., both prohibited abortion.¹⁶ As the nineteenth-century Italian sociologist Balestrini points out in commenting on the report, it seems inconsistent to suppose that a society that permitted parents to expose their unwanted offspring to be devoured by wild beasts would have prohibited abortion.¹⁷ However, there is some evidence—as in the Hittite legislation mentioned above—of a feeling that interference with the course of nature is wrong,

and hence that abortion might be reproved even where infanticide was not. Abortion, of course, posed a threat to the life and health of the mother, and where infanticide was not forbidden, it may have seemed altogether undesirable as a way of avoiding unwanted offspring.

Although there is no evidence, apart from the passage in Pseudo-Galen, to indicate that abortion was illegal in ancient Greece or the Roman republic, it is incorrect to say that it was regarded as unobjectionable. In its summary of the historical precedents in *Roe v. Wade*, the Supreme Court relied heavily on the first few pages of a short monograph by Ludwig Edelstein, *The Hippocratic Oath*,¹⁸ as well as on Arturo Castiglioni's general work on the history of medicine, which contains a few, scattered references to abortion (which in fact conflict with the interpretation given them in *Roe v. Wade*).¹⁹

The purpose of Edelstein's paper is to explore the origins of the Hippocratic Oath, which, as is well known, explicitly prohibits abortion. In order to show that the Oath had its origin in Pythagorean philosophy, Edelstein claims that in Greek and Roman times, abortion was resorted to without scruple.²⁰ It is certainly true that it was frequently practiced, but it is incorrect to say that there was no objection to it. The Latin poet Ovid, certainly no moralist in the stamp of Cato the Elder, makes it clear in a number of texts that he looked on abortion as unnatural and impious:

"Mens ubi materna est? Ubi sunt pia vota patrum?" (Where is the maternal sense? Where are the pious wishes of the fathers? *Metamorphoses*, viii.). In the same context, he states that "the first one who thought of detaching from her womb the fetus forming in it deserved to die by her own weapons."²¹ As Edelstein notes, the Stoic school of philosophy considered life to begin only with the first breath, and hence, he concludes, there was no reason for Stoics to oppose abortion. This is not entirely true, for abortion may plausibly be opposed for reasons not connected with one's views of the point at which human life begins. The first-century Stoic Musonius Rufus refers to abortion as a "danger to the commonwealth" as well as an act of impiety and approves of the laws against it—thus incidentally providing an indication that such laws did exist.²²

Edelstein's concern, as we have noted, is not to discuss the validity of the ethical principles embodied in the Hippocratic Oath (he subsequently espoused them, as indicated below). What he set out to do was to show that the ideas contained in the oath were not part of the general Hellenistic culture, but were derived from a particular philosophical and moral tradition, that of the Pythagoreans. If he exag-

gerates somewhat in stating that the ancient world was altogether without scruples in the matter of abortion, the reason for overdrawing the contrast with the Pythagorean ethic is not to discredit that ethic as the peculiar concern of a dogmatic minority (as the Court seems to conclude in *Roe v. Wade*), but rather to show where an ethic that came to enjoy universal acceptance in fact originated.

To judge from the argument in *Roe v. Wade*, it would appear that the Court relied heavily on Edelstein's monograph, or more particularly on the first part of it, for its conviction that abortion was acceptable to Greek and Roman law as well as to "ancient religion" (i.e., paganism), and objectionable only to a small group of dogmatists, the Pythagoreans.²³ In view of this apparent reliance on Edelstein, it is remarkable that the Court overlooked what was Edelstein's starting-point and conclusion, namely the fact that this Hippocratic ethic soon won universal acceptance in Edelstein's words, as "the embodiment of truth". Why did this happen? The Court follows Edelstein in understanding that the Hippocratic Oath, although of Pythagorean origin and thus reflecting the views of a limited circle, won general acceptance because it coincided with the convictions of Christianity, which was rapidly becoming the dominant religion in the later Roman Empire. The unspoken implication of the Court's argument seems to be that the Hippocratic Oath need not be taken seriously as an expression of medical ethics because, at the outset, it was the view of a minority, the Pythagoreans, and later, when it came to enjoy majority acceptance, this only took place because the majority by that time had embraced Christianity.

Edelstein's conclusion is somewhat different. Having demonstrated that the Oath began as a kind of reformist manifesto, he asks why it came to win such universal acceptance. Because, he says, "The Pythagorean god who forbade suicide [and abortion] to men, his creatures, was also the God of the Jews and the Christians . . . the Hippocratic Oath became the nucleus of all medical ethics. . . . In all countries, in all epochs, in which monotheism, in its purely religious or its more secularized form, was the accepted creed, the Hippocratic Oath was applauded as the embodiment of truth. Not only Jews and Christians, but the Arabs, the medieval doctors, men of the Renaissance, scholars of the Enlightenment and scientists of the nineteenth century embraced the ideals of the Oath."²⁴ If one assumes that the Court was familiar with the whole of Edelstein's 60-page monograph, one would have to interpret its rejection of the oath as an implicit rejection of the very heart of our ethical tradition, of principles common not merely to Judaeo-Christian religion in the nar-

rower sense, but to Western civilization as a whole. It is perhaps more likely that the Court acquainted itself only with part of Edelstein's presentation, namely with his discussion of the particular origins of the Hippocratic ethic, but not with his affirmation of its universal acceptance. (The Court is also guilty of very selective citation in its summary of the opinion of Soranus of Ephesus, considered to be the founder of gynaecology, who flourished under the Emperor Trajan (98-117). The Court observes that although he was "generally opposed" to abortion, he put the life of the mother first.²⁵ This is true but misleading, for Soranus in fact forbade abortion except where necessary to save the life of the mother,²⁶ and this is precisely the position of Tertullian, whose opposition to abortion we have already noted, and of Augustine.²⁷) It is remarkable that the Court takes recourse to the moral views of paganism, apparently without reflecting on the fact that the same legal systems and philosophies that permitted abortion also permitted infanticide. In fact, the ancient pagan world was not without some legislation against abortion. Although it was not punishable by law under the Republic, it could be rebuked by the censors. The reform of marriage laws by Augustus was apparently intended to mitigate this abuse, and the *Lex Cornelia de sicariis et veneficis* (Concerning cutthroats and poisoners) was applied to those who sold abortifacients.²⁸ The pagan emperors Septimius Severus (193-211) and Antonius Caracalla (211-217), in a rescript, punished abortion with banishment.²⁹

Turning from the pagan Roman Empire to the Christian Church that was consolidating and growing within it, we find that the New Testament does not mention abortion, although there is a reference to the pagan practice, which the Egyptians imposed on their Hebrew slaves, of exposing children to die (Acts 7:19). One of the earliest Christian catechetical writings, the *Didache* or *Teaching of the Twelve Apostles*, dating from the early second century, gives this exposition of the Second Great Commandment (Thou shalt love thy neighbor as thyself): "Thou shalt do no murder; thou shalt not commit adultery; thou shalt not commit sodomy; thou shalt not commit fornication; thou shalt not steal; thou shalt not use magic; thou shalt not use philtres [dangerous drugs]; thou shalt not procure abortion, nor commit infanticide; thou shalt not covet thy neighbor's goods . . ."³⁰ The fact that the prohibition of abortion, along with other things, is placed in a series that includes the prohibitions handed down at Sinai in the Decalogue indicates the deep gravity with which the early Church regarded this offense. We may also note the fact that this early Christian document, like the Hippocratic Oath and the use

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made of the *Lex Cornelia de sicariis et veneficis*, places abortion in the same context with poisoning, traditionally considered one of the most dishonorable of crimes. An even earlier document, included with the *Didache* in the collection called the *Apostolic Fathers*, is the *Epistle of Barnabas*, where we are told that among those who are in the way of death, that destroys the soul, are "child murderers, and those who destroy what God is forming."³¹ Even more explicitly, the epistle states, "Thou shalt not procure abortion, thou shalt not commit infanticide."³² The considerably later document known as the *Apostolic Constitutions* (circa 380, the year that the Emperors Theodosius and Gratian made Christianity the official religion of the Empire) forbids abortion and infanticide in a series of regulations prohibiting sexual immorality, fraudulent dealing, magic, and witchcraft, and expressly speaks of vengeance for the aborted fetus: "Thou shalt not slay thy child by causing abortion, nor kill that which is begotten, for everything that is shaped, and has received a soul from God, if it be slain, shall be avenged, as being unjustly destroyed."³³

The non-canonical *Apocalypse of Peter*, which was widely circulated in the Church during the early centuries, places great emphasis on the fact that the destruction of nascent life is incapable of reconciliation with Christian morality.³⁴

Among the earliest Church Fathers was Athenagoras of Athens (late second century), who refuted the charge that Christians ate human flesh in their services with these words: "How could we, who insist that women who use drugs to produce an abortion are murderers and will have to answer to God for it, kill human beings?"³⁵ Minucius Felix, an early third-century apologete, goes from the defense over to the attack by accusing his pagan opponents: "Among you I do see newly-born sons at times exposed to wild beasts and birds, or violently strangled to a painful death; and there are women who, by medicinal draughts, extinguish in the womb and commit infanticide upon the offspring yet unborn."³⁶ Tertullian, whom we have already noticed in connection with his comments on Exodus 21:22-25, is equally explicit in his *Apology*, detailing the convictions of Christians: "For us murder is once for all forbidden; so even the child in the womb, while yet the mother's blood is being drawn on to form the human being, it is not lawful for us to destroy. To forbid birth is only quicker murder. It makes no difference whether one take away the life once born or destroy it as it comes to birth. He is a man, who is to be a man; the fruit is always present in the seed."³⁷ Although twentieth-century readers may smile with amusement at some of Tertullian's speculations, it is interesting to note that his views at

this point are fully in accord with those of modern science (see John W. Montgomery, "The Fetus and Personhood," in this issue, esp. pp. 42-43). His Greek-speaking contemporary Hippolytus of Rome likewise used the word murder to characterize the behavior of so-called Christian women who used mechanical means to rid themselves of the growing embryo.³⁸

Clement of Alexandria, a Greek-speaking scholar and the teacher of Origen, wrote the first major treatise on Christian ethics, *The Teacher*. He pointed out that those who use abortifacient drugs to abort the embryo "destroy human feeling with it."³⁹ Bishop Ambrose of Milan, the teacher of Augustine and the man who confronted the Emperor Theodosius and successfully demanded public repentance from him for a violent act of military repression, observed that even in ancient times abortion was more readily resorted to by the upper classes: "The poor abandon their newborn infants and refuse to acknowledge them. The wealthy repudiate their offspring while still in the mother's body, and extinguish the body's promise by means of an abortion-causing drink: life is taken away before it is given." By comparison, Ambrose remarked, the ravens could teach mankind something about parental love.⁴⁰

The beginnings of a kind of natural law theory may be discerned in the comment of John Chrysostom (d. 407), patriarch of Constantinople and of a stature in the Eastern Church comparable to Augustine's in the West. He writes: "Where murder is committed before birth . . . you make the prostitute into a murderess as well . . . yea, it is worse even than murder . . . Why do you so dishonor the gift of God, fighting against his laws, seeking as though it were a blessing what is really a curse?"⁴¹ It is Ephraem the Syrian (306-377), one of the most important early Eastern theologians of non-Greek background, who called capital punishment the appropriate penalty for abortion: "Because she made the child in her body into a miscarriage, so that it would be buried in the darkness of the earth, it also makes her into a miscarriage, so that she must wander in outer darkness. This is the penalty for adulterers and adulteresses who take their children's life: they are punished with death . . ."⁴¹ Among the later early Church writers, Caesarius of Arles wrote, "No woman should take any drug to procure an abortion, because she will be placed before the judgement seat of Christ, whether she has killed an already born child or a conceived one."⁴²

Although the Supreme Court passed from the Hippocratic Oath directly to common law, overlooking both Roman Law—given a distinctively Christian cast by Theodosius, Justinian, and later rulers

—and Canon Law to a large extent as well, it is interesting to note the attitude of the early Christian councils on the issue. In one of the last councils held before the toleration Edict of Milan was promulgated in 313, the Council of Elvira (306), Canon 63 states that the adulteress who has aborted her illegitimate offspring can never receive absolution and communion, not even on her deathbed.⁴³ (What this meant was not that the offender could not be forgiven, but that the offense was so heinous that she could never be received back into the Church on earth, even on her deathbed, but only by God.) Eight years later, Canon 21 of the Council of Ancyra modified this drastic penalty to ten years of penance for a repentant woman who had resorted to abortion before she could be restored to communion. (These ecclesiastical penalties did not supersede prosecution and punishment in the criminal courts, but had to do only with the relationship of the sinner to the Church. At the time in question, however, there were virtually no criminal penalties in force against abortion.) This ruling was taken over by the Fourth Ecumenical Council of Chalcedon in 451.⁴⁴ The Council of Constantinople of 692, called *Quinisextum* because it supplemented the Fifth and Sixth Ecumenical Councils, held in Constantinople in 553 and 680, made both the giving and the taking of abortifacient drugs the equivalent of manslaughter.⁴⁵

The Court makes much of the fact that early Christians, including Augustine (and Tertullian, whom the Court does not mention in this context) were uncertain as to the point at which the embryo ceased to be *inanimatus* (without a soul) and became *animatus* (possessed of a soul). A consideration of the relevant passages in Tertullian indicates that what was open to question, in his mind, was the time at which the fetus took on its *forma* (essential human character). He was in no doubt, however, about the fact that the soul is part of that essential character. In other words, had Tertullian known, as we do today, that the total genetic pattern (the *forma*?) is present in the embryo from conception, it is altogether likely that he would have assumed that it possessed a soul from the first moments. However, although the early Christian writers were diffident in stating that they knew exactly when the fetus became *animate* (i.e., possessing a soul, not necessarily the same thing as “quick” or “viable”), as the Supreme Court correctly reports, they were uniform and consistent in their condemnation of abortion. The question of the origin of the soul is a speculative, theological issue, but the question of abortion is a practical, moral one, and on it the early Church and its teachers gave a clear and unambiguous verdict. As the great Eastern theologian

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Basil of Caesarea (d. 379) stated, we do not need to engage in speculative inquiries about the time and manner of the origin of the soul in order to answer the question of whether abortion is permissible: "The woman who prematurely aborts the fruit of her body is subject to the penalty for murder. We will not conduct a petty inquiry whether the embryo was developed or unformed. For here accountability is demanded not only for the child that should have been born, but also for the woman, who endangered herself. For women generally die in such an undertaking. On top of this there is the death of the embryo, a second murder [Christian writers referred to suicide as murder], at least according to the intent of those who undertake this risk."⁴⁶

Although the opposition of later Christians to abortion may be based—as in the case of the Roman Catholic Church—on the conviction that human life begins at conception and that the embryo has a soul from conception onward, it is evident that the early Christians were uniformly and vigorously opposed to abortion without regard for their opinions concerning the nature of fetal life or the manner of origin of the human soul. Does the Court, by its citations of various theological views on these latter topics mean to suggest that early Christians were not, or should not, have been opposed to abortion unless they were sure of the answers in these areas? We cannot plausibly say what the early Christians *should have* thought and believed, but on the basis of very good records we can certainly say what they did think and believe on abortion. In common with the earliest law-codes on record, the early Christians universally held abortion to be a heinous offense. It was not always considered tantamount to murder, and although several theologians do speak of it as equivalent, it is interesting that some early conciliar decrees on the subject treat it as a lesser, although very severe, offense. No doubt the early Christians, like more modern courts, recognized that the woman who sought an abortion was doubtless acting under considerable pressure and in a distraught state, and hence some provision was made for gracious dealing with the offender and restoration to Church fellowship. However, there can be no doubt that it was considered, from the outset, a mark of a depraved and ungodly society.

Abortion to save the life of the mother was always regarded as a special case, permissible because of the lack of any alternative. (It should be noted that the vast majority of the cases that, under conditions of early medical practice, appeared to require an abortion to save the life of the mother, can be handled today by far less drastic means, so that only a tiny minority of cases present the situation in which Tertullian spoke of the propriety of destroying the child in the

mother's womb "with necessary cruelty," for otherwise it would become "a matricide, if it did not die.")⁴⁷ And of course even those who were willing to concede abortion for a greater number of causes than the single one admitted by Tertullian, Augustine, and other early Christians, the saving of the mother's life, generally regarded it as an extremely undesirable last resort, as something to be avoided wherever possible.

Christians have generally concerned themselves with individual cases, and many modern Christian spokesmen, having cases of extreme hardship in mind, have argued for lenient abortion laws, despite the uniform consensus of Christian tradition against abortion. Indeed, one must assume that at least one member of the Court who voted with the majority in *Roe v. Wade*, Chief Justice Burger, thought likewise. In his concurring opinion, Burger writes, "I do not read the Court's holding today as having the sweeping consequences attributed to it by the dissenting Justices. . . . Plainly, the Court today rejects any claim that the Constitution requires abortion on demand."⁴⁸ As things have turned out, the effect of *Roe v. Wade* has indeed been sweeping, contrary to the Chief Justice's hope. Perhaps the Court would have better served the United States and humanity if, in its consideration of ancient law and ethics and particularly of the Hippocratic Oath, instead of rejecting the oath because Christianity was instrumental in gaining for it universal acceptance, it had devoted more attention to this question: why did the Hippocratic view, which began as the manifesto of a reform movement within a decaying society, gain general approval even though the choices it imposed, in view of the limited medical knowledge and techniques of the day, must have frequently appeared much harder than in similar circumstances in our own day?

If Edelstein is correct, as it seems evident he is, the Hippocratic Oath and the parallel Christian condemnations of abortion were voiced on a world that had grown extremely callous about the value of all human life—infants, children, adults, old people, and of course the unborn. The results of such a philosophy were apparent on every hand. Perhaps the Court, despite the explicitness with which it rejects Hippocratic and Christian ethics in favor of those of different origin, was still living so naturally within the framework created by almost two millennia of general condemnation of abortion that it did not suspect the general and sweeping use that would immediately be made of the license it granted. Close to a century earlier, one of the first modern writers to argue for relaxation of abortion legislation

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displayed greater insight into the social implications of widespread abortion:

Abortion, elevated to the degree of a social custom, is in sum nothing but the apparent manifestation of a state of decadence of a people, which has very deep roots and which can only be cured with far-reaching remedies, not with the attempt to suppress the manifestation itself.⁴⁹

If Balestrini is right, perhaps the widespread indifference on the part of a large section of the American public to the practical moral values violated in generalized abortion only reflects a moral decadence, the intellectual equivalent of which is demonstrated in a different way by the antecedent indifference of high judicial authorities to what had become the universal opinion of the civilized West on a fundamental issue of human life and its value.

NOTES

1. Arturo Castiglioni, *A History of Medicine* (New York: Knopf, 1941), p. 84. Reference to this passage is made in *Roe v. Wade*, VI n. 8. Castiglioni's general history brings in an anachronistic reference to a medieval, Islamic Persian text of scanty historical reliability, the *Shah Nameh* of Firdausi, dated at 999 A.D., in its discussion of ancient medicine, and the Court's researchers apparently missed this anachronism. Castiglioni also mentions the application of the *Lex Cornelia* to abortion, p. 227. (f.n. 28 below.)
2. See the discussion in the R. K. Harrison, *Introduction to the Old Testament* (London: Tyndale, 1970), pp. 174-177.
3. *The Code of Hammurabi*, §§ 206-214, trans. Theophile J. Meek, in James B. Pritchard, editor, *Ancient Near Eastern Texts Relating to the Old Testament*, 3rd ed. (Princeton: Princeton University Press, 1964), p. 175.
4. *The Middle Assyrian Laws*, §§ 50-53, trans. Theophile J. Meek, in Pritchard, pp. 184-185.
5. *The Hittite Laws*, §§ 77 A-B, trans. Albrecht Goetze, in Pritchard, p. 192.
6. Alexander Scharff und Anton Moortgat, *Ägypten und Vorderasien im Altertum* (Munich: Bruckmann, 1950), p. 353.
7. *The Interpreter's Bible*, ed. George Arthur Buttrick (New York: Abingdon, 1952), *ad loc.*, Vol. I, pp. 999-1000.
8. C. F. Keil and F. Delitzsch, *Biblical Commentary on the Old Testament*, trans. James Martin (reprinted, Grand Rapids: Eerdmans, 1949), *ad loc.*, pp. 134-135.
9. Tertullian, *De anima*, xxxvii, in: *The Ante-Nicene-Fathers*, ed. Alexander Roberts and James Donaldson (reprinted Grand Rapids: Eerdmans, 1957), Vol. III, pp. 217-218.
10. Origen, *Homélies sur l'Exode*, trans. P. Fortier (Paris: Editions du Cerf, 1947), Hom. X, pp. 220ff.
11. John Calvin, *Commentaries on the Last Four Books of Moses*, trans. Charles William Bingham (reprinted Grand Rapids: Eerdmans, n.d.), Vol. III, pp. 41-42.
12. Matthew Henry, *Commentary on the Whole Bible*, ed. Leslie F. Church (London: Marshall, Morgan, and Scott, n.d.), *ad loc.*, p. 96.
13. Keil-Delitzsch, *ad loc.* A convincing demonstration that the passage cannot mean miscarriage is offered by John M. Frame et al. in "Report of the Committee to Study the Matter of Abortion," in *Minutes of the Thirty-Eighth General Assembly, The Orthodox Presbyterian Church* (Philadelphia Orthodox Presbyterian Church, 1971), pp. 142-143.

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14. Umberto Cassuto, *Commentary on Exodus*, trans. Israel Abrahams (Jerusalem: Magnes, 1967), *ad loc.*, pp. 273-277.
15. For the argument that Exodus 21:22-25 implies that the fetus is not considered to be human life, see Bruce K. Waltke, "Old Testament Texts Bearing on the Issues," in *Birth Control and the Christian*, ed. Walter O. Spitzer and Carlyle L. Saylor, (Wheaton-Tyndale, 1969), pp. 9-13. However, in a symposium held at Philadelphia College of the Bible in March, 1975, Dr. Waltke read an as yet unpublished paper indicating that he has changed his views and accepted the traditional interpretation of Keil-Delitzsch and Cassuto. (Information supplied by C. Everett Koop, M.D., a participant in the symposium.) For a more recent presentation of the traditional interpretation, see Jack W. Cottrell, "Abortion and the Mosaic Law," in *Christianity Today*, March 16, 1973, pp. 6-8.
16. Cited in Franz Joseph Dölger, "Das Lebensrecht des ungeborenen Kindes und die Fruchtabtreibung in der Bewertung der heidnischen und christlichen Antike," in Dölger, *Antike und Christentum*, Vol IV (Münster: Aschendorff, 1934), p. 10n.
17. Raffaello Balestrini, *Aborto, infanticidio ed esposizione d'infante* (Torino: Bocca, 1888), p. 141.
18. Ludwig Edelstein, *The Hippocratic Oath*, in *Supplements to the Bulletin of the History of Medicine*, ed. Henry E. Sigerist, No. 1 (Baltimore: Johns Hopkins, 1943), p. 10.
19. *Roe v. Wade*, VI, 2.
20. Edelstein, *Hippocratic Oath*, p. 10.
21. Cited by Eugène Henriot, *Moeurs juridiques et judiciaires de l'ancienne Rome* (Paris: Didot, 1865), Vol. II, p. 173. Henriot supplies several additional examples of ancient pagan criticism of abortion.
22. Cited in Dölger, "Lebensrecht," p. 14. See also Wilhelm Rein, *Das Criminalrecht der Römer* (Leipzig: Köhler, 1844), pp. 445-449, for further indications of Roman restrictions on abortion.
23. *Roe v. Wade*, VI, 2.
24. Edelstein, *Hippocratic Oath*, p. 64.
25. *Roe v. Wade*, VI, 1.
26. Soranus, *Gynaecia*, III, 19, 60. Cited in Dölger, "Lebensrecht," p. 26.
27. Tertullian, *De anima*, xxv, Augustine, *Enchiridion*, xxiii, 86.
28. Raulo-Wissowa, *Real-Encyclopädie des Classischen Altertums*, art. *abortio*; cf. *Corpus Juris Civilis, Digest*, XLVIII, xix, 38 (5); cf. XLVIII, viii.
29. *Digest*, XLVII, xi, 4.
30. *Didache* ii, 2; see also v, 2.
31. *Epistle of Barnabas*, xx, 2.
32. *Ibid.*, xix, 5.
33. *Constitutions of the Holy Apostles*, VII, 3.
34. Cited in Dölger, "Lebensrecht," p. 50.
35. Athenagoras, *Entreaty*, xxxi.
36. Minucius Felix, *Octavius*, xxx, 2.
37. Tertullian, *Apology*, ix.
38. Hippolytus, *Elenchos*, ix, 12.
39. Clement of Alexandria, *The Teacher*, II, x, 95-96.
40. Ambrose, *Hexameron*, V, 18, 58.
41. Ephraem the Syrian, *De timore Dei*, x.
42. Caesarius of Arles, *Sermons*, i, 12.
43. Cited in Dölger, "Lebensrecht," p. 55.
44. Klaus Bockmühl, "Die Beurteilung der Abtreibung in der Frühzeit der christlichen Kirche," in *Theologische Beiträge* (Wuppertal), 1972/1, p. 40.
45. Canon 91, in Mansi, *Sacrorum conciliorum nova et amplissima collectio*, Vol. XI, col. 981-82.
46. Basil of Caesarea, *Letters*, 118, 2.
47. Tertullian, *De anima*, xxxvii, 2.
48. *Roe v. Wade*, Syllabus, first concurring opinion.
49. Balestrini, *Aborto*, p. 191.

Abortion: A Protestant Debate

I. Shall We Return to Absolutism?

J. Philip Wogaman

A major national controversy has again erupted over the abortion question. In the wake of the Supreme Court's ruling that present state abortion laws are unconstitutional, sensitive Christians and Jews along with other persons of good will are re-examining this moral question in the light of their faith and conscience. Some, who have already concluded that abortion is a threat to the value of life in our society, have begun a counterattack against the effect of the high court's decision. Those of us who support that decision, but at the same time value human life dearly, are under a special obligation to explain why. It is particularly important to explain why in relation to our ultimate beliefs and values. First, however, it is necessary to review the Court's decision and to pay some attention to the views of those who now oppose it.

Debate Over the Court's Decision

In *Roe v. Wade* (decided with a companion case on January 22, 1973), the Supreme Court, by a 7 to 2 majority, struck down state laws prohibiting abortion prior to the viability of the fetus. It did permit states to enact laws designed to protect the health of women during the second three months of pregnancy and to prohibit abortion altogether during the period of viability (about the last three months of pregnancy). The Court's own summary of these decisions was in three parts:

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(a)For the stage prior to approximately the end of the first trimester, the abortion 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 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.

The first two paragraphs were based upon the Court's careful review of medical evidences. The last paragraph was based upon the Court's judgment that prior to viability (that stage in the development of an unborn fetus when it could be expected to survive premature delivery) there is no basis in law for the judgment that the fetus is a human person in the full legal sense. Writing for the Court's majority, Justice Blackmun contended that "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."

This last point was crucial. Even though the Court's decision was based on a careful and scholarly review of the history of thought on this subject, it was subjected to an almost immediate counter-attack. The counterattack was based upon the belief that human life is present at *all* stages of pregnancy. This belief was stated forcefully by Senator Mark Hatfield (R.-Ore.) in a Senate speech supporting a Constitutional Amendment to counteract the decision. "The facts of embryology seem compellingly clear to me," he said, "human life—the existence of the person—begins when life begins. When that life commences its development, it is human life—not any other form of life, or not just general life, but human life. And since it is there, it is obviously being. It is a human being. That seems to be the evidence of science." The proposed Constitutional Amendment, sponsored by Senator James Buckley (C.-N.Y.), Senator Hatfield, and others, would redefine the word "person" in the following way: "With respect to the right to life, the word 'person,' as used in this Article and in the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States, applies to all human beings, *including their unborn offspring at every stage of*

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their biological development, irrespective of age, health, function or condition of dependency" (emphasis supplied).

Quite understandably, thoughtful people find much in this counterattack against abortion appealing. The definition of all nascent life (that is, all life between conception and birth) as human simplifies what may otherwise be very difficult questions. The problem of definition is that between conception and birth nascent life is in constant development. Unless we choose one of those two rather definite points (conception and birth) as the time when life becomes human, we do have a difficult time drawing the line. Few would want to leave nascent life in its last stage unprotected by law, and the only other clear point of reference is at the very beginning of pregnancy.

But the appeal of the anti-abortion position is not just the value of its apparent clarity. Rhetoric employed by spokesmen for the movement makes much of the confrontation between the sanctity of life on the one hand and the cheapening of life through violence on the other. Prof. C. Eric Lincoln put this vividly,* while Senator Hatfield expressed the same point in his Senate speech:

Abortion is a form of violence. That is the undeniable reality. It is the destruction of life. It furthers the dehumanization of life. It cheapens life. There is no single characteristic of our society that troubles my inner self more than the degradation, the cheapening, the dehumanization of life that we see all around us today. That is what is at the heart of the terrible inhumanity of our policies in Indochina. Human life became cheap, and easily expendable—especially Asian life, which somehow seemed less valuable than American life. We justified policies by talking about body counts. And we destroyed all sensitivity to the sanctity of human life. That is what happened at Attica. That is what happens whenever we heed the frightened and vengeful pleas for "law and order" that would have us crush the lives of others. The same holds true for capital punishment. The State cannot be so arrogant as to take away that ultimate right of every citizen—the right to life. . . . We have suffered so many assaults on the sacredness of human life that our conscience is insensitive and numb.

Such statements rather clearly seem to link the proponents of abortion to a generally callous attitude toward life and violence.

There is, moreover, the somewhat subtle question of how a pregnant woman views the fetus within her own body. Senator Hatfield quotes a statement by Roman Catholic moral theologian Bernard Haring which speaks eloquently of this relationship: "It makes an enormous difference whether she considers the fetus only as 'tissue' or entertains motherly feelings toward this living being. The human-

*See Prof. Lincoln's article elsewhere in this Review.

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ization of all mankind, the totality of human relationships cannot be disassociated from this most fundamental and life-giving relationship between the mother and the unborn child. All forms of arbitrary rationalization to justify abortion will lead to other types of alibiing about interpersonal relationships and further explosions of violence." Indeed, would widespread practice of abortion make such human relationships simply utilitarian? Would this not affect the attitudes of even those mothers who have no intention of ever aborting a pregnancy?

Further questions have been raised by some black leaders, such as the Rev. Jesse Jackson, who regard abortion as a form of genocide practiced against blacks. Senator Hatfield argues that "the dispossessed should be listened to, and allowed to speak for themselves." When they do so, he asserts, "the truth is that in general they have not been the ones asking for abortion laws to be liberalized. . . . When we realize that society has been more ready to provide assistance for the poor to have abortions than for the poor to have children, maintained by an adequate standard of living, we recognize the truth spoken by those who view abortion as another form of our oppression of the poor." Thus, support for abortion emerges in the minds of its opponents not only as anti-life and pro-violence but also anti-black people and anti-poor people.

Not surprisingly, such arguments place proponents of abortion on the defensive. Does liberalization of abortion laws really put us on the slippery slope of violent disregard for human life and justice? Does this threaten the fundamental values of our society? Is this really against the stream of higher values of the Judeo-Christian religious traditions?

Of course there is much to what Senator Hatfield and Prof. Lincoln and others have said. Our society *has*, to a considerable degree, shown disrespect for human life. We *have* used violence casually. We *have* neglected the poor, and we *have* oppressed minority groups. Our sexual behavior *has* become looser and more utilitarian and our family ties *have* become weaker. We are, in many respects, morally insensitive and irresponsible. Whether any of this can be related to abortion, either as cause or effect, is in my mind very doubtful. Indeed, the main sponsor of the proposed new Constitutional Amendment, Senator James Buckley, has been a consistent advocate of capital punishment, the Vietnam war, and other evidences of dehumanization of life cited by Senator Hatfield in his speech supporting the same amendment!

Furthermore, so much of the debate is carried on by male poli-

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ticians or male theologians and ethicists, that, as Claire Boothe Luce once wrote. "The motivations, psychology and emotions of women who face the trauma of induced abortion are given little attention. . . . The question here is not of 'taking the side of women,' but of taking the woman's side of the abortion question into consideration." Have those who seem totally concerned with the rights of the fetus seriously considered the impact on the life of a woman whom they would have the law *compel* to carry a pregnancy to term, no matter what that might do to her own life?

Certainly the sanctity of life is basic, and the problems raised by those who favor legal structures against abortion warrant our deepest concern. For one thing, I believe, we can all agree that abortion is not the best form of birth control. Other forms of birth prevention are preferable where a choice is possible because respect for fetal potentialities is not unrelated to respect for life. As a matter of personal choice, the initial presumption in any particular instance should be against use of abortion.

But the legal question is another matter. Those who favor a new Constitutional Amendment wish to demolish outright the Supreme Court's decision. They would have us return abortion to the criminal code. What would this mean? Potentially, it would mean that women would be prohibited by law in all the states from having abortions. An abortion would again become a form of illegal behavior, punishable by criminal law.

Indeed, if the language of the proposed amendment were followed strictly in all the states, it is difficult to escape the conclusion that abortion would be defined as out-and-out *murder*. The most serious penalties of law would result for women, their doctors, and any others involved. In other words, Senators Hatfield and Buckley and others wish to *force* women not to have abortions and to *force* physicians not to perform them. Is this really the humane, life-affirming way to deal with abortion?

Consequences of Illegal Abortion

We may begin to answer this by asking ourselves what could reasonably be expected to result from this return of abortion to the criminal law codes. Almost certainly there would be a return to the hazards and tragedies of illegal abortions. The number of illegal abortions performed annually before some states began to legalize the procedure cannot be known, but responsible estimates range to one million. It has been calculated by some that during the mid-1960's illegal abortions terminated up to 30 per cent of all preg-

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nancies in the United States and that several thousand deaths and as many as a hundred thousand injuries resulted annually.

Such hazards and tragedies are to be expected in large numbers when large numbers of women feel compelled by circumstance to seek the abortions which physicians feel compelled by law not to perform for them. The result is that abortions must be self-inflicted or sought from frequently incompetent illegal abortionists under surreptitious and often unsanitary conditions. It is no wonder that thousands died or were seriously injured. Where abortion is no longer illegal, the number of operations has increased to some extent, but the injuries and deaths have dropped sharply. Today an early abortion is statistically safer than proceeding through pregnancy to the normal time of delivery.

Is there any prospect that a new Constitutional Amendment and a new round of state criminal laws would reduce the number of women seeking abortions? There is on the contrary every reason to suppose that the suffering and tragedy from illegal abortions would be *increased* from the already appalling levels experienced before legalization. Abortion is now regarded as a matter of right by millions of women. Are we to suppose that these women will suddenly change their minds as a result of a new Constitutional Amendment and the moral arguments of those who take the absolutist position? Is it not more likely that there would be a greater disrespect and disregard for law, accompanied by the dangers of illegal abortions? Would this contribute to the sanctity of life in our society?

We might also expect a return to the double standard as to who would be able to get safe abortions. Prior to liberalization of abortion law, it was the well-to-do who could afford to fly to England or Mexico or Japan or who could arrange for legal exceptions in states permitting this. We are told now that poor people and minority groups are really not interested in this kind of "genocide" anyway. But recent statistics suggest that this is *not* viewed as genocide by black women. Out of 70,000 abortions performed during a recent 12-month period in New York City, 48 per cent of the women involved were black, and only 39 per cent were white. This is in startling contrast to the fact that before the change in the New York law, 90 per cent of all therapeutic abortions in New York City were performed on white women, according to the Association for the Study of Abortion.

Black columnist Carl T. Rowan commented on this reversal from the period when abortions were illegal:

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Why the sudden upsurge in the number of black women getting abortions? For the same reason that far more poor white women are getting abortions: For the first time in history they can legally abort an unwanted pregnancy under medically safe conditions at a price they can afford. . . . That so many black women are turning to abortion is especially remarkable when you remember that they have been bombarded with superstudies about how abortion is genocide. These women know that, as long as someone else does not force an abortion on them, it is not genocide. . . . The anti-abortion fanatics offer another kind of vicious circle to the poor. Force those poor women to have babies, curse them when their children go on welfare, deny the children even a minimum level of decency, then wait for them to get pregnant at age 12 or 13 when you can tell them, "no abortions, you must have babies." (The Washington Star-News, December 16, 1973.)

Making an abortion a criminal offense again will deprive such women of a service which can be purchased with safety by the more prosperous. Would this contribute to the humanization of our society?

Speaking for her sister blackwomen, Margaret Sloan, co-editor of Ms. Magazine, said:

" . . . It's nice for philosophers and moralists to sit around and debate whether or not women should have abortions. The fact of the matter is we have lost as many women from illegal abortions as we lost American men at the height of the Viet Nam war. Eighty-five percent of the women that die every year from illegal abortions are black and brown women. So while we're sitting back debating whether or not women should have them, women are dying because of sexism. We have lost a lot of women and we are still doing that."

Implications for Population

We cannot separate these personal decisions from the social framework in which they happen, nor the U.S. position from the world situation. Abortion is the most widely used means of birth control in the world, because for many it is the only method available. Estimates are that there are between 30 to 40 million abortions around the world each year. The toll of suffering is immense, yet in present circumstances, would it have been less if 30 to 40 million more babies had been added to a world population each year—and in situations where adequate nurture was impossible? Many thoughtful people have already concluded that too many people, far from contributing to our sense of human worth, actually tend to diminish it. Historically, population growth has been limited by disease and famine, supplemented on some occasions by war and on very few occasions by voluntary abstinence from sexual activity. Increased use of birth control measures has had consid-

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erable effect, but apparently not enough to preclude a return to disease and famine as nature's own way to limit growth. We need to ask ourselves seriously whether the immense suffering and dehumanization accompanying famine and pestilence is better than the use of abortion as a fall-back measure of birth control. Any pattern of laws which contributes to the world's population growth rate should be scrutinized *very* carefully by those who are truly sensitive to human values.

We might look at the experience of a relatively rich country, Japan, which has had the legal option of abortion for some years. The Japanese growth rate, which was around 2.1 per cent in 1949 just after its own liberalization of abortion laws, dropped to 1.1 per cent within five years. If abortion laws had remained highly restrictive, it is probable that the Japanese population would have grown from 82 million to 125 million rather than to the 107 million reported in mid-1973. Whether Japan could have handled the additional 18 million people is more than doubtful. Comparable figures can be cited for Eastern Europe, where laws were greatly liberalized during the 1950's.

It seems likely that the United States is having a similar experience. During the 1960's and the early 1970's, the U.S. growth rate was about 1.1 per cent annually (a figure which, if held to, would have resulted in a doubling of the population before the middle of the 21st century). The birthrate has now fallen to near replacement level. This decrease in the birthrate reflects greater public awareness of the relationship between population size, environmental problems, and resource and energy depletion. We have had to learn the hard way that the planet does not have unlimited room for more people. But the decrease has also coincided with the liberalization of abortion law in this country, culminating in the Supreme Court decision of early 1973. Abortion is not the preferable method of birth control but, as method of last resort, it is indubitably effective.

Many of those who seek to make abortion illegal show a concern for enlarging the available supply of food and other human life-support resources and for distributing these necessities with greater social justice. But this does not of itself make their position on abortion a responsible one. They must be responsible, not only for their intention to *enlarge* the world food supply, nor even for their own personal actions in this direction. They must also accept responsibility for their *capability* to do this and for the world's capacity to sustain life on the scale it will have to with abortion excluded. This is not simply a matter of improving adoption regulations to provide

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homes for unwanted children. It is a matter of being reasonably certain that human life-support conditions will be present on a scale commensurate with need.

It will do no good to argue that it is possible to affirm the sanctity of life in the presence of even the most miserable circumstances of poverty and overcrowding, famine and disease. That is romantic sentimentality, impressed largely by those not living under those conditions. God's life-affirming love must be mediated through human channels, and some minimum of physical well-being is required. It is one thing for strong people to choose poverty or to respond to poverty out of their strength of spirit. It is quite another thing for persons who have never known anything other than want and squalor to emerge into spiritual strength. God's grace does apply to the latter as well as to the former. But, God's grace does not operate in a material vacuum. God did not create us as disembodied spirits. Physical life must be present in adequate form before human spirituality is possible. Those who wish to return to repressive laws against abortion need to ask themselves in a serious way whether this would really be a decision in favor of life or whether it would contribute to greater disregard for the sanctity of life in the long run.

The illegal abortion route likewise cheapens life. Do we really want to return to the coat-hanger abortions? To the clandestine abortions performed by exploitative incompetents and unethical physicians under unsanitary conditions and at higher costs? Obviously, Senator Hatfield and others like him do not want to return to that—they want to do away with abortion altogether. But do they really think it would be possible to do today what was never possible prior to the Supreme Court decision?

We might expect an agonizing reply to these questions: Granted, millions of women and families might suffer; granted, there is a serious population problem and we must try to do something about it; granted, illegal abortions would resume by the hundreds of thousands—it is still the case that every abortion is simple murder. Murder is better defined as murder and made illegal despite whatever benefits in the way of health and safety to women can be expected when it is conducted in a legal, clinical setting. This argument would finally boil down to the simple assertion: "You wouldn't solve the population problem or go about your own individual family planning by killing babies, and abortion means the same thing." In this way, all discussions of the morality of abortion sooner or

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later come back to the central question: When, really, *does* human life begin?

Biological Life

Senator Hatfield treats this as a very simple biological matter at first ("Human life—the existence of the person—begins when life begins."), but then he discovers that this has to be defined more carefully. For he follows this with the remark that "it may be sensible to point to implantation, and the time after potential segmentation, as the more precise moment when truly individual and personal life is present." Implantation, of course, occurs a few days *after* conception. The relative advantage to defining new human personhood in relation to implantation, unstated by the Senator, is that several birth control devices (such as the IUD) are designed to prevent implantation of the conceptus on the uterine wall, not to prevent conception. If conception, as such, were regarded as the moment of emerging human personhood, all such birth control devices would have to be treated as the equivalent of abortions.

The proposed Constitutional Amendment itself presumably falls into this trap, since it defines as "persons" as "unborn offspring at every stage of their biological development." (Indeed, for that matter, do not even the sperm and the ovum represent a stage in the biological development of human life?) Senator Hatfield's position is thus not as logical as that of most official Roman Catholic pronouncements, which treat life even before conception as subject to protection—at least insofar as artificial contraception is to be avoided.

The problem here is that those who take the more simplistic view of abortion are trying to get at human value biologically when they should rather seek to understand it relationally and spiritually. This is not to say that there is not a crucial biological element in all statements concerning the sanctity of life (nor that there are not important biological pre-conditions to human spiritual existence). But it is to say that the biological element alone is not enough to form the basis of that sanctity.

Senator Hatfield finally admits to uncertainty: "I recognized," he writes, "that everyone may not agree about the certainty of where personhood begins. But I suggest that if we are to err, then let us err on the side of being too liberal about the definition of human life." If we do so, he continues, "then there must be convincing certainty that a human being does not exist when that life is eliminated. The burden of proof lies with those who would ad-

vocate abortion to demonstrate conclusively that they are not taking human life.”

The Relationship between Persons and God

To Christians and Jews who take God’s reality seriously, the definition of human personhood centers on the relationship between persons and God. The value of human life lies in that relationship—not in the simple facts of biological existence. How are we to understand, then, the relationship which each *fetus* has to God? In what sense does it already participate in God’s purposes and in God’s covenant of love? Does nascent life have the same value to God as does life after birth?

To get at that question indirectly, we may well refer to an apparent contradiction in the thought of Dietrich Bonhoeffer, the celebrated German theologian who strongly opposed abortion. Bonhoeffer expressed himself forcefully: “Destruction of the embryo in the mother’s womb is a violation of the right to live which God has bestowed upon this nascent life.” (*Ethics*, page 175.) While the word “this” is an improper addition in translation from the original German text, it remains clear that Bonhoeffer believed that any *particular* embryo exists because God has *specifically* given it the gift of life. In any and all pregnancies, he continues, “the simple fact is that God certainly intended to create a human being. . . .” (page 176). Accordingly, in his view, abortion “is nothing but murder.”

Any Christian or Jew could rather quickly agree that *in general* life in the womb exists because of God’s creative empowerment. A life is God’s gift in the sense that all life is ultimately given and empowered by God. But Bonhoeffer has argued that what is in general God-empowered is also specifically intended by God, and from the very moment of conception. In other words, God not only gives parents the power to have babies, but God also is specifically responsible for each instance in which they do so.

What did Bonhoeffer mean by this? Certainly he did not mean *all* human acts are specifically willed by God (which would make God directly responsible for all human sin!). Nor did he mean that, while human beings retain the power to have or not have sexual intercourse, it is God’s desire that children result from all sexual unions. Did he believe, then, that God intends that all possible pregnancies should occur? No, because he goes on to support planned parenthood in these words, “it would not be right for blind impulse to run its course as it pleases and then go on to claim to be particu-

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larly pleasing in the eyes of God; responsible reason must have a share in the decision" (page 177).

Thus the apparent contradiction: Bonhoeffer regarded every conception as being intended by God, but at *the same time* he called for responsible birth control. Are we to suppose that God also intends those conceptions which result from our failure to be responsible in our birth planning (when "blind impulse" runs its course)? Bonhoeffer is an interesting thinker for us to study because what he has clearly asserted is often less clearly implied by present-day absolutists on the abortion question. With few exceptions, the latter also believe in birth control while also continuing to regard each conception as possessed of the full value of life.

But these two positions may be difficult to reconcile. If the number of children one has is a matter for sober decision before God, then clearly it is a frustration of God's intention if one irresponsibly has either too few or too many. This is implied in all that churches and their theologians have been saying about the responsibility of each couple to engage in family planning. It plainly means that many actual conceptions are a frustration of God's will. Concerning such conceptions, it is necessary to say that God probably never intended for them to occur at all, even though it is still God's creative general empowerment that made them possible. To put this bluntly, from God's loving viewpoint, it were better that the conceptus had never come into existence in the womb.

It can still be argued by opponents of abortion that even though God may not have intended a particular pregnancy, once it has occurred God then accepts the new conceptus as a child to love. Indeed, we must insist upon the universality of God's loving covenant with all his children—whether or not they are aware of his love in any immediate conscious sense. If nature is permitted to pursue its course, then clearly a child, loved by God, will result from most pregnancies whether or not one believes the initial conception to have been a reflection of God's loving purposes.

But the question remains whether this is equally true of a conceptus at the very beginning of pregnancy. Here we must refer again to Senator Hatfield's point that "if we are to err, then let us err on the side of being too liberal about the definition of human life." This way of handling the acknowledged uncertainty is easier only because it avoids the possibility that a given pregnancy may itself be a frustration of God's intention. How then are we to resolve the question of when the fetus acquires that relationship to God which is the basis for all human valuation?

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I do not believe that point is established by conception itself, nor by implantation, nor even by the physical appearance of the fetus. Rather, it is established by when the fetus begins to *experience* reality for himself or herself. A new being must be an "I" in some sense before God can know it as an actual (not simply a potential) "thou."

Persons are human beings who are capable of experiencing reality. When, in the developmental process, does this begin to happen? It is difficult to be certain, but I am confident that in some rudimentary sense this capacity to experience reality is in being during the last few months before birth. I am equally confident that this is *not* in being during the earliest months of pregnancy—which is the period with which abortion is really concerned. I do not know *any* responsible life scientist or theologian who is prepared to argue that a human being exists with the ability to experience reality from the very beginning of pregnancy.

Even this might not matter greatly, since a certain high value must be placed upon even the physiological basis of potential human personhood. But it does matter greatly because this value must also be seen in the wider perspective. A theological over-valuing of early embryonic life has tempted too many people to overlook the weighty grounds for believing that in many cases (and not just those involving the health of the mother or deformity of the fetus) abortion may be faithful obedience to the God of life and love.

A Responsible Choice

The problem can be approached from a different angle by exploring the morality of sexual relationships as they relate to the possibility of pregnancy. It is often asserted in the case of unmarried women seeking abortions that "they want to have their cake and eat it too." The implication behind this kind of remark is that sexual relationships are a pleasure with the possibility of a resulting responsibility and that the unwillingness to anticipate or accept the responsibility of parenthood clouds the morality of the relationships themselves.

The point is applicable in the case of married couples as well. The acceptance of potential parenthood is regarded as the basis of the morality of sexual intercourse even in cases where birth control measures are used. Some theologians have expressed this thought beautifully in their writings on human sexuality. Sexual relationship expresses at its deepest levels God's intention for human love, and this love cannot be genuine unless it includes love for a potential life resulting from the union. I strongly agree with the central point.

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Sexual relationship is dehumanized apart from faithful love involving one's partner, God, and the children of the union. It does not help the cause for abortion that some of the proponents of liberal laws have also seemed to regard sexuality casually.

Nevertheless, the love standard of truly human sexuality cannot be applied solely to the unintended fetus. It must also apply to the whole series of relationships in which the marriage is involved. Consider, for example, the position of a poor family in Mexico or India or an urban ghetto with three children already, for whom a fourth child would make the difference between tolerable and intolerable conditions of life for all. Consider the case of a middle-aged woman who has already raised a family and is now devoting herself to creative new pursuits which are inconsistent with trying to raise still another child. Consider a suburban couple with two children who would rather adopt a third. In such cases, is not love for existing children and for others in the family and community also a basic test of the moral integrity of the sexual union?

Abortion may not be dismissed simply as a result of human selfishness and pleasure-seeking. Even in cases where an unmarried couple engages in sexual intercourse on the basis of entirely selfish mutual exploitation, it is not at all self-evident that a decision to bear the child would be the more loving thing for the mother to do. In such a case, *requiring* the mother to bear the child would not improve upon the morality of her prior sexual experience.

Affirming the Sanctity of Life

It seems to me that, far from reflecting a sensitivity to life, the absolutizing of the rights of the fetus in the early stages of pregnancy can lead to greater callousness concerning life and God's full and loving intentions for it. Clearly, the increase in violence in our society during the 1960's was not *caused* by liberalized attitudes or practices concerning abortion. The change of laws on abortion and the Supreme Court decision appear too late to be blamed for urban riots and My Lai and Auschwitz. No after-the-fact posturing can hope to attribute increased violence in our society to the legalization of abortion. Nor can we argue that the liberalization of abortion law is an effect of increased violence. One's judgment on this inevitably depends upon whether one regards abortion as disrespect for life in the first place.

I suppose anybody could locate many people who combine advocacy of liberalized abortion with disrespect for the sanctity of life in general. (Interestingly, however, Adolph Hitler, while sponsoring

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outright genocide for Jews, was strongly opposed to abortion for other Germans!) But would it not be equally easy to find people with a deep abhorrence of war and other forms of social violence?

The abortion debate is not really between one group of people who are committed to the sanctity of life and another group who have regrettably become callous and selfish. I would not take pen in hand for one moment to write an argument for what I considered disregard for life, and I know that this is also true of those, such as Senator Hatfield, who now believe abortion to be immoral. Doubtless many of those who favor the present liberalized approach do take human life cheaply. Doubtless also many of those who wish to make abortion a punishable crime are insensitive to the life and freedom of women, to the needs of the whole family and to the dehumanizing realities and possibilities of rapid population growth.

But there are also serious people on both sides of the argument. It needs to be remembered that among those supporting the liberalized abortion laws there are pacifists and people who vigorously struggled to end the Vietnam conflict and people who have long struggled for racial and economic justice. Others combine their advocacy of permitting women and their doctors to make this decision with dedicated efforts to humanize our penal institutions and abolish capital punishment. Such points should not have to be made, but apparently the debate over abortion needs to be elevated just a little. Whenever it is implied that abortion is proposed out of a cheapened attitude toward life, it must be replied that this simply is not so. Those of us who concur with the Supreme Court's decision regard it as a landmark of humane spirit and practical wisdom.

II. Harold O.J. Brown Replies

Dr. Wogaman, a prominent Protestant ethicist and Dean of Wesley Theological Seminary, American University (United Methodist Church), wrote the preceding article at the request of the Religious Coalition for Abortion Rights, in part in response to the position taken by Senator Mark O. Hatfield, a noted Christian layman (member of a Conservative Baptist church and regular attendee at Bethesda's Fourth Presbyterian Church). Senator Bob Packwood introduced Wogaman's pamphlet into the Congressional Record in the course of his testimony before the Constitutional Amendments Subcommittee of the Senate Judiciary Committee,

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March 10, 1975. Inasmuch as Wogaman is a respected scholar, his support—albeit with apparent hesitation—of the Supreme Court's abortion decisions tends to reinforce Packwood's contention that there is nothing resembling unity of opposition among Christians on the morality of abortion. Therefore it is pertinent to note that his position involves many serious reservations about abortion which cannot effectively be taken into account under the present conditions without some form of reversal of the Court's action.

Wogaman realizes the moral impact of the position taken by Senator Hatfield, Professor C. Eric Lincoln and the Rev. Jesse Jackson, among others, although he somewhat discounts it on the grounds that "much of the debate is carried on by men." We may note that Wogaman himself and the seven Supreme Court justices who voted for abortion, as well as Hatfield, Lincoln, Jackson, and the two justices who voted against it, are all male. He is evidently concerned about the possibility that passage of the right to life amendment as currently proposed would mean that "abortion would be defined as out-and-out murder," and much of his argumentation seems to be to protect the mother and physician caught in a crisis situation where the mother's life may hang in the balance. However, there ought to be some way to respect his concern short of concurring, as he does, in the Supreme Court decision, which in effect allows abortion on demand at any stage in pregnancy. To contend, as Wogaman does, that abortion must remain legal because, if made illegal, it would continue under uncontrolled circumstances of course proves too much, inasmuch as the same argument might well be used to legalize any criminal behavior in which people persist despite the sanctions of the law. The same may be said of the following point, namely that restrictive abortion legislation in effect discriminates against those who lack the financial means to elude the consequences of the law. The argument that population pressure requires abortion ("Abortion is not the preferable method of birth control but, as a method of last resort, it is indubitably effective,") is of course correct but could be used with equal logic to justify war, extermination camps, and other expedients which, while scarcely "preferable," are also indubitably effective.

Wogaman asks whether Hatfield thinks that by reversing the Court's decision it would be possible to do today what was never possible prior to it, i.e., stop abortions. Presumably this is not the whole question where justice and moral principle are concerned: we seem to be unable to stop war, murder, or highway fatalities, but few would contend that we should therefore permit them on demand.

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He evidently recognizes that the strength of Hatfield's position lies in the contention that the unborn embryo or fetus already has human life, which abortion necessarily destroys. (Interestingly, the Supreme Court's majority, in *Roe v. Wade*, did not contend that the embryo/fetus does not possess human life, but that it is not, prior to viability, capable of meaningful life, *Roe v. Wade*, X.) To give the standard and almost universally held Christian view on the subject, he cites neither a Roman Catholic nor a conservative neo-orthodox theologian such as Karl Barth, but the hero of the "situation ethicists," the German anti-Nazi Dietrich Bonhoeffer, who became a kind of martyr for his Christian convictions, executed by Hitler's police in the last days of World War II: "Destruction of the embryo in the mother's womb is a violation of the right to live which God has bestowed upon this nascent life" (citing Bonhoeffer, *Ethics*, p. 175). Accordingly, as Wogaman notes, Bonhoeffer holds that abortion "is nothing but murder." However, Wogaman believes, Bonhoeffer was involved in an "apparent contradiction," for he did call for responsible birth control. Wogaman does not press the point that abortion offers a means to make good a "failure to be responsible in birth planning," for he admits, "If nature is permitted to pursue its course, then clearly a child, loved by God, will result from most pregnancies whether or not one believes the initial conception to have been a reflection of God's loving purposes." Instead, he asks whether this is equally true "of a conceptus at the very beginning of pregnancy." A curious rhetorical question, for obviously for Wogaman's case the intended answer is "No," but in fact the medically and statistically correct answer is "Yes."

Having granted all these concessions to the historic, Christian conviction that destruction of the unborn is a grievous crime, Wogaman then goes on to make his major point that a "relationship to God" is "the basis for all ultimate human valuation." This point is not "established by conception itself, nor by implantation, nor even by the physical appearance [i.e., birth] of the fetus. Rather, it is established by when the fetus begins to *experience* reality for himself or herself. A new being must be an 'I' in some sense before God can know it as an actual (not simply a potential) 'thou'."

We should note that, apart from Wogaman's subsequent qualifications, this criterion might logically be used to justify the "termination" of the life of the newborn as well as of the unborn, because it has been argued that the fetus does not begin "to *experience* reality for himself or herself" until some time after birth. It should also be observed that Wogaman's contention that God can know the

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fetus as an "actual 'thou' " only at a certain advanced stage in its development says less than the Bible implies in several passages, e.g.: "Thou hast covered me in my mother's womb" Ps. 139:13, cf. ff.; "Before I formed thee in the belly I knew thee; and before thou camest forth out of the womb I sanctified thee, and I ordained thee a prophet unto the nations" (Jer. 1:5). Evidently Wogaman is apprehensive lest his criterion of "experience" be used to justify too much, for he continues, "I am confident that in some rudimentary sense this capacity to experience reality is in being during the last few months before birth. I am equally confident that this is *not* in being during the earliest months of pregnancy—which is the period with which abortion is really concerned. I do not know *any* responsible life scientist or theologian who is prepared to argue that a human being exists with the ability to experience reality from the very beginning of pregnancy." Of course this overlooks the fact that unless one accepts his criterion of capacity to experience reality as the necessary criterion, the point in fetal development at which this capacity can be established is not relevant to the argument about the legitimacy of destroying the embryo. In addition, it is necessary to quarrel with his contention that the "earliest months of pregnancy" are the "period with which abortion is really concerned." It may be that if totally permissive abortion legislation were perpetuated for a number of years, women desiring abortions would, in the overwhelming majority, seek them early. But there can be no doubt that at the present time there are a significant number of late and even "very late" abortions. In any event, the logic of Wogaman's own position is that at least abortions *after* the earliest stages of pregnancy are wrong.

In the final two pages, Wogaman introduces his concern for responsible sexuality, and for "the sanctity of life," and notes that "the changes of laws on abortion and the Supreme Court decision appear too late to be blamed for urban riots and My Lai and Auschwitz." Whether the Court decision might reflect the same mentality exhibited in the examples cited would be a valid and relevant question. In addition, as he correctly notes, "among those supporting the liberalized abortion laws there are pacifists and people who vigorously struggled to end the Vietnam conflict and people who have long struggled for racial and economic justice. Others combine their advocacy of permitting women and their doctors to make this decision with dedicated efforts to humanize our penal institutions and to abolish capital punishment," this to counter the equally valid observation that there are among abortion advocates many who

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otherwise exhibit complete disdain for human life and values. These observations, all of them correct as far as they go, do not seem to change what ought to be the logical implication of Wogaman's suggestion that abortions in the later months of pregnancy are wrong.

Inasmuch as the present state of affairs, created by the Supreme Court decision, effectively permits abortions at any stage in pregnancy, and in view of the fact that this situation can be changed only by a constitutional amendment, it is difficult to understand Wogaman's concluding sentence, "Those of us who concur with the Supreme Court's decision regard it as a landmark of humane spirit and practical reason." Apparently, in order to frustrate what he calls "a theological over-valuing of early embryonic life," he is sadly willing to accept the *ad libitem* destruction of late fetal life, despite the fact that he admits that it exhibits even his own criterion for personhood, i.e., the capacity to experience reality, which is, in his own words, "in being during the last few months before birth."

The Fetus and Personhood

John Warwick Montgomery

AN examination of the biblical concept of the soul² brings us to the conclusion that it is intimately, though not absolutely, connected with the life of the physical body. In general we may regard "soul" as a theological term for the "person"—who, though he exists without his earthly body after physical death, is "clothed" temporarily even in that condition. Evidently, then, to conceive of the "person" apart from any and every "body" is not a biblical mode of thought. So considerable is the importance of the earthly body that one thinks naturally of the intermediate "tabernacle" as having a close enough relation with it to maintain continuity of the total person.

The intimate connection of soul and body in scripture establishes a predisposition against the idea of a divine "superadding" of the soul to an already existent body, but such a possibility cannot be excluded *a priori*, since, as we have seen, the soul and the physical body must be considered ontologically distinct. The question of a possible super-addition of the soul to the fetus requires a brief glance at the venerable conflict between the *creationists* and the *traducianists*.³

"Creationism," or (better) "concreationism," is a theological position held by Pelagius, Peter Lombard, St. Thomas, the Roman Catholic ordinary magisterium (though that Church has never given the position solemn definition), and by most Calvinists. This view affirms that God creates souls *ex nihilo* and supplies them to developing individuals at conception or during the intrauterine period.

Dissent has existed in the creationist camp in regard to the time when God supplies the soul to the developing person: Does this occur at the moment of conception or at a later point? Though St. Thomas, as we have noted, held to the latter viewpoint, the pressure of modern embryological knowledge has pushed creationist theologians more

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and more to the view that the soul is supplied by God when conception itself occurs. When sperm and ovum unite and the two pronuclei fuse, a process commences, governed by the DNA molecular pattern, that fixes the new individual's characteristics—and this occurs prior to the first division of the zygote. The following argument by the director of research at France's Centre National de Recherche Scientifique is typical of the judgments which have influenced creationists to focus their attention on the moment of conception:

This first cell [formed by sperm-and-egg union] is already the embryo of an autonomous living being with individual hereditary patrimony, such that if we knew the nature of the spermatozoid and the chromosomes involved, we could already at that point predict the characteristics of the child, the future color of his hair, and the illnesses to which he would be subject. In his mother's womb, where he will grow, he will not accept everything she brings to him, but only that which is necessary to his existence: thereby he will realize his hereditary patrimony. In that first cell the profound dynamism and the precise direction of life appears. . . . In spite of its fragility and its immense needs, an autonomous and genuinely living being has come into existence. . . . It is rather surprising to see certain physicians speak here of 'potential life' as if the fertilized egg began its real life when it nests in the uterus. Modern biology does not deny the importance of nidation, but it sees it only as a condition—indispensable, to be sure—for the *development* of the embryo and the *continuation* of a life already in existence.⁴

But does not the phenomenon of identical twins demand a later point for the introduction of the soul? Identical twins result—just as does the ordinary single individual—from the fertilization of one ovum by one spermatozoid; but splitting brings about *two* developing embryos with identical hereditary patterns.⁵ Must not the soul therefore enter the picture at the point when the two individuals become truly distinct? And what can be done with the analogous conundrum posted by Ettinger?

Experiment 4. Applying biochemical or microsurgical techniques to a newly fertilized human ovum, we force it to divide and separate, thereby producing identical twins where the undisturbed cell would have developed as a single individual. (Similar experiments have been performed with animals.)

An ordinary individual should probably be said to originate at the "moment" of conception. At any rate, there does not seem to be any other suitable time—certainly not the time of birth, because a Caesarean operation would have produced a living individual as well; and choice of any other stage of development of the foetus would be quite arbitrary.

Our brief, coarse, physical interference has resulted in two lives, two

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individuals, where before there was one. In a sense, we have created one life. Or perhaps we have destroyed one life, and created two, since neither individual is quite the same as the original one would have been.⁶

A minority of Roman Catholic theologians—the most persuasive being Hudeczek—have seen such arguments as definitive support for St. Thomas' mediate animation theory. But a close examination of Hudeczek's case reveals that it stands or falls on the scholastic principle that the soul, as a "rational" or "spiritual" entity, must be indivisible (*simplex*).⁷ Our study of the biblical data on the soul certainly established no such *a priori* principle, and on what other ground could such a principle be asserted definitively? Perhaps the soul is as divisible as is the fertilized egg! If the resultant identical twins show remarkable affinities in appearance, temperament, habits, etc., and if (as we have seen) scripture sets forth an intimate soul-body relationship, perhaps one can as legitimately speak of "twin souls" as of twin bodies!

But as we have found ourselves imperceptibly moving back toward the motif of psycho-physical unity, we have in fact been approaching the domain of the theological traducianists. "Materialistic" traducianism holds either that parents generate from inanimate matter not only the body but also the soul of the child, or that the soul is actually contained in the sperm and conveyed by organic generation. More attractive by far has been "spiritual" traducianism, often called "generationism," which asserts that the soul of the child derives from the souls of the parents. Augustine, in opposing the Pelagians and in his insistence on man's total depravity, held to generationism,⁸ as did Luther and most theologians influenced by him. The Roman Church, while not solemnly defining creationism (as we noted), has seen fit through its ordinary magisterium to condemn both forms of traducianism.⁹

The contemporary orthodox Protestant systematician Mueller is quite right to use the traducianist-creationist dispute as an example of an "open question"—a question "on which the Word of God is silent."¹⁰ In a sense it is a pseudo-problem: a special case of the more general question as to whether the appearance of a new human individual is an act of direct or mediate creation by God. But the conflict is very instructive from the point of view of the abortion question, for we see how, whether more obviously as in traducianism or less obviously in creationism, the point of origin of the individual is pushed backwards in time. For the traducianist, it would be absurd to regard the individual as commencing later than conception, for

even his soul derives from his parents. For most creationists, the moment of conception is the point when the soul is bestowed. Even those theologians who follow Aquinas in his mediate animation theory now argue from the case of identical twins, analysis of which leads directly to the original fertilized egg as supplying what will become the total and identical hereditary constellation of genes and chromosomes for both individuals. Moreover, the Roman Church has long condemned the viewpoint that if one grants that the soul is supplied subsequent to conception, abortion would not be murder. Pope Innocent XI, in a decree of 2 March 1679, condemned this position;¹¹ the encyclical *Casti connubii* (1930) reinforced the Church's unqualified opposition to abortion; and very recently (3 October 1964), Paul VI, in reviewing the doctrine for a group from the New England Obstetrical and Gynecological Society,¹² repeated Pius XII's condemnation of abortion (26 November 1951).¹³

But cannot the force of the embryological evidence be reduced simply by recourse to contemporary philosophical attempts at defining "personhood" functionally? Granted that from the moment of conception everything has been supplied to produce an individual; can it really be said to *be* an individual prior to, say, the onset of its brain functions, or its viability, or its manifestation of rational activity—in short, prior to its genuine *functioning* as a human being? Should we not, with Van Peursen, choose as our starting-point "the whole man in his ordinary, day-to-day conduct, attitudes and decisions. These things are not accretions to the human being who exists in himself *qua* substance (body plus soul), but they are the indispensable essence or core of man, without which he would not be man at all"?¹⁴ If this is the case, abortion could hardly be murder, for the fetus lacks this "indispensable essence or core of man." Glanville Williams suggests brain-functioning as the *point de départ*:

The soul, after all, is frequently associated with the mind, and until the brain is formed there can be no mind. By placing electrodes on the maternal abdomen over the foetal head, electric potentials ("brain waves") are discernible in the seventh month, i.e., shortly before the time of viability. If one were to compromise by taking, say, the beginning of the seventh month as the beginning of legal protection for the foetus, it would practically eliminate the present social problem of abortion.¹⁵

The answer to this is two-fold. First, even from a totally secular viewpoint, the "functionalist" definition of man will not wash. What functions will be regarded as *truly* human—as *sine quibus non* for genuine humanity? Movement? (But what about total paralysis?)

Intelligence? (But what degree of it?) Personhood escapes all such definitional attempts, and the reason appears to be that personality is a transcendent affair: the subjective "I" can never be totally objectified without destroying it.¹⁶ If this is true, then one can hardly look for the origin-point of personhood anywhere other than at the moment when all potentialities necessary for its functioning enter the picture: namely, at conception. To argue otherwise is to become caught inextricably in a maze which would deny true humanity to those who, through organic defect, are incapable of carrying out certain rational activities (e.g., some mental cases). The efforts of the Third Reich "eugenically" to eliminate such "non-humans" should give us no little pause here. Can we say that when a human being on the operating table undergoes suspension of activity he ceases to be human? As long as the native potentiality to function as a human being exists, one must be treated as human and must have his human rights protected.¹⁷ Though the new-born child does little at the time to justify its humanity (except to make an immediate pest of itself), its potentiality to exercise a range of human functions later rightly causes the law to regard its wanton destruction as murder in the full sense; and the same may be said by simple extension for the nonviable fetus.

Theologically, the argument is even stronger. Man is not man because of what he does or accomplishes. He is man because God made him. Though the little child engages in only a limited range of human activities, Jesus used him as the model for the Kingdom¹⁸—evidently because, as one of the "weak things of this world that confound the wise," he illustrates God's grace rather than human works-righteousness. Even the term βρέψος, "unborn child, embryo, infant," is employed in one of the parallel passages relating children to God's Kingdom.¹⁹ The same expression appears in the statement that when Mary visited Elizabeth, the unborn John the Baptist "leaped for joy" in Elizabeth's womb and she was filled with the Holy Spirit.²⁰ Peter parallels the ideal Christian with a βρέψος,²¹ and Paul takes satisfaction that from Timothy's infancy (ἀπὸ βρέψονος) he had had contact with God's revelation.²² Moreover, the Bible regards personal identity as beginning with conception, and one's involvement in the sinful human situation as commencing at that very point: "Behold, I [not "it"] was shapen in iniquity; and in sin did my mother conceive me [not "it"]."²³ For the biblical writers, personhood in the most genuine sense begins no later than conception; subsequent human acts illustrate this personhood, they do not create it. Man *does* because he *is* (not the

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reverse) and he *is* because God brought about his psycho-physical existence in the miracle of conception.

Abortion In Light Of The Christian Ethic

We have now reached the point where ethical judgment can be made on the abortion question. Four considerations warrant the strongest possible emphasis.

1. Abortion is in fact homicide, for it terminates a genuine human life. God's revealed moral law in Holy Scripture, with its high view of the sanctity of life, is an absolute, and therefore to cut off human existence is always an evil, regardless of changing circumstances or "situations."²⁴

2. Nonetheless, it must be clearly seen that Christians have no business "legislating morality" in such a way that their non-Christian neighbors are forced to adhere to laws which create impossible stresses for them. The divorce laws in some countries and in some states of the United States are of such severity that many non-Christians who never contracted their marriage on a proper foundation are forced to greater sin in attempting to circumvent the legislation against divorce. Abortion problems are often analogous: the individual has put himself or herself in a situation where abortion might conceivably be the lesser of evils. Still an evil, definitely, and the law of the land must unflinchingly say so; but the penalties could well reflect the ambiguity of the sinner's condition. As the law recognizes gradations of homicide, it should look with some understanding on abortions where the lesser-of-evils principle unquestionably comes into play. Certainly there is some social difference between an abortion-homicide and the murder of a full member of society, whose life intermeshes with the lives of many others.²⁵ We are not here advocating legal laxity, but we are underscoring a fact often forgotten by Christians, namely that the purpose of a human court of law is not identical with that of the Great Assize.

3. Christians must not, however, tolerate the fallacious argument that the establishment of legal abortion would *per se* constitute a lesser of evils by allegedly eliminating illegal abortions. A recent and careful study of ten years of legal abortion practice in Sweden reached the conclusion that "the frequency of illegal abortions has if anything increased,"²⁶ and recommended that "a more restrictive attitude should be adopted in the evaluation of the grounds for legal abortion."²⁷ The causes of legal abortion stem from much deeper considerations than can be touched through legalizing such operations. As a Planned Parenthood Federation conference on the subject rec-

commended, sensing the underlying moral problems involved: "There should be encouragement . . . of higher standards of sexual conduct and of a greater sense of responsibility toward pregnancy."²⁸

4. The lesser-of-evils principle referred to above can (and frequently does) apply to Christian ethical decisions in abortion cases. The Christian, no less than the non-Christian, lives in an ambiguous and sinful world, where few decisions can be regarded as unqualifiedly good—untainted by evil consequences. Thus the Christian physician may be called on to sacrifice the fetus for the mother, or the mother for the fetus. Decisions in cases like this will be agonizing, but there is no *a priori* way of knowing what to do: given the particular medical problem, the Christian doctor will endeavor with all his skill to cheat the grim reaper to the maximum and bring the greatest good possible out of the given ambiguity.²⁹ And the Protestant, unlike his Roman Catholic confrère, will not casuistically endeavor to "justify" himself through his decisions. Though in particular instances the Protestant may well arrive at the very same action as his Catholic counterpart, he will find his decisions—in which lesser evils still remain evils—driving him continually to the Cross for forgiveness.³⁰ "Abortion" will suggest to him first and foremost the total human drama as well as his own life: an "arrested development" due to neglect of God's creative love—yet wondrously redeemable through the sacrifice of Christ for us all.

The reader will have observed that the author has become convinced of the truly human character of the fetus, and that he has reached this conclusion on the basis both of medical and of theological considerations. The essayist therefore looks with particular severity on the practice of abortion, allowing it only in instances where abortion unquestionably constitutes the lesser of evils. This is in substance the viewpoint held by most theologians, among whom Helmut Thielecke, a leading German Protestant, may serve as an example.

The fetus has its own autonomous life, which, despite all its reciprocal relationship to the maternal organism, is more than a mere part of this organism and possesses a certain independence. . . . These elementary biological facts should be sufficient to establish its status as a human being. . . . This makes it clear that here it is not a question—as it is in the case of contraception—whether a proffered gift can be responsibly accepted, but rather whether an already bestowed gift can be spurned, whether one dares to brush aside the arm of God after this arm has already been outstretched. Therefore here [in abortion] the order of creation is infringed upon in a way that is completely different from that of the case of contraception.³¹

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NOTES

1. **Birth Control and the Christian**, edited by Walter O. Spitzer and Carlyle L. Saylor (Wheaton: Tyndale House, 1969). Copyright 1969 by Tyndale House Publishers. Used by permission.
2. *Ibid.*, pp. 69-75.
3. On the issue, see especially R. Lacroix, *L'origine de l'âme humaine* (Québec, 1945); R. Boigelot, *L'homme et l'univers* (Bruxelles, 1946); C. Fabro, *L'anima* (Roma, 1955; with valuable bibliography); and P. Overhage & Karl Rahner, *Das Problem der Hominisation* (Freiburg i.Br., 1961).
4. Jules Carles, *La fécondation* (5 éd.; Paris: Presses Universitaires de France, 1967), pp. 81-82. Trans. J.A.M.A., Dec. 7, 1970, pp. 1893-4.
5. *Ibid.*, pp. 86-90. See also *L' hérédité humaine* by Jean Rostand of the Académie Française (7 éd.; Paris: Presses Universitaires de France, 1966), pp. 9-11.
6. Robert C.W. Ettinger, *The Prospect of Immortality* (Garden City, New York: Doubleday, 1964), p. 132. I have discussed the central thesis of Ettinger's book in my article, "Cryonics and Orthodoxy," *Christianity Today*, XII (May 10, 1968), 816.
7. M. Hudeczek, "De tempore animationis foetus humani secundum Embryologiam hodiernam," *Angelicum* (Roma), XXIX (1952), 162-81 (especially p. 175).
8. Augustine, *Epist.*, 166.8.25-26; 190.4.14-15.
9. See P.B.T. Bilaniuk, "Creationism," *New Catholic Encyclopedia*, IV (New York, 1967), 428-29; Traducianism," *ibid.*, XIV, 230.
10. J. Theodore Mueller, *Christian Dogmatics* (St. Louis, Missouri: Concordia, 1934), p. 58.
11. Condemned was the following proposition: "Videtur probabile omnem foetum (quamdiu in utero est) carere anima rationali et tunc primum incipere eandem habere, cum paritur: ac consequenter dicendum erit, in nullo abortu homicidium committi" (Denzinger, *Enchiridion*, § 1052).
12. *Pope Speaks*, X (1964), 1.
13. *Discorsi e radio messaggi di Sua Santità Pio XII*, 13.415. The the papal bull *Apostolicae sedis* (12 October 1869), the canon law penalty of excommunication was levied against those persons responsible for procuring abortions of nonviable fetuses.
14. C.A. Van Peursen, *Body, Soul, Spirit: A Survey of the Body-Mind Problem*, trans. from the Dutch by H.H. Hoskins (London: Oxford University Press, 1966), p. 181 (cf. pp. 188, 193-94).
15. Glanville Williams, *The Sanctity of Life and the Criminal Law* (London: Faber & Faber, 1958), p. 210.
16. See my treatment of the "irreducible I" in "The Theologian's Craft: A Discussion of Theory Formation and Theory Testing in Theology," *American Scientific Affiliation Journal*, XVIII (September, 1966), 74.
17. The legal practice of "ascription of rights" well illustrates this point (see especially the writings of H.L.A. Hart): though the fetus cannot defend himself in court (any more than an infant can), society ascribes genuine legal rights to him and seeks to uphold them.
18. Mt. 19:13-15; Mark 10:13-16.
19. Luke 18:15.
20. Luke 1:41, 44.
21. I Pet. 2:2.
22. II Tim. 3:15.
23. Ps. 51:5.
24. The most effective presentation of this viewpoint in all its aspects is, in this writer's judgment, *Le respect de la vie* (Paris: Beauchesne, 1963), by the eminent French medical scientist Paul Chauchard. Cf. also Rousas J. Rushdoony, "Abortion," *The Encyclopedia of Christianity*, ed. Edwin H. Palmer, I (Wilmington, Delaware: National Foundation for Christian Education, 1964), 20-23.
25. The following judgment is admittedly overdrawn, but is there not some truth in it? "In comparison with other cases of murder, a minimum of harm is done by it [abortion] . . . The victim's mind is not sufficiently developed to enable it to suffer from the contemplation of approaching suffering or death. It is incapable of feeling fear or terror. Nor is its consciousness sufficiently developed to enable it to suffer from pain in appreciable degree.

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Its loss leaves no gap in any family circle, deprives no children of their breadwinner or their mother, no human being of a friend, helper or companion. The crime diffuses no sense of insecurity. No one feels a whit less safe because the crime has been committed. It is a racial crime, purely and solely. Its ill effect is not on society as it is, but in striking at the provision of future citizens, to take the place of those who are growing old; and by whose loss in the course of nature, the community must dwindle and die out, unless it is replenished by the birth and upbringing of children" (Charles Mercier, *Crime and Insanity* [London, 1911], pp. 212-213).

26. Per Arén, *On Legal Abortion in Sweden: Tentative Evaluation of Justification of Frequency during Last Decade* ("Acta Obstetricia et Gynecologica Scandinavica," Vol. XXXVII, Supp. 1; Lund, 1958), p. 62.

27. *Ibid.*, p. 70.

28. Mary S. Calderone (ed.), *Abortion in the United States* (New York: Hoeber-Harper, 1958), p. 183.

29. It is perhaps well to note that even for Protestant Christians (such as this writer) who are members of communions where infant baptism holds a place of great theological importance, the baptism issue does not automatically place the unborn child's welfare above the mother's. No possible interpretation of Scripture can yield the belief that children who die without baptism are ipso facto consigned to hell or to a "limbo" state, and even the most "orthodox" of Lutheran theologians (e.g., Martin Chemnitz) made this perfectly clear; the destiny of such a child, though beyond human ken (as is, note well, the specific destiny of every individual, old or young—Mt. 25:31-46), rests in the hands of the Father of all mercies. As Augustine and Luther rightly maintained: *Contemptus sacramenti damnat, non privatio*. Thus the Christian physician must not decide a question of physical life or death on the basis of the unknown quantity of a given individual's ultimate personal salvation. (Cf. Mueller, *op. cit.* [in note 10 above], pp. 499-500).

30. A point well made by George Forell in his writings on the Protestant social and individual ethic.

31. Helmut Thielecke, *The Ethics of Sex* (New York: Harper, 1964), pp. 227-28.

A Human Life Amendment: What Would It Mean?

Robert M. Byrn

WE ARE HERE concerned with the "secondary effects" of the several constitutional amendments which have been proposed in response to the Supreme Court's abortion decisions of January 22, 1973.* There are, as I understand it, two types of amendments:

(a) the so-called "States Rights Amendments" which purport to invest in the legislative process the power to regulate, permit or prohibit abortion, and

(b) the Human Life Amendments (Senate Joint Resolutions 6, 10, and 11**) the purposes of which are 1.) to assure Fourteenth and Fifth Amendment personhood, *vis à vis* the right to live, to unborn children and to other unwanted human beings who might be endangered by the jurisprudence of *Roe v. Wade* and 2.) to protect against the exclusion of the lives of any class of human beings, *qua* class, from the protection of the law which in this context will almost invariably mean the criminal law. (The fundamental goal of a Penal Code is that "the people . . . may be secure in their persons, property, and other interests . . ."¹).)

*The author has dealt with some of these matters at length in two law review articles: *An American Tragedy: The Supreme Court on Abortion*, 41 *Fordham L. Rev.* 807 (1973), an examination of the historical, legal and constitutional errors in the abortion decisions, and their implications in such areas as compulsory abortion and involuntary euthanasia; *The Abortion Amendments: Policy in the Light of Precedent*, 18 *St. Louis L.J.* 380 (1974) which reviews the scientific evidence supporting the conclusion that every unborn child is a live human being from conception.

**The complete texts of these three S.J.R.'s are reprinted in Appendix A in this issue.

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It must be remembered that the Human Life Amendments are concerned with the fundamental right to live and with the protection of that right against deliberate invasion. There is no intent to intrude upon other areas of the law nor do I see how a rational reading of the Amendments can unearth a different intent.

Motivated by genuine concern, some have asked probing questions about the effects of the Amendments and these questions deserve answers. However, others in the public forum have seemed less interested in genuine dialogue than they are in conjuring up surrealistic spectres of a breakdown in the legal system. Although I trust the common sense discretion of the Congress to demand some colorable basis in law for these flimsy spectres, nevertheless we deal here with a matter of life and death. The seriousness of this responsibility has led me to attempt (comprehensively, I hope) to cover both the real and the surreal.

Since I am a lawyer, my interest is in the legal and jurisprudential implications of the Amendments. I leave the battle of statistics to the statisticians.

With the above in mind, I will undertake to pose and answer a number of questions on the effects of the Amendments.

I. What will be the effect of a "States Rights" Amendment?

A "States Rights" Amendment can reasonably be expected to produce the following:

A. *Uncertainty as to the right of state legislatures to enact restrictive abortion laws.* According to *Roe v. Wade*, Due Process in the Fourteenth Amendment includes the right to abort, and states may not restrict that right for the benefit of the unborn child, at least until after viability, because the unborn child has no fundamental right to live. A States Rights Amendment does not purport to recognize any right in the child; it merely removes a federal constitutional inhibition from certain governmental conduct. In other words, the basic holding in *Wade* that the unborn child has no fundamental right to live would be untouched. Further, a States Rights Amendment does not purport to amend the Due Process Clause in state constitutions. Thus, *Wade* would remain the law of the land to this extent: let us suppose that a States Rights Amendment has been ratified. State X enacts a restrictive abortion law; the law is challenged in the appropriate court of State X as violative of the Due Process Clause in that state's constitution; the court casts about for precedent on the meaning of Due Process in this context; it lights upon the most authoritative decision

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—*Roe v. Wade*; the court notes that the subsequently enacted States Rights Amendment did not create a federal constitutional right of unborn children to live, nor did it amend the State X's constitution. Thus the court on the persuasive authority of *Wade* declares State X's restrictive abortion law unconstitutional. What has been accomplished?

The outcome I have suggested is not unreasonable. Nor would the addition to the amendment of an acknowledgment that the unborn child is a human being necessarily produce a different result. In declaring Wisconsin's abortion statute unconstitutional, the court in *Babitz v. McCann*² stated: "For the purposes of this decision, we think it is sufficient to conclude that the mother's interests [privacy] are superior to that of an unquickened embryo, whether the embryo is mere protoplasm as the plaintiff contends, or a human being, as the Wisconsin Statute declares." Might not the court in State X reach the same result?

At the very least, there exists a reasonable doubt whether a States Rights Amendment will assure to state legislatures the right to enact restrictive abortion laws.

B. A cheapening of human life: The ultimate issue in the abortion debate has always been whether the law should recognize that the unborn child has a right to live which is superior to competing claims involving values less than life itself. Constitutional purists may argue whether a state has a right to restrict abortion in the same way that it may restrict hunting animals, but the participants in the abortion debate have not spoken on this level. The focus has been on human life. Were it otherwise, one sincerely doubts that this Subcommittee would be holding hearings. Thus any amendment proposed by this Subcommittee will be taken as a judgment on the central issue: the value of human life.

A States Rights Amendment, in effect, recognizes that an unborn child is a human being, but denies that the child has a fundamental right to live. Yet few would deny that the right to life is of constitutional dimension:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities. . . . One's right to life. . . . depend(s) on the outcome of no elections."³

"One might fairly say of the Bill of Rights in general, and the Due Process clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency

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and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.”⁴

On its face, a States Rights Amendment puts that “fragile value of a vulnerable citizenry,” the right to live, at the perpetual mercy of shifting legislative majorities (rather than “beyond the reach of majorities”) and makes it dependent upon the outcome of bitter political campaigns (although it ought “depend on the outcome of no elections”). Prof. John T. Noonan has written, “The worst of the consequences of *Roe* and *Doe* is the acceptance of the principle that law can say who is not a human being.”⁵ Perhaps the worst is yet to come: a States Rights Amendment which expounds the principle that some human beings are not human persons—that they do not possess a fundamental right to live.

Consider the cheapening effect on human life. A restrictive abortion law, avowedly intended to protect human life, might be enacted in one state legislative session and repealed in the next as the composition of the legislature changes—and so on *ad infinitum*. One official, a governor exercising a veto, might deny the right to live to hundreds of thousands. State A might severely restrict abortion in response to claims that the unborn child is a human being with a human right to live. Neighboring State B might be the abortion capital of the world. The right to life would predictably become a political tennis ball. Life and the laws governing its protection would be cheapened.

C. *Political agony*. At least the Supreme Court in *Wade*, by inventing a “right” to abort, pleased one side of the abortion debate. A States Rights Amendment will please no one. For the foreseeable future abortion would be the central issue in state political campaigns. On the most pragmatic of levels, state lawmakers must live in terror of a States Rights Amendment. What legislator wants to face abortion as a campaign issue *in perpetuity*!

Frankly I believe that this Subcommittee would be engaging in an exercise in futility were it to propose a States Rights Amendment. The Amendment would have no chance of ratification. No one wants it. To propose a hopeless Amendment might seem a politically expedient way out, but I am convinced from the history of these hearings that this is not what the Subcommittee seeks.

The abortion issue will be resolved only when the people are given the opportunity to decide whether all human beings have a constitutionally protected right to live. Only a Human Life Amendment presents that choice.

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II. Will a Human Life Amendment, (a) framed in terms of the Fifth and Fourteenth Amendments and (b) restricted to the right to live, cause "chaos" in constitutional, property, tort, and social welfare law?

A. Restriction to the right to live.

Given the purpose of a Human Life Amendment, it makes sense to restrict the Amendment to the right to live inherent in the guarantees of the Fifth and Fourteenth Amendments. With respect to unborn children, the right to live would include the right to be free of aggressive human experimentation. A famous New York decision concludes that "This guarantee is not construed in any narrow or technical sense. The right to life may be invaded without its destruction . . . the right to life includes the right of an individual to his body in its completeness and without dismemberment."⁶ Any medical experimentation on the unborn child, not intended for the medical benefit of that child, would clearly violate the child's right to live—to the completeness of his body—within *Bertholf*. In no way does this interpretation give the unborn child more rights than his after-born counterparts. Modern law generally prohibits the performance of medical procedures upon a child or other person deemed incompetent of consent unless the procedures are for the medical benefit of that person.

B. The unborn's tort and property rights will not be diminished.

Where the rights of the unborn child were at stake, the law prior to *Roe v. Wade* was completing a process of universal evolution toward full protection of these rights.⁷ Typically this evolutionary process occurred in an orderly way in the states by court decision and legislative enactment. The Supreme Court in *Wade* saw no inconsistency between its holding that the unborn is a nonperson and the already evolved tort and property rights of the child. It is difficult to see, therefore, how limiting a Human Life Amendment to the right to live will in any way *diminish* these rights or prevent their further evolution.

Finally, there is constitutional precedent for limiting the constitutional rights of the unborn (outside the basic guarantee of the right to live) while at the same time recognizing their legal personhood in other areas of the law. In *Montana v. Rogers*,⁸ plaintiff argued that though he was born outside the United States, he was nevertheless a citizen because he was conceived within the United States. The Court of Appeals held (278 F. 2d at 72):

Whatever rights may accrue to an unborn child by the operation of the

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common law and by statute, it is clear that the Fourteenth Amendment limits citizenship to persons "born . . . in the United States."

Why also may not the Human Life Amendment now be limited to the unborn child's right to live "whatever rights may accrue to an unborn child by the operation of the common law and by statute . . .", and without diminishing these rights in any way?

C. No expansion of the unborn's tort and property rights will be mandated.

The Fifth and Fourteenth Amendments speak of "life, liberty or property." The Human Life Amendment speaks only of life. The Amendment will not mandate a change in *property law*.

With respect to *tort law*, it has been claimed that a Human Life Amendment will mandate a personal injury action in favor of the unborn child *while still in the womb*, and the problems of proof would be insurmountable.

The premise is specious. The spectre is surrealistic.

There is no inconsistency between legal personhood and the denial of a tort cause of action because of uncertainty in proof. More specifically, it has been held that the denial of a tort action for intra-uterine injuries unless and until the injured child is born alive is not a denial that the unborn child is a being *in esse* to whom legal duties are owed. Rather it is based on difficulties in proof.⁹

It is true that in the past opponents of permissive abortion have argued that if the unborn is a legal person in tort law, instinct as it is with pragmatism, he must also be a legal person under the principled guarantee of life in the Fourteenth Amendment. That the argument is valid does not mean that its converse must also be true. A guarantee of the right to life in a Human Life Amendment will not wipe out of tort law such pragmatic considerations as uncertainty of proof and expediency in the distribution of risk of loss. The Human Life Amendment will mandate no change in tort law.

D. No disruption of constitutional law (e.g., the decennial census and legislative apportionment) will occur.

The Human Life Amendment sets out to redefine the word "person" only as that word is used in the Fifth and Fourteenth Amendments. To the extent that that "person" in other Articles of the United States Constitution has not heretofore included unborn children, it will not include them after ratification of the Human Life Amendment. For instance, Article I, Section II provides for a decennial census. Unborn children have not heretofore been counted in the census. Since the Human Life Amendment does not purport to amend the

meaning of "person" in Article I, unborn children will still not be counted in the census after ratification. Similarly, apportionment of the House of Representatives (Article I, Section II; Amendment XIV, section II) is ultimately founded upon Article I. Hence, Congressional apportionment will be unaffected.

Further, the Human Life Amendment is limited to the right to life. The propriety of legislative apportionment within the states is determined by "the right of suffrage," as that right is protected by the Equal Protection Clause, not by the right to life. Thus neither the apportionment of the House of Representatives nor of state legislative bodies will in any way be affected by a Human Life Amendment.

Finally, it is to be noted that for purposes of some rights, corporations are persons within Section I of the Fourteenth Amendment. They are not counted in a census or figured into legislative apportionment.

The census and reapportionment objections, as well as other claims of disruption in constitutional law, are frivolous.

E. Reforms of social welfare will be facilitated.

Passage of a Human Life Amendment will facilitate reforms of social welfare law in the following ways:

1. *Removal of coercion to abort, and restoration of legislative discretion in the equitable and humane disbursement of public assistance funds.* Following *Roe v. Wade*, the social engineers of the abortion movement began a campaign to coerce public and private hospitals to open up their doors to abortionists. While they have been unsuccessful as to the latter, most cases now require public general hospitals to make their facilities available for the performance of abortion. In New York, while municipal hospitals were operating efficient abortatoria, people were dying because of a lack of adequate facilities and personnel on other hospital services, the reason being (according to a director of the corporation that runs the municipal hospitals) that much needed funds were being used for abortions.

As a corollary to the coercion on hospitals, arguments are now being made that Congress cannot constitutionally exclude abortions from medical welfare legislation and that unborn children are not properly includable in programs for Aid to Families with Dependent Children.

It is to be noted that in general there is no separate constitutional right to public welfare. A Human Life Amendment, restricted to the right to live, will not create such a constitutional right. Thus, the Human Life Amendment will remove the coercive effect of *Roe v. Wade* and restore to legislatures the discretion to disburse public assistance funds in an equitable and humane manner.

2. *Decline in the bias against the children of the poor.* In an action testing the constitutionality of New York's permissive abortion law, in which I was involved as guardian of certain unborn children, an *amicus* brief was filed in support of the law on behalf of certain prestigious private agencies. The *amici* commented that New York's permissive law had "accomplished its beneficent purposes." Among the accomplished purposes was:¹⁰

"Similarly, it appears that discrimination against the poor and non-white has been substantially eliminated. Thus, in New York City in 1960/1961 the ratio of therapeutic abortions per 1,000 deliveries was 2.6 for white women, .5 for Negro women, and .1 for Puerto Rican women . . . During the first nine months under the new law, abortions were performed on New York City residents at the rate of less than 3 for every 10 live births among the City's Puerto Rican community, 4 for every 10 live births among whites, and about 6 for every 10 live births among blacks . . ."

One wonders why it is "discrimination" when the ratio of government-approved abortions is higher for whites than for blacks and "benificent" when it is higher for blacks than for whites—when the lives of six unborn black children are deliberately aborted for every ten black children who are born alive. Recently an influential columnist (Harriet Van Horne, *An Anti-Life Verdict*, N.Y. Post, 2/17/75 p. 20.) exalted abortion as "A kind of surgery, moreover, that many Americans accept as socially constructive in a nation that cannot feed its populace and is running out of vital nonrenewable resources." She continued:

"The cost of maintaining the children of the poor comes to well over \$1 billion a year. The number of children on welfare rolls has tripled in the past ten years. The poor of Chicago have had, for many years, a birth rate almost on a par with that of India. We have long since exceeded our optimum minimum population. Poor families breed more promiscuously than affluent families.

If we care about the quality of life, if we recognize that today's unwanted children are too often tomorrow's criminals, addicts and public charges, we'll encourage birth control and—when a woman requests it—abortion."

Ashley Montagu and Garret Hardin have written the bottom line to this bias against the children of the poor: "I consider it a crime against humanity to bring a child into the world . . . who itself menaces . . . the quality of the society into which it was born." (Letter from Ashley Montagu to the N.Y. Times, Mar. 9, 1967, p. 38.); "If the total circumstances are such that the child born at a particular time and under particular circumstances will not receive a fair shake

in life, then she [the mother] should know . . . that she has no right to continue the pregnancy It may seem a rather cold hearted thing to say, but we should make abortions available to keep down our taxes, but let us not hesitate to say this if such a statement will move legislators to do what they should do anyway In this field, as in so many others, economic interest and ethical interest fortunately coincide." (Garret Hardin, quoted in N.Y. Times, May 12, 1969, p. 66).

As Grace Olivarez wrote in her separate statement appended to the report of the Commission on Population Growth, "The poor cry out for justice and equality and we respond with legalized abortion."

One is also given pause to question statistics on reduced maternal mortality rates among the poor. For instance:

1. Should we not include in the mortality and morbidity statistics the poor who have suffered and died in municipal hospitals because funds, which should have been used for lifesaving, were used for abortion?

2. Should we not ask why, for many months after New York's permissive abortion law became effective in July, 1970, subway placards advertised the advisability, from a health standpoint, of early abortion, while no placards advertised the availability to the poor of ordinary health services including early prenatal care?*

With the enactment of a Human Life Amendment, with its facial emphasis on the inestimable value of a human life at its common-denominator level, we can look forward to an increased awareness of our moral obligation to the most vulnerable members of society—the unborn children of the poor. Saving these lives—not killing them—is what "benificent" is all about.

III. Will not all illegal abortion become murder in the first degree?

The question assumes that any legislative grading which results in a variation in punishment among intentional homicides runs afoul of the Equal Protection Clause of the Fourteenth Amendment.

The assumption is wrong. A distinction must be made between the complete exclusion of the lives of a class of persons, *qua* class, from the law's protection, and an informed legislative judgment on the appropriate punishment for particular offenders or families of offenses.

*It was many months before posters appeared urging early prenatal care for poor pregnant women. Maternal mortality is highest among the poor who lack the facilities and funds for good medical care and frequently underutilize the services available to them. See Report of the National Commission on Civil Disorders 269-72 (Bantam ed. 1968).

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The former would be inconsistent with the Equal Protection Clause. It would represent a legislative judgment that a whole class of human beings are nonpersons—contrary to the dictates of the Human Life Amendment. The latter would not. The purpose of a Human Life Amendment is not to legislate degrees of homicide, nor will that be its effect.*

A valid legislative judgment on the degree of punishment for illegal abortion may be based on a variety of factors:

1. *The degree of malice.* The law recognizes “degrees of evil” and “a state is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment.”¹¹ Killing an unborn child may, in legislative judgment, involve less personal malice than killing a child after birth, and a legislature may choose to downgrade the punishment accordingly. Certainly there is precedent for it. At various times, state courts have spoken of the right to life of the unborn child as “sacred and unalienable,” (*State v. Moore*, 25 Iowa 128, 135-36 1868; *People v. Sessions*, 56 Mich. 594, 596, 26 N.W. 291, 293 1886; *Gleitman v. Cosgrave*, 49 N.J. 22, 30-31, 227 A. 2d 689, 693 1967) or as entitled “to the same protection as that guaranteed to human beings in extra-uterine life,” (*Trent v. State*, 15 Ala. App. 485, 73 So. 834, 836 1916, *cert. denied*, 198 Ala. 695, 73 So. 1022 1917). It is evident from the language in each of these cases, that the courts considered the lives of the unborn children to be as valuable as afterborn lives. Yet in no instance did the contemporary state abortion statute categorize abortion as murder in the first degree. There is no reason why a Human Life Amendment, reaffirming the judgment of these courts on the sacredness, unalienability and entitlement to protection of the lives of unborn children, should now result in a mandatory categorization of abortion as murder in the first degree.**

Additional precedent for legislative grading of intentional homicides on the basis of malice may be found in statutes outside the abortion field such as the New York statute which labels aiding and abetting a suicide as murder unless it is done without the use of duress

*But the amendment cannot be circumvented by enactment of farcical, grossly disproportionate and obviously inadequate penalties. If, for instance, a fine were the only statutory penalty for illegal abortion, a strong argument might be made that the fine was no more than tax and provided no protection at all.

**Legislatures might also validly find different degrees of malice in abortions occurring at different times in pregnancy, e.g., an abortion in the eighth week vs. an abortion in the twenty-sixth week. However, the complete exclusion from criminality of early abortions would be the exclusion of the lives of an entire class, qua class, from the law's protection.

or deception in which case it is manslaughter in the second degree. Here again there is a differentiation in the degree of malice.* Similar to the suicide gradation is an intentional homicide committed under the influence of extreme emotional distress. It too may be lower in degree than other homicides on the basis of lesser malice.

It is to be noted that in each of these cases, the legislative judgment to downgrade the crime from the highest degree of homicide is not grounded in any finding that the victims or class of victims are less than human persons which would be the case if a class were totally excluded from the law's protection. It is based on the varying degrees of malice typical to the different situations. Any argument that a legislature may not make such a judgment—that all intentional killings must be treated alike regardless of the state of mind of the killer—is a regressive and reactionary return to the barbarous days of the criminal law.**

2. *The degree of empathy.* It has not been unusual in the past to downgrade certain homicide offenses because of the empathy which the jury predictably feels for the plight of the offender. The jury might be unwilling to convict of a higher degree of the crime but would convict of a lesser degree. This is so even though the downgrading results in different punishment for offenders who, from the point of view of their victims' personhood and their own *mens rea*, are equally guilty. Illustrative of such statutes are those which punish vehicular homicides less severely than other culpably negligent homicides.¹²

Given the pressures that frequently surround the decision to abort,

*Obviously a person could aid and abet a suicide, without duress or deception, and yet be actuated by the basest of motives. Under such circumstances, he would still be guilty only of manslaughter in the second degree. Nevertheless the legislature has made an overall judgment that the absence of duress or deception is a useful way of distinguishing the degree of malice. So also an abortion may be performed out of the basest motives, but the legislature may choose birth as a useful, overall dividing line in grading the crime on the basis of malice. In short, the legislature makes a judgment on the degree of malice typical to "a family of offenses." In this respect "abstract symmetry" is not required. *Skinner v. Oklahoma*, supra, 316 U.S. at 540.

**In *Skinner v. Oklahoma*, supra, the Supreme Court struck down, as a denial of the equal protection of the laws, a statute which provided for the sterilization of felons convicted of some, but not all, types of theft offenses. It is clear that the court had no objection to gradation of punishment as such: "Thus, if we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised." 316 U.S. at 540. Rather its objection was to sterilization. See *id.* at 541; *La Fave & Scott, Criminal Law* 134 (1972). As noted above, the general principles expounded in *Skinner* refute any argument that illegal abortions would of necessity become murder in the first degree under a Human Life Amendment.

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a legislature may determine that a jury would typically be unwilling to convict the offender of the highest degree of homicide. As in the case of vehicular homicide, the crime may be downgraded. Neither the legislative downgrading nor the jury's unwillingness to convict of a higher degree signify an approval of the crime or a devaluation of the victim. They are merely expressions of empathy for (but not total toleration of) certain offenders.

3. *The requirement of community security.* Legislatures may decide that the security and basic order of the community demand that some intentional homicides be punished more severely than others. This is true even though the victims are all Constitutional persons and the offenders are all equally malicious. For instance might not a legislature validly determine that the intentional killing of a police officer in the course of his duties should be punished as murder in the first degree while other homicides are downgraded? Might not a legislature make a similar determination with respect of distinguishing between the killing of prenatal and postnatal persons?

For all of the above reasons, abortion would not have to be categorized as murder in the first degree under a Human Life Amendment. Again it must be pointed out, however, that there is a fundamental, generic difference between the validity of downgrading a crime for any of these reasons and the invalidity of totally removing an entire class of human persons from the law's protection.

IV. Will not every other culpable killing of an unborn child by a third person result necessarily in a conviction of that third person of some degree of homicide?

I would refer back to the purposes of a Human Life Amendment and the discretion possessed by legislatures to enact criminal laws consistent with these purposes. In view of the purposes and the discretion, it is clear that legislatures will retain the ultimate power to decide whether to incriminate culpable killings of unborn children where the failure to incriminate will not result in a denial of the law's protection. Whether it be felony murder, involuntary manslaughter (negligence), an assault on a pregnant woman, or any other crime which might result in the death of an unborn child, the protection that the law affords the pregnant woman and to society in general will devolve upon the child. A felon, a reckless driver, or an assailant of a pregnant woman is guilty of a crime whether or not he is punished for the resulting death of the unborn child. The unborn child is protected by the umbrella of the predicate crime. Thus the determination of whether to incriminate the death of the child in such cases involves no issue of a denial of the law's protection to the lives of an

entire class. Such, of course, is not the case with legalized abortion.

V. Will a Human Life Amendment have the effect of enacting into law sectarian religious dogma?

The better view of the history of abortion in Anglo-American criminal law is this: Relying on contemporary science to determine when a new human life begins, the law has sought to protect life, *qua* human being, from the first moment of its biological existence. In the early criminal law, that moment was taken to be quickening because contemporary science, with knowledge that it then possessed, could not assure the law that a living human being existed prior to the time that the child was felt to move. Even then, abortion after quickening was not homicide unless the child were born alive and then died because in the event of a stillbirth it was practically impossible to prove that the abortion had caused the death. As science progressed, it was ascertained that human life begins at the moment of conception. The law then sought ways to protect unborn children prior to quickening—even prior to the earliest time that an accurate pregnancy test could be performed. Ultimately, this protection was accomplished by incriminating conduct intended to produce an abortion without requiring that the woman be pregnant.¹³

Before the abortion movement of the nineteen-sixties, the law's approach to abortion had been an interdisciplinary mix of the secular, scientific identification of the biological beginning of the life of a new human being with an overall jurisprudential judgment on the inestimable value of human life, as human, as its common-denominator level.

Some would prefer to recast this secular-jurisprudential rationale of the unborn child's right to live into one of religious sectarianism. Obviously the deliberate destruction of innocent human life has overtones that are of religious concern. However, the matter is also of vital secular concern. This was clear at Nuremberg. In one of the Nuremberg military trials, the indictment charged, *inter alia*, that "Eastern Women workers were induced or forced to undergo abortions."¹⁴ But the rights of unborn children also entered the case. The prosecution introduced into evidence a captured German document (dated October 30, 1943) which commented on the "objections of a minority of reactionary Catholic physicians" to the decree on interruption of pregnancy of female Eastern workers and female Poles. First among the doctors' objections was that "the decree was not in accordance with the moral obligation of a physician to preserve life." The relevance of the document became clear in the prosecutor's

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closing brief. In addition to arguing that Eastern women had been denied the law's protection by being encouraged or even forced to undergo abortions, the prosecution urged, "*But protection of the law was denied to unborn children* of Russian and Polish women in Nazi Germany." (Emphasis added.) Note that the reference is to *the denial of the rights of the children* themselves. Unless the unborn children were human persons, the American prosecutor, arguing before a court of American judges, would have limited his brief to the violation of the rights of the women, since only "persons" are entitled to the equal protection of the laws. Unborn children were considered to be human persons at Nuremberg. The objection of the Catholic physicians that the abortion decree violated "the moral obligation of a physician to preserve life" was translated into the broader, legal objection that "protection of the law was denied to unborn children . . ." The prosecutor's point was no less valid because it had previously been made in moral terms by physicians whose objections the German government had dismissed with such pejorative labels as "Catholic" and "reactionary."

A law which has a valid secular purpose will not be struck down because it coincidentally embraces the theology of a particular religious sect.¹⁵ Further, as the Nuremberg abortion trial teaches us, a moral principle may have a legal counterpart. American law is not devoid of conscience.

Respect for the fundamental right to live is not the exclusive property of any single religious sect. Nor can the vital, secular-jurisprudential concerns of a Human Life Amendment be distorted by charges of sectarianism.

VI. How will a Human Life Amendment affect an abortion to prevent the death of the pregnant woman?

S.J.R. 6 does not provide for an exception for maternal lifesaving abortions. S.J.R. 10 and 11 do so provide, but in differing language. Several questions arise.

A. Will an exception clause, limited to maternal lifesaving abortions, cheapen human life?

The right to life we speak of is the American jurisprudential ideal of the fundamental sanctity and equality of human life at its common-denominator level. There is no inconsistency between that ideal and a maternal lifesaving exception to illegal abortion. Neither the ideal nor human life itself will be cheapened by including the exception in a Human Life Amendment.

1. *The fundamental sanctity of life.*

The American ideal of the fundamental sanctity of life and a maternal lifesaving exception have coexisted in our law since the first abortion statutes were enacted. Consider:

Alabama: In *Trent v. State*, the Court, in expounding the purpose of Alabama's abortion statute asked rhetorically "[D]oes not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?" Even though the Alabama abortion statute contained an exception for an abortion "necessary to preserve her life," the Court viewed the unborn child as a legal person entitled to the same protection as his extrauterine counterpart.

Iowa: In *State v. Moore*, the Court, speaking of the unborn child, stated, "The right to life and to personal safety is not only sacred in the estimation of the common law, but it is inalienable." It is true that the abortion in *Moore* occurred after quickening but no mention is made of that fact in the opinion, and the Court was obviously speaking of the "sacred" and "inalienable" right to life of all unborn children. The Iowa abortion statute, in force at the time, permitted an abortion "necessary to preserve the life of such woman."

Michigan: Referring to the unborn child, the Court in *People v. Sessions*, stated, "At common law life is not only sacred but is inalienable. To attempt to produce an abortion or miscarriage, except when necessary to save the life of the mother under advice of medical men, is an unlawful act and has always been regarded as fatal to the child and dangerous to the mother." Obviously, the Court saw no inconsistency between the "sacred" and "inalienable" right to life of the child and a maternal lifesaving abortion. The Michigan statute at the time contained an exception for such abortion.

New Jersey: In *Gleitman v. Cosgrove*, plaintiffs husband, wife and child sought damages from two doctors who had attended Mrs. Gleitman during her pregnancy. The Gleitmans alleged that their child had been born with grave defects after the doctors had negligently failed to warn them that an attack of German measles suffered by the mother during pregnancy might result in birth defects. The failure to give the warning, it was alleged, deprived the family of the opportunity of terminating the pregnancy. In affirming the dismissal of the complaint, the majority of the court emphasized the primacy of the child's right to live while at the same time recognizing that a different question would be presented if the pregnancy had threatened the mother's life:

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"The right to life is inalienable in our society. . . . We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life to support a remedy in tort."

The New Jersey abortion statute, in force when *Gleitman* was decided, forbade abortions performed "maliciously or without lawful justification," but the phrase was interpreted to be confined to an exception to preserve the mother's life.

It must be clear from the Iowa (1868), Michigan (1886), Alabama (1916), and New Jersey (1967) decisions and statutes that the American ideal of the sanctity of life and a maternal lifesaving exception have never been regarded as inconsistent.

2. *The fundamental equality of life.*

A maternal lifesaving exception is not inconsistent with the American ideal of the fundamental equality of human life at its common-denominator level. The exception can be justified at law under the doctrine of "legal necessity" which applies equally to afterborn persons.

B. *Would other exceptions be consistent with the right to life?*

Any exceptions beyond maternal lifesaving are inconsistent with the American ideal of the value of human life.

When one aborts to prevent maternal death, he acts to save life; the life of the child is not subordinated to a lesser value than life itself, and typically there is regret at the life lost. Other abortions are, for all practical purposes, intended to preserve mental tranquility; there is no parity of values, and most frequently the true intent is to kill a burdensome life. Furthermore, how is one to justify exceptions (beyond lifesaving) in certain instances and not others? Mental tranquility will vary from woman to woman. Woman X might be much more disturbed by the prospect of having to interrupt her postgraduate university education because of a pregnancy due to contraceptive failure than Woman Y whose unborn child has been diagnosed as defective. How can one justify an exception for Woman Y and not for Woman X? Moreover, might not Woman Y, in a given situation, be more disturbed than Woman Z who has become pregnant as the result of rape? Under these circumstances, can an abortion be justified for Woman Z and not for Woman Y?

It is to be noted that in all three cases an innocent child will be killed

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by the abortion. In no sense, even in the case of rape, can the child be called an aggressor. Killing the child is not self-defense, *i.e.*, "defensive force against felonious attack." (Model Penal Code, Tentative Draft No. 8, pages 16-17.) The child does not threaten "unlawful violence" or "unlawful force" the appearance of which are requisites for self-defense.* The child is not the rapist. We do not punish the rapist without proof of guilt of the crime beyond a reasonable doubt. Beyond a reasonable doubt the unborn child of rape is innocent of any crime.

Nor can Woman Z be distinguished from Woman X and Y on the ground that Woman Z did not intend to have sexual intercourse, while Women X and Y did. Childbearing is not to be viewed as a punishment for voluntary sexual intercourse and withholding abortion cannot be justified on that ground. Woman X did not intend to conceive at all and Woman Y did not intend to conceive a defective child. What occurred is not the "fault" of either of them anymore than Woman Z's pregnancy is her "fault." On the basis of "fault" they are indistinguishable. *And so are their unborn children indistinguishable as innocent human beings.* It is the deliberate causing of the death of an unborn child for a value less than life itself which renders abortion the antithesis of the American ideal of the fundamental sanctity and equality of life in the case of all three women. Thus, it is not possible to write into the Amendment a limited number of exceptions beyond maternal lifesaving without, on the one hand, doing violence to the ideal of the fundamental sanctity and equality of life and, on the other, unjustifiably differentiating among pregnant women.

It is my personal belief that every direct abortion is immoral. It is also my personal belief that termination of an ectopic pregnancy or removal of a pregnant cancerous uterus is not immoral though in each case the death of an innocent child results. The bases for these personal beliefs are not relevant to this statement. Relevant indeed, however, are the factors common to a direct abortion to save the mother's life and the removal of an ectopic pregnancy, *i.e.*, an unborn child dies; the mother's life is saved, and the traditional American ideal of the value of life is undisturbed.

C. *What would be the effect of not including any exception clause, e.g., S.J.R. 6?*

The effect would be uncertainty. Assuming that an exception to prevent the death of the pregnant woman is justifiable (A, *supra*) and

*Nor can legal necessity be asserted as justification. Legal necessity at least requires a parity of values, *i.e.*, that the life have been taken in order to save life.

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other exceptions are not (B, *supra*), the Amendment should provide for the enactment of the appropriate exception.

Even if the Amendment contained no specific maternal lifesaving exception, it seems probable that the exception would be read into it on the basis of the history of restrictive abortion laws and the doctrine of "legal necessity." (A. and B., *supra*). Nevertheless, fears have been expressed that a court might overturn a statutory maternal lifesaving exception on the grounds that the Human Life Amendment omits it. To dispel any doubts, the exception, in some form, should be included.

From another point of view, failure to include the exception might lead to other exceptions being read into the Amendment, including, for instance, the specious psychiatric-health abortion. New Jersey's abortion statute, which condemned abortions performed "maliciously or without lawful justification" was interpreted to be confined to an exception to preserve the mother's life in *State v. Moretti* (1968). On the other hand, the Massachusetts statute, which proscribed abortifacient acts "unlawfully" done was held to include an exception for the "health" of the woman in *Kudish v. Board of Registration* (1969). The teaching of these cases cannot be ignored. It is evident that if exceptions to the Amendment are assuredly to be confined to maternal lifesaving situations, then the exception must be spelled out in those terms.

D. *Is there a difference in effect between the exception clauses in S.J.R. 10 and S.J.R. 11?*

It may be that ultimately there will be no differences in how the exception clauses operate. However S.J.R. 11 seems preferable for several reasons:

1. The protection of S.J.R. 11 is facially universal (as it ought to be in the case of the right to live), leaving it to state legislatures to enact the exception. This has traditionally been the province of the states within the boundaries of the constitution.

2. S.J.R. 11 more clearly limits the exception to maternal lifesaving.

3. S.J.R. 11 more clearly provides the maximum protection to the unborn child by referring to "medical procedures." In each case, the doctor must make a reasonable and good faith judgment that an abortion is required and another medical procedure will not suffice. As amongst various types of abortion, he must choose the method, consistent with preventing the death of the mother, which will most likely produce a live birth and provide the best opportunity to preserve the child's life.

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VII. How will a Human Life Amendment affect the rights and liabilities of women?

It is difficult to see how the rights and liabilities of women will be different under a Human Life Amendment from what they were under a restrictive abortion law prior to *Roe v. Wade* (and the abortion movement of the nineteen-sixties). Almost universally these laws had the effect of protecting the lives of unborn children, as a class, against abortion except when necessary to prevent the death of the mother. As a matter of common sense, the *ad terrorem* spectres of government invasion of the womb and tort and criminal liability for inadvertent miscarriages did not materialize under prior abortion laws; why should we give them credence now?

Let us consider some of the effects of a Human Life Amendment on women:

A. Will the Amendment mandate incrimination of the illegally aborted woman?

Prior to *Roe v. Wade*, some states penalized the illegally aborted woman; others did not. The exclusion of women from criminality has historical and pragmatic roots.

Historically the woman "did not stand legally in the situation of an accomplice; for although she, no doubt, participated in the moral offense imputed to the defendant she could not have been indicted for that offense; the law regards her rather as the victim than the perpetrator of the crime." As a "victim," the law deemed her consent a nullity. "I conclude that at common law the act of producing an abortion was always an assault, for the double reason that a woman was not deemed able to assent to an unlawful act against herself, and for the further reason that she was incapable of consenting to the murder of an unborn infant. . . ." ¹⁶

Pragmatically, conviction of the abortionist frequently depended upon the testimony of the aborted woman; and the woman could hardly be expected to testify if her testimony automatically incriminated her. An omission to incriminate the woman might be no more than a statutory grant of immunity.

Historically and pragmatically, the constitutional personhood of the child would not seem to require incrimination of the aborted woman. However, should the means of a relatively simple self-abortion become commonly available, a question might be raised as to whether the failure to incriminate the woman is not really a class exclusion of the lives of unborn children from the law's protection.

B. Will the Amendment mandate the imposition of tort and criminal liability upon the woman for an inadvertent miscarriage?

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Consideration has already been given to the effects on tort and criminal law of a Human Life Amendment. In view of what has been said, it is difficult to understand why a Human Life Amendment should mandate the imposition of tort and/or criminal liability upon a woman for an inadvertent miscarriage.

Moreover, it seems unlikely that a legislature or court would choose to impose liability. (They did not prior to *Roe v. Wade*.) There are substantial hurdles.

Presumably liability would be based on some degree of culpable negligence. But every pregnancy differs and doctors differ among themselves on how to treat pregnancies. Even if negligence were arguable in a particular case, a strong public policy of preserving intra-family harmony would militate against liability. For instance, despite the abrogation of parent-child immunity in New York, it has recently been held that a parent is not liable for injuries suffered by a *non sui juris* infant for alleged parental failure to supervise the child. (*Holodook v. Spencer*). Might a legislature choose to incriminate a pregnant woman's reckless disregard of the life of her child causing the injury or death of the child? It might, but it would seem that under all the circumstances the woman's conduct would have to be so egregious that incrimination should offend no one. The prospects of maternal tort and/or criminal liability for inadvertent miscarriages are flimsy indeed.

C. *Will a woman be required to have a monthly pregnancy test to determine whether an unborn child is in existence?*

She was not under prior restrictive abortion laws; why should the situation be different under a Human Life Amendment? Typically state abortion laws protected against early illegal abortions by incriminating those acts intended to cause a miscarriage, whether or not the woman was pregnant. One can anticipate the same sort of legislation under a Human Life Amendment.

D. *Will a pregnant woman be subjected to an injunction by a court of equity to follow some sort of routine during pregnancy?*

Again—she was not under prior restrictive abortion laws; why should the situation be different under a Human Life Amendment? It is true that in the past courts have ordered unwilling pregnant women to undergo blood transfusions necessary to save the lives of their unborn children—even in the face of a maternal claim of free exercise of religion—but these orders have concerned submission to specific medical treatments to avoid a specific threat to the child's life. No court has ordered a woman to follow some sort of routine of care during pregnancy. Nor under general principles of equity

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would a court do so. On the one hand, a court will not issue a vague order, such as "be careful," because the woman would not know what was specifically required of her; on the other hand, it would be impossible for the court to frame a sufficiently detailed order covering such minutiae as what the woman may eat, what time to get up, etc.

VIII. How will a Human Life Amendment affect contraceptive drugs and devices?

A. Abortion vs. contraception

A 1962 Planned Parenthood pamphlet pinpoints the difference between abortion and contraception: "An abortion kills the life of a baby after it has begun. . . . Birth control merely postpones the beginning of life."

A Human Life Amendment reaches abortion not contraception. It will have the following effect on various drugs and devices:

1. Drugs and devices which function only as contraceptives will, of course, be unaffected.

2. Traffic in drugs and devices which function only as abortifacients will predictably be limited to licensed businesses, and the use of such drugs and devices will be dependent upon a licensed physician's reasonable and good faith determination that an abortion is required to prevent the death of a pregnant woman.

3. Traffic in, and use of, drugs and devices which (a) have uses in addition to their use as abortifacients or (b) may operate either as contraceptives or abortifacients will predictably be subjected to close regulation to assure their proper use, under appropriate medical supervision, for a genuine medical purpose.

4. A legislature or appropriate administrative agency may choose to outlaw a particular drug or device on a finding that its legitimate use is not sufficiently compelling compared to its misuse as an illegal abortifacient.

5. Legislatures will protect against illegal abortion by (a) prohibiting acts intended to cause an illegal abortion—including the dispensing of abortifacient drugs and devices—whether or not the woman is pregnant and (b) punishing more severely those abortifacient acts which result in a miscarriage.

B. The beginning of life: "Moment of fertilization" (S.J.R. 6) vs. "all human beings, including their unborn offspring at every stage of their biological development" (S.J.R. 10 and 11).

It is evident that both these phrases are intended to recognize the human personhood of the unborn child and protect the child's life

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from the first moment of the child's existence. As between the two, it becomes a question of which will better accomplish these purposes. I prefer the wording of S.J.R. 10 and 11 for the following reasons:

1. It more precisely expresses the intent of the framers of the Fourteenth Amendment to identify personhood (and the fundamental right to live) with common-denominator factual human-beingness, *i.e.*, the biological existence of a particular life.

2. It employs medical language in common usage at the time of the framing of the Fourteenth Amendment and the developmental years of abortion legislation immediately thereafter.*

3. It more clearly establishes protection from the moment of conception, which both science (stripped of the self-serving and subjective judgments of the pro-abortionists) and law have recognized as the beginning of the life of a new human being. Conception, which has frequently been used as a synonym for fertilization, has been perverted by some to mean "a process" or "implantation." The same type of specious redefinition might befall "moment of fertilization." On the other hand, S.J.R. 10 and 11 do not rely upon the meaning of a single word. They describe the biological facts and ask the question of everyone who would kill an unborn child at or after conception, "Is this not a stage of biological development?" There can be no other answer except "Yes," and the aegis of Amendment protects the child.

4. It more explicitly expounds the fact that each human life is a continuum from conception to death.

IX. Is a Human Life Amendment just another Prohibition Amendment?

There are substantial differences:

1. A Human Life Amendment is an affirmation of a fundamental human right; the Prohibition Amendment merely removed a pre-existent right. Contrary to the Prohibition Amendment, the Human Life Amendment carries on its face a moral incentive for compliance—respect for the life of another.

2. A Human Life Amendment will serve as an educational tool for promoting the moral incentive. It would certainly be appropriate for government agencies, under the aegis of the Human Life Amendment, to undertake a program of education on the facts of life be-

**Professor Joseph P. Witherspoon, Professor of Law at the University of Texas Law School and a leading civil rights scholar, has done considerable research on the contemporary view of the unborn child at the time of proposal and ratification of the Thirteenth and Fourteenth Amendments.*

fore birth and the unborn's right to live. Experience indicates that those who have seen pictures of the unborn do not, for the most part, any longer consider them to be only pieces of tissues.¹⁷ As justice Brandeis once said: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."¹⁸

Up to 1963, as I have said, a Planned Parenthood pamphlet contained the statement, "An abortion kills the life of a baby after it has begun." After 1963, that statement was omitted. In 1970, Harriet Pilpel, counsel to Planned Parenthood, wrote, concerning legalized abortion, "As our laws in the United States are repealed or liberalized or declared unconstitutional, it becomes clear that only half the battle is won and that public and professional attitudes and the will (or lack of will) to implement the freedom conferred are also crucial."¹⁹ One would hope that after the ratification of the Human Life Amendment, those who have been waging the other "half the battle" to influence "the public will" to "implement the freedom" to abort will cease their war. Perhaps they will ultimately return to the realization that "abortion kills the life of a baby after it has begun," and reinsert that fact in their educational literature.

3. Professor Paul Freund points out that ultimately it appeared to the public that Prohibitionists opposed drinking not so much for the pain it caused to society or to the drinker, but for the pleasure which the drinker derived from it. There is no such ambiguity of motivation in a Human Life Amendment.

4. Where basic human rights are at issue (which was not the case of the Prohibition Amendment), the state interest in minimizing violations of the law is not sufficiently compelling to tolerate legalized invasions of these human rights. For instance, the Supreme Court has frequently confronted arguments that *de jure* segregation of the races promotes the public peace by preventing race conflict, and integration results in chaos and violence against Blacks. Inevitably the Supreme Court has rejected such arguments on the ground that basic rights cannot be denied to a class simply because of hostility toward that class. "If a community evidences a growing inclination to ignore the most basic rights of a helpless minority, one should not regard the repeal of criminal laws enforcing these rights as the appropriate response of the leaders of society. Instead they should seek to instill or revive an application of and respect for the rights protected by law."²⁰

5. The jurisprudence of *Wade* carries implications far beyond the rights of the unborn and endangers the rights of other burdensome

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people.²¹ These implications transcend any discussion of the immediate effectiveness of a Human Life Amendment. There will always be abortion, just as there will always be invasions of the civil rights of minority groups. Just as civil rights legislation and Court decisions have served an educational function in awakening the public to the rights of minorities, so too will the Human Life Amendment tend to minimize abortion and, more importantly, restore the basic jurisprudence of the nation.

The analogy to Prohibition fails; a more precise analogy is to the Thirteenth, Fourteenth and Fifteenth Amendments.

X. What will be the effect of the presence (S.J.R. 11) or absence (S.J.R. 6 and 10) of a "private action" clause?

S.J.R. 11 contains a private action clause: "No unborn person shall be deprived of life by any person. . . ." S.J.R. 6 and 10 do not. A private action clause is desirable for a number of reasons:

1. It will enhance the educational effects of the amendment by clearly subordinating the right of privacy to the right to live.

2. It will head off onerous and lengthy challenges to restrictive state abortion laws enacted pursuant to the amendment. Professor Laurence Tribe has contended that a woman's right to abort ("privacy") would be superior to the unborn child's right to live even if the child were a constitutional person under the proposed Human Life Amendments then under consideration. I believe Professor Tribe is wrong. What he has done is substitute an absolute "right" to control one's body for the more limited right of privacy expounded by the Court in *Wade*. Indeed, the Court specifically rejected the absolute right advocated by Professor Tribe.²² Further, Professor Tribe failed to discuss other limitations on privacy including the pre-*Wade* cases in which a pregnant woman, contrary to her wishes and her religious convictions was forced to undergo a blood transfusion to save the life of her unborn child. These cases establish the paramountcy of the child's right to life.

Nevertheless, Professor Tribe's testimony lays the groundwork for litigation challenging restrictive state abortion laws enacted pursuant to the Amendment. More than likely the litigation will fail but it will be onerous and lengthy, and who can say what a court, committed to the new ethic and exercising "raw judicial power," will do? The private action clause in S.J.R. 11 explicitly establishes the paramountcy of the unborn child's right to live and precludes the kind of litigation envisioned by Professor Tribe.

3. The private action clause is not intended to pre-empt the right

of states to determine the appropriate criminal sanctions for abortion. The private action clause complements the right to life in the Fourteenth Amendment in the same way that the Thirteenth Amendment, with its proscription of private action, complements the right to liberty. The Fourteenth Amendment is directed toward governmental action. Language in some Supreme Court decisions would seem to support the right of Congress to enact remedial civil rights legislation, without the requirement of state action, under the implementing clause of the Fourteenth Amendment. Lest any doubt remain, the private action clause in S.J.R. 11 would assure the viability of Congressional legislation providing, for instance, for an equitable remedy in the federal courts, via individual or class action, against a private hospital or doctor performing abortions in contravention of the rights established by the Amendment. The remedy would be particularly important if a state intransigently refused to enact abortion legislation.

The implementation section of S.J.R. 11 is the vehicle for Congressional legislation under the private action clause. It provides, "Congress and the several states shall have the power to enforce this article by appropriate legislation within their respective jurisdictions." The "jurisdiction" of Congress here is clearly the nation as a whole. (*e.g.*, the Thirteenth Amendment: "Neither slavery nor involuntary servitude . . . shall exist within the United States or any place subject to their jurisdiction.") However, for the sake of constitutional uniformity, it might be preferable to omit the phrase "within their respective jurisdictions."

For the above reasons, the Amendment should include a private action clause.

XI. What effect will a Human Life Amendment have upon euthanasia?

From time to time doctors are called upon to make life and death decisions. When these situations arise, the vast majority of doctors conduct themselves with due regard for their patients' right to live. For instance, there may come a time during the last stages of a terminal illness when doctors, at the instance of the patient or relatives, will cease the administration of fruitless medical treatment which merely puts the inevitable off for a short time.

None of the Human Life Amendments touch this or similar situations.

Rather S.J.R. 10 and 11 explicitly seek to assure as a matter of principle that no human being will be deprived of the right to life by being categorized as a nonperson on account of "age, health,

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function or condition of dependency.” That there are doctors who contemplate just such a redefinition of human person is clear from the editorial in California Medicine which Senator Buckley included in his introductory remarks to S.J.R. 119 on May 31, 1973.²³

It requires no belaboring of *Roe v. Wade* to conclude that the burdensome have been left in peril:

1. (a) The Court put forth as justification for its purported refusal to resolve the crucial issue of fact of when human 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.*” 93 S. Ct. at 730. (Emphasis added.)

(b) Professor Joseph Fletcher, a foremost theoretician of the abortion movement has written, “When is the *humanum*, humanness, here and when is it gone? *In our present state of knowledge, I suspect this is an unanswerable question* but that therefore we ought to be putting our heads together to see what criteria for being ‘human’ we can fairly well agree upon. It’s worth a try.” *Medical initiative is at stake in both abortion and euthanasia and the problem is ethically the same.*” *The Ethics of Abortion*, 14 Clinical Obstetrics & Gynecology 1124, 1128 (1971). (Emphasis added.)

2. (a) The Supreme Court wrote “With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of *meaningful* life outside the mother’s womb.” 93 Ct. at 732. (Emphasis added.)

(b) Dr. Walter W. Sacket, Jr., proponent of a “right to die” bill in Florida, has written of the end of life, “I’ve had to make a distinction between a semblance of life and life that can be considered *meaningful.*” *Medical Economics*, (April, 1973).²⁴ (Emphasis added.)

It is evident from these two examples alone that the jurisprudence of *Roe v. Wade* is the language of aggressive euthanasia—the language of writing human beings out of the family of human persons when their lives are no longer “meaningful.”

Those of us who have been in the abortion controversy since the early 1960’s know the danger of the attitude, “It can’t happen here.” Our intent is to make certain that it does *not* happen here.

CONCLUSION

In the light of all the foregoing, I would urge that:

1. A constitutional amendment is required.
2. A States Rights Amendment is unacceptable.
3. A Human Life Amendment (the wording of S.J.R. 11 is best

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sued to the purpose) will mandate none of the horrible consequences urged by pro-abortionists, nor is it plausible to conclude that they will occur.

NOTES

1. S.1, 94th Congress, 1st Sess., 1/15/75.
2. 310 F. Supp. 293 (E.D. Wis.), **appeal dismissed**, 400 U.S. 1 (1970).
3. **West Virginia State Bd. of Educ. v. Barnett**, 319 U.S. 624, 638 (1948).
4. **Stanley v. Illinois**, 405 U.S., 645, 656 (1972).
5. Noonan, **Why a Constitutional Amendment?** 1 Human Life Rev. 26, 32 (1975).
6. **Bertholf v. O'Reilly**, 74 N.Y. 509, 515 (1878).
7. See Note, **The Law and the Unborn Child: the Legal and Logical Inconsistencies**, 46 Notre Dame Law. 349 (1971).
8. 278 F.2d 68, **aff'd nom.**, **Montana v. Kennedy**, 366 U.S. 308 (1961).
9. See **Matter of Logan**, 4 Misc. 2d 283, 156 N.Y.S. 2d 49, **affirmed**, 2 A.D. 2d 842, 156 N.Y.S. 2d 152, **affirmed**, 3 N.Y. 2d 800, 166 N.Y.S. 2d 3 (1956); **Marko v. Phila. Trans. Co.**, 420 Pa. 124, 164 A.2d 502 (1966), and the two principles are not inconsistent. **Id.**
10. Brief **Amici Curiae** on behalf of Citizens Committee for Children et al, page 3, submitted to the New York Court of Appeals in **Byrn v. N.Y.C. Health & Hosp. Corp.**, 31 N.Y. 2d 194, 286 N.E. 2d 887, 335 N.Y.S. 2d 390 **appeal dismissed**, 410 U.S. 949 (1973).
11. **Skinner v. Oklahoma**, 316 U.S. 535, 540 (1942).
12. See Byrn, **Homicide Under the Proposed New York Penal Law**, 33 Fordham L. Rev. 173, 204-205, n. 186 (citing, 1963 Interim Report of the N.Y. State Temporary Commission on Revision of the Penal Law and Criminal Code at page 40).
13. An extensive review of the history of Anglo-American abortion law is contained in 41 Fordham L. Rev. 814-839.
14. **U.S. v. Greifelt**, 4 Trials of War Criminals Before the Nuremberg Military Tribunal 613 (Gov. Printing Off.).
15. **McGowan v. Maryland**, 366 U.S. 420 (1961) (Sunday Closing Laws).
16. **State v. Farnam**, 82 Ore. 211, 217 161P. 417, 419 (1916). There is, however, authority for the proposition that a woman was guilty of homicide if she self-abortioned and the child was born alive and then died. See **Beale v. Beale**, 24 Eng. Rep. 373 (Ch. 1713).
17. See **Rosenfeld, The Second Genesis** 125 (1969).
18. **Olmstead v. U.S.**, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
19. N.Y. Times Book Review, June 14, 1970.
20. Gianelli, **The Difficult Quest for a Truly Humane Abortion Law**, 13 Vill. L. Rev. 257, 268 (1968).
21. See discussion at 41 Fordham L. Rev. 859-61; 18 St. Louis L. J. 390-91, 404-406.
22. See 93 S. Ct. 726-27.
23. See also **Human Life Review**, Vol. I, No. 1., Appendix B.
24. Quoted in Gastonguay, **Euthanasia: The Next Medical Dilemma**, America. March 2, 1974, at page 152.

Permissive Abortion: A European Perspective

Erik von Kuehnelt-Leddihn

AFTER centuries in which abortion, though frequently resorted to, was almost universally condemned both by law and by generally accepted standards of morality, the cause of permissive abortion laws has suddenly emerged all over Europe, and has had far-reaching, fatal effects. We have to face the fact that abortion as such is nothing new (nor are murder, manslaughter, theft, robbery, forgery, rape, and so on). In Hungary, it was always an endemic crime among the rural populace, though less frequent among the Catholic majority than among the fairly large Calvinist minority. (Calvinist ethics also condemned abortion, but Roman Catholic confessional practice provided a more effective means of limiting it.)

Socialist (and Communist) parties have regularly promoted the abolition of the anti-abortion laws as part and parcel of the emancipation of women. Some "liberal" groups had similar velleities—especially in France where abortion became legal under a non-socialist government. (Yet we must be exceedingly careful in the use of the term "liberalism" because in Europe it covers a large variety of political and economic currents.) This drive towards the emancipation of women in the socialist camp naturally also had several motives. It was partly of an egalitarian, if not of an "identitarian" nature: women are equal to men, if not "the same" as men and thus they should not suffer any discrimination, not even in the biological field—which, of course, is chimerical, nature having decreed it differently. But there is also a very different reason: the various Marxist ideologies tend towards a far-reaching enslavement of human beings as far as their civic, intel-

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lectual, and economic liberties are concerned. An all-powerful state and collectivism are the immediate demands. In the long run, however, after the "waning away of the state," they promise us that mankind will be totally free and subjected only to purely societal forces. This is a notion shared by socialists and communists, while the anarchists merely deny the intermediary stage of wholesale oppression. Yet, until total liberty is achieved, in the period of transition, man will be subjugated and therefore will need some "outlets." During the period of state totalitarianism, in other words, he will be free only from the waist down. Unbridled sex will be his only consolation and therefore he must be given a chance to dispose of the unwanted results of his sex life. Hence also the drive for abortion.

During the May 1st demonstrations in Vienna, back in the early nineteen-twenties, one could see groups of young women sporting red kerchiefs and carrying posters with the inscription: "Down with Paragraph 144!"—the penal law paragraph punishing willful abortion. In Austria the Communist Party was always very small, but in the First German (Weimar) Republic it represented a sizable force. In the last free German election before the Nazi takeover, one fifth of the voters sided with the K.P.D. (the German Communist Party). The Socialists ("Social Democrats"), too, disliked the German anti-abortion law (§ 218), but since they were usually allied with the strongly Catholic Center Party, their hands were tied. Needless to say, the genuinely rightist parties were opposed to that specific form of murder called abortion, while the National Socialists (in fact a party of the collectivist left) took an intermediary position. They were in favor of a high birthrate, but only on the basis of racial purity and their eugenic theories. They dreamt of enforced abortion and sterilization (if not wholesale slaughter) of "lesser breeds without the law" once they were in power in Central Europe. And after 1939 no holds were barred for them.

In the fight for "free abortions" prior to 1933, the German Communists were in the forefront. The famous play *Cyankali*, written by Dr. Friedrich Wolf, an eminent member of the K.P.D. who later played an important role in the "German Democratic Republic" after 1945, created headlines. Communist propaganda painted the anti-abortion laws as a piece of sadism invented by the ruling classes. Poor unwed mothers, as well as decent but penniless wives belonging to the proletariat allegedly had no other solution to their problems when expecting a child but to have an abortion. Rather than starve to death with their child, they had to kill it right away. Logically enough, this sort of argumentation is absent in the Soviet Union: in spite of the

material plight of the majority of Soviet citizens, the government must uphold the fiction that they live a life of plenty; nevertheless abortion is free and easy. (The reason here? Freedom below the waist.)

In reborn Austria and (Western) Germany after the Second World War, and right until the late nineteen-sixties, the parties with the greatest influence and power were the People's Party (*Volkspartei*) in Austria and the C.D.U.-C.S.U. (the Christian Democratic Union combined with the more conservative Christian Social Union of Bavaria) in Germany. Now the Socialists (S.P.Ö.) have an absolute majority in Austria, while in Germany the C.D.U.-C.S.U. is still the largest single party; but the Socialists (S.P.D.) have formed a coalition with the Free Democratic Party (F.D.P.—often, but not correctly, referred to as the Liberals). Together they now rule the German Federal Republic. And as soon as the Socialists were firmly in the saddle, they started to work toward the realization of a cherished dream: the abolition of the paragraphs 144 in Austria and 218 in Germany. In Austria this was achieved by a vote in the parliament and confirmed by the (duly packed) Supreme Court. In Germany it was voted (as in Austria) with the narrowest of margins by the Diet (*Bundestag*), then vetoed by the upper house, the Federal Council (*Bundesrat*), revoted by the Diet and now, finally, rejected by the German Supreme Court.

Now, let us review the prehistory of this weird story. It must be borne in mind that this new cry for abortion, for woman's "right over her body" arose at the time of a) the greatest affluence ever experienced in European history, of b) the greatest perfection of contraceptive methods, techniques and medications (as well as their most widespread use) of c) the virtual disappearance of the old alternative between the death of the expectant mother or that of the child, of d) the termination of the "bourgeois" age with the stigma it attached to unwed mothers and the illegitimate children, and of e) a tremendous demand by childless couples for children to adopt. (One might add that until the end of 1974 the demand for immigrants from Southern Europe continued unabated. Germany and Austria had too few hands.) In other words: there is no pressing practical social or economic reason why at this juncture a crime like abortion should suddenly be made respectable. There must be—and indeed there are—deeper psychological, if not metaphysical, reasons.

The churches, obviously, have always been opposed to abortion. The American reader must remember that the variety of denominations to which he is accustomed does not exist in Europe, least

of all in the German-speaking countries. In Germany as well as in Austria there are only the Catholic Church and the so-called Evangelical (i.e. Protestant) Church, whose majority is composed of Lutherans. Calvinists form the bulk of the Swiss Reformed Church. There are only 40,000 Jews left in Germany today and 5,000 in Austria. Those not formally enrolled in a church are a very small minority, but among the church members the majority are merely nominal members. Still, the division between churchgoers and backsliders familiar to Americans does not exist on the Continent. There are Catholics and Evangelicals who do not attend church at all, but still are reluctant to leave their church formally, although this would save them from paying the state-collected church tax. Apostasy in all its seriousness is somewhat frowned upon. Spiritually as well as practically this makes for a complex situation.

Less complex is the ecclesiastical situation as far as abortion is concerned. In Germany, the protest of the two major churches (which, thanks to the ecumenical spirit of Pius XII, have lived and worked very much in harmony ever since the days of National Socialist persecution) appeared in a single document over the signatures of Kardinal Doepfner and Lutheran Bishop Dietzfelbinger. The text was widely distributed by both denominations. In Austria the situation was a bit different. Here there has been for years a real abyss between the Church and the Socialists, though in recent times a rapprochement has taken place. The Austrian Catholic bishops thus were relatively restrained in their protest—very much to the dismay of a number of laymen (myself included). It was instead the only Lutheran bishop of Austria, Dr. Sakrausky, representing just 6 percent of the population, who pounded the table. He declared roundly that the legalization of abortion put Austria right on the road to Auschwitz, thus touching a raw nerve in our history and eliciting furious protests from the Socialists. (“Only truth offends” says the French proverb.) For his manly stand, he was also congratulated by some of the Austrian Catholic bishops and was flooded with reassuring telegrams. His reelection a few weeks later showed that his popularity remained at an all-time high.

When we in Europe hear that some “Protestant” bodies in America have come out in favor of abortion, or have refrained from taking any definite stand, we are amazed. Do they not claim to be Christian? This is not the same problem as contraception, which, to be quite candid, has never been considered as a serious moral problem in Continental Europe as it was in the United States. Yet, as far as the fetus is concerned, there cannot be the slightest scientific doubt that it is a

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human being in the fullest sense of the term. A hundred years ago one might have argued differently about an embryo in the first stages, but by now this is no longer in question. (Hence the perverted nature of this "modern" demand.)

"*Unerwünschtes Leben*—Unwanted Life!" This is a phrase we hear very often from the abortionists, but also, uttered with disdainful irony, from their opponents. It is the latter who point out that "abortionism" stands for a new *Childermass* similar to one we have already witnessed within our lifetime: the slaughter of the Jews. The judges of the German Supreme Court in Karlsruhe have obliquely referred to it: they not only invoked the *Staatsgrundgesetz*, the "Basic State Law" of the German Federal Republic, they also hinted at the National Socialist extermination camps when they insisted that in view of past history the sacredness of human life represents a very specific German problem. Something very similar is felt by many Austrians, for Austria was gobbled up by Germany in 1938 and, willy-nilly, many Austrians feel that they share in this German "collective guilt." It is very generally realized in Austria and in Germany that, if the life of an unborn child is not safeguarded and is legally exposed to extinction, the next step will be euthanasia. From voluntary abortion to enforced abortion, from voluntary euthanasia to the gas chambers offering "obligatory death"—such an evolution is not beyond imagination. The Gates of Hell then would be wide open. Yesterday the "non-Aryans" were the victims; today it is the turn of the unborn (because Mom forgot the pill, Dad needs a new car, or the expected kid might be hard of hearing). And tomorrow thousands may be "put to sleep"—to ease unemployment, to save energy, to stem pollution, or to stop overcrowding. The fear that by making abortion legal, we are entering the road leading to unspeakable horrors is quite justified.

Feelings are at the present moment very tense in Austria and in Germany; the Austrian Socialist Chancellor Bruno Kreisky is furious at being called a *Kindsmörder*, an assassin of children. Americans do not have a history of mass slaughter but we do. Americans (and Britishers) are by tradition not much given to thinking in terms of basic principles. They tend to be pragmatic and empirical. With Germans and Austrians this is not the case. It is no accident that the word *Weltanschauung* is quite untranslatable. However, what has happened now in the heart of Europe is this: it seemed until fairly recently that we were changing, that the age of ideologies was over. Helmut Schelsky, a noted sociologist, expressed this view in a book which became a bestseller. And, indeed, if we bear in mind that

the Socialist parties were originally founded by Karl Marx and Friedrich Engels, but have gradually put so much water into their wine that this origin has become practically unrecognizable, such a view is not surprising. Before World War II our Social Democrats were thoroughly at odds with both churches. Leading Socialists hardly ever received a church funeral. Socialists and Communists opposed each other, but they were competitors rather than enemies, and both opposed religion.

This had changed with World War II. The rift between Social Democrats (Socialists) and Communists widened considerably, and the virtual excommunication of Socialists ceased. They had become "bourgeois"—last, but not least because the working class is not revolutionary by nature. It is the middle class, on the other hand, that has produced the vast majority of the world's revolutionaries. Ludwig Reichhold in his *Farewell to the Proletarian Illusion* has expounded this very clearly. The number of prominent Catholics and Evangelicals who, in the last decade, openly joined the ranks of the Socialists is large—in Germany more so than in Austria. Our church leaders, likewise, have ceased to attack Socialism and the Socialists. All of which is not so surprising because Socialism has made decided inroads into Christian thinking. This one feels not only on the Rhine and the Danube, but even in Rome.

Then suddenly, the abortion issue arose and this whole mutual rapprochement between Socialism and the churches came to a halt. Unexpected emotions were stirred up. (Fanaticism on our side? Yes, if that is what you call a wholehearted commitment accompanied by a sense of horror and indignation.)

To understand the situation a bit better it must be kept in mind that the voters of the Austrian Socialist Party (S.P.Ö.) and of the German Social Democratic Party (S.P.D.) consist mostly of workers plus some lower-middle-class supporters and a sprinkling of intellectuals. The latter are the only ones who keep up certain vestiges of the Marxist-materialist doctrine and tradition. Being Continental Europeans (and not Englishmen or Americans), our workers treat these bourgeois intellectual socialists with great respect. But it is they who have brought up the legalization of abortion—as a matter of ideological principle, I would say. There are also some Socialists in both countries who think that this is an explosive and dangerous issue which should never have been touched. Others are really convinced that the sacredness of human life ought to be respected, and hence agree with the churches' stand. Still, there can be absolutely no doubt that the *détente* between the churches and the socialist par-

ties is over—or nearly over. In spite of assurances from all parties (and from the churches) that in the forthcoming elections in Austria (October 1975) abortion will not become a political issue, the problem will be present in the minds of most voters, one way or the other. Of course, the hue and cry that the churches want to impose their morals on the rest of the nation has already been raised. (Ah, if the churches had only been able to do this in the 1933-1945 period!) This sort of idiocy has also been a conundrum in the battle over abortion in the United States.

There is indeed a deep significance to the entire abortion issue: it has acted like lightning in a dark night which suddenly and harshly illuminates a whole landscape. Unexpectedly, even not overly sophisticated people seem to realize where we stand on the time-table of history. Ralf Dahrendorf, a German liberal sociologist, has pointed out quite rightly that National Socialism—which poor F. D. Roosevelt in his delightful historical ignorance called “medieval”—was the irruption of modernity into German history. And, as a matter of fact, the pagan synthesis of nationalism and racism with Socialism had precisely that character. The defeat of Hitler created a setback of “modernity” and a revival of the Christian spirit, but now this murderous “modern” mentality is again coming to the fore. Of course, the legalization of abortion has been offered, believe it or not, in Austria no less than in Germany, as a *compromise*. It sails under the flag of *Fristenlösung*, a term which is difficult to translate; let us call it “time-limit solution.” It means that abortion should be permissible up to a certain time—in this case, until the end of the third month of pregnancy. *Then* it is to be punishable. Actually, the opposition parties were threatened that if they continued their delaying tactics, the majority might “get tough” and make abortion available at “any time.”

All this means that the state claims for itself the right to *decree* the exact time when an embryo is no more than a wart, a fingernail or a hair, and when it suddenly becomes (by “majority vote?”) a human being worthy of protection. This is the real triumph of legal positivism as it was implanted into American legal thinking by Oliver Wendell Holmes Jr. and in Austria, at least partly, by Hans Kelsen. However, true justice and inalienable rights are not “made”, they are “found.” They are, in principle, independent of law courts. They come from God.

Unfortunately, most people today take their cue from the state. To them it seems the only authority there is. If the state gives an assenting nod, the question is settled. (This also explains how the National

Socialists were able to commit their hideous atrocities.) The trio of ethics, biology, and logical thought is often painfully beyond the ken of the man in the street, whose intellectual capacity has been flattened out by modern education.

How does our medical profession react towards abortion? Eighty-two percent of Austrian and eighty-nine percent of German physicians reject it, and so do the *Ärzttekammern* (medical societies), bodies more tightly organized and influential in the profession than the A.M.A. in America. It is evident that all the many hospitals controlled by Christian bodies will continue in their stand. They have already refused to comply with the new permissive laws. The nuns and deaconesses working in public hospitals have expressed their categorical opposition. Now another difficulty has arisen: Bonn and Vienna want to pay for abortion as a service of socialized medicine. If I consider abortion plain murder, why should I be made to pay for it through taxes? If I am a conscientious objector to military service, the authorities will find some other work for me. Yet what about my schillings or Deutsche marks which will be used to kill another person? Suddenly we all are being faced with the limits of tolerance. Suddenly otherwise meek and gentle people find out that somewhere, somehow they have to draw the line.

Of course, there is the silly old argument that, whether we like it or not, legalized or not, abortions will always be carried out. The same argument could be made for theft, though nobody is going to advocate the legalization of theft. And only too frequently we are told that the "rich" have always been able to get an abortion. They knew the ways and had the means. Actually, this is one of the main arguments in the mouth of the Socialist leadership (August Bebel was the first to use it—though in an oblique way—in his *Woman and Socialism*, 1883). No wonder, ever since the French Revolution the key to political success has been to mobilize the envy of the many against the few. If you are the wife (or the daughter) of a board chairman, you can go to a posh private clinic and they will dispose of the baby; if you are poor you go to a quack and are likely to die. Thus legalized abortion assumes the character of a piece of "social justice," a manifestation of "real charity," of a "love for the poor."

The legalizers come with the most amazing arguments: if a woman cannot have an abortion, the poor expectant mother will commit suicide or she and her child will have to live in everlasting shame. This really was not true of the old aristocratic society, nor of rural societies, and it is no longer really true of modern bourgeois society either. Not only was the Rt. Hon. Ramsay MacDonald, Prime Min-

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ister of His Britannic Majesty King George V, the illegitimate son of a Scottish servant girl (and a very devout Christian), Willy Brandt, né Frahm also was born out of wedlock, and so was Dr. Engelbert Dollfuss, Prime Minister of a very Catholic Austria and a martyr to his Faith. So, too, was the great French Bishop Félix Dupanloup, so was Don John of Austria who saved Europe from the Turks in the Battle of Lepanto, so was the mother of Prince Rainier of Monaco. Europe obviously does not share the mentality of the United States of America in the days of Warren Gamaliel Harding. How many young unwed mothers advertize here in the marriage sections of our newspapers mentioning boldly their offspring in need of a father! Abortions made easy to avoid unspeakable tragedies? This cliché is simply no longer valid.

Let us for a moment forget the heat of the discussion, the emotions on both sides. (A week after the six to two decision of the German Supreme Court, members of a feminist leftist organization placed a bomb in its building, causing great damage, but luckily not causing any loss of human life.) In Germany, the opposition outside the party ranks is only slowly organizing. In Austria, on the other hand, an association called *Rettet das Leben!* ("Save Life!") has been formed. It will make full use of a possibility offered by the Austrian Constitution: a referendum. Already 700,000 signatures have been collected for this purpose, out of a population of seven and one-half million. (Only if a sufficient number of signatures can be marshalled can a referendum actually take place.) The power of the referendum, however, is limited: it merely forces parliament to review the law, but does not force it to change it. And the Austrian Supreme Court? The trouble is that it is packed, and respect for the constitution in Austria is a very feeble little plant. Only recently, an assistant to the (formerly Communist) Austrian Minister of Justice, in commenting on the German Supreme Court's decision, declared pompously that in Austria no such Court would dare to annul a decision democratically arrived at by a majority vote in parliament. And, needless to say, our Socialists constantly allude to the "superior" state of affairs in France, England and in the United States. ("Who could be more progressive than the United States?" is the argument. For better or for worse, America is the leader.) And Switzerland, another country belonging to a large extent to the Germanic world? There the National Council (upper house) has just rejected all legalization of abortion.

Rettet das Leben has committees in all the Austrian states. For good reasons, it tries not to look like an ecclesiastic or political

organization attached either to the churches or to the People's Party (Ö.V.P., which in turn tries to maintain that it is not a specifically Catholic or Christian party). As one can imagine, *Rettet das Leben* nevertheless cannot avoid all such associations. It will naturally receive some moral support from the churches. It cannot be entirely ignored by the People's Party, nor even by Austria's third party, the "Liberal Party" (F.P.Ö., *Freiheitliche Partei*), nine of whose ten deputies voted against legalization (one abstained). The organization will, therefore, start its drive for the referendum only after the October elections are over and the political situation is clearer than it is now.

In the meantime *Rettet das Leben* does a lot of practical work. It has offices in many places and it can be reached by telephone. Its main appeal is to girls and women in *Konfliktsituationen*, "conflict situations." Talking to the women who are running these bureaus, you will be told that the expectant mothers in such situations are only up to a point free to decide what to do. They usually stand under enormous pressures—not of circumstances, but of other people. There is something unnatural about a woman who wants to destroy the child growing in her; psychiatrists can tell endless stories of nervous breakdowns, the pangs of guilt, the depressions following the abortions. But the trouble is that boy friends, even husbands, mothers, sisters and brothers, in-laws, employers, and colleagues conspire against the child-to-come. *Rettet das Leben* has only one interest: to save a life and to aid mother and child. Financially, legally, medically, socially, spiritually they will do whatever they can—and once the mother agrees, she can be easily helped. Help is given either by the organization alone, or in conjunction with other private or public institutions.

In Germany, as before, only the rare, strictly medical indication permits abortion. In Austria, abortion now is legal up to the third month, but except for Vienna, the city of St. Poelten, and Carinthia, the clinics refuse to comply. The *Ärztelkammer* continues to reject it. In Linz, Austria's third largest city, even the few Socialist doctors will not cooperate. And what will happen now is this: doctors (who, after all, have taken the Hippocratic oath to preserve life, not to destroy it) will be divided into healers and butchers. In many cases, I am sure, the former will refuse to speak to the latter. The rift is there and has become a dividing force of the first order. And not only among doctors.

What is the actual driving force behind the abortionists? There is no burning problem to be solved; thus the only possible motives re-

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maining are an ideological stand of a sinister nature or, what is even more terrifying, a plainly satanic desire to kill. It is difficult to find another explanation. On the other hand, this evil trend also has its positive side: It has awakened many people to their civic and, even more, to their human responsibilities. It is making people realize in a concrete, a very tangible way the enormous crisis our Western, once Christian, civilization is facing at the present time. And it makes them conscious that there comes a moment in life when one has to take a stand, to go out into the arena and fight. The "Long Weekend" of tranquility after World War II is definitely over. Every hospital is now in danger of becoming a little slaughterhouse. Hitler was defeated, but his spirit is not dead by any means.

Let's Stop Deceiving Ourselves About Abortion

Margot Hentoff

FOR A period of time before abortion became legal, I used to enliven dull dinner parties by throwing into the conversation the statement that abortion was certainly murder. Since I rarely had dinner with any but a variety of civil libertarians, other liberals, and leftists, this was always good for some outraged denunciation—directed at me. If I were especially bored, I would add that I found some killing acceptable, that indeed I would want a defective newborn child disposed of, that perhaps capital punishment *was* a deterrent, and that if someone attempted to assault me—even only with fists—I would shoot him between the eyes without a tremor of guilt. Still, I would insist, we should call things what they are. And surely one did not have to be Catholic to understand that what abortion entailed was the slaughter of innocents.

But that kind of philosophical fooling around took place before the state, in effect, took its hands off the issue of abortion, leaving it to doctors and women. We now have a real situation in which abortions are being performed beyond the point of scraping out embryonic tissue. Now, the age of the products of midtrimester abortions are, at times, the same as that of prematurely-born infants who have a chance, however small, to live. In some cases, what determines whether the *thing* will be treated as an aborted fetus or a premature infant is whether it is wanted or not—a rather odd way to make a determination of humanity.

The whole issue of the ethics of dealing with human fetal life recently has been stirred up again. There is the Kenneth Edelin Boston manslaughter conviction. There are other cases in which doctors are coming under attack for having done research on aborted fetuses (in

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some instances, this research having required that the fetuses be kept alive for a period of time).

As the debate heats up, the liberal community is becoming more outraged than I have seen it since the Christmas bombing of Hanoi. But it remains unwilling to look at the real question abortion raises now and forever: is killing for utilitarian principles morally acceptable to humanists and where should it end?

Dr. Edelin and the pro-abortion people have made much of the idea that he was really convicted of performing a legal abortion and that he is a martyr in the abortion cause. But, in point of fact, Edelin was being tried for smothering a living fetus in utero during a late midtrimester hysterotomy (a kind of mini-cesarean operation, the point of which is clearly not to bring forth another Julius Caesar). Edelin got stuck with the hysterotomy procedure because two previous salting-out attempts on the mother had failed to dislodge or kill the fetus. Since (as the juror who held out longest for his acquittal said) the purpose of the operation was death, what was Edelin to do? Apparently, his major error was that he didn't fudge what he was doing—which was to make sure that a viable fetus did not emerge.

I spoke to an obstetrician who mentioned that one possible procedure in such cases is to go into the uterus, remove the placenta first, and tie off its connection with the fetus—thereby depriving the fetus of oxygen. "Then" the doctor said, "if you go back into the uterus and fish around a while for the fetus, you will bring out a naturally dead fetus, not a live one."

Edelin apparently addressed himself to the end of the fetus first—an act which looked, to some of the witnesses and to the jury, remarkably like murder, albeit in a good cause.

Here we have one of the problems created by the liberal community's obfuscation of language in refusing to speak plainly about what abortion is. They have held on to the illogical concept that the fetus is not a human being, that no killing is involved, and that an abortion is merely an operative procedure on a woman who has the right to decide what she wants to do with her body and the products thereof.

To liberals, state-condoned killing is what only the right-wing espouses. Capital punishment, for example. And, for liberals, when the Right-to-Life people claim to care about unborn children, it is comforting to insist that they are merely making mischief which will result in the further deaths of mothers, as well as more battered children who might die later on as a result of being unwanted.

On television, on Sunday, I watched a young black woman being

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interviewed about what would happen if she did not have an abortion. As if she had been programmed, she responded to the question, "Why do you want this abortion?"

Like another breed of Stepford wife, she answered, "I would rather have the abortion than have the baby and hurt it later on."

Have we finally convinced the poor that they are out of control?

In a Herblock cartoon last week (sardonically titled "Creation of Life") the gleeful Boston D.A. becomes Dr. Frankenstein watching his monster (labeled Massachusetts Abortion Case Conviction) rise to commit his evil deeds. But it is not entirely because of evil district attorneys that fetuses lie in unquiet graves.

In the same week, Harriet Van Horne wrote:

Right to Life people were the hawks shrieking for blood in the dark days of Vietnam . . . They are tainted with death, these zealots who would put a 37-year-old doctor behind bars for performing surgery sanctioned by the Supreme Court. A kind of surgery, moreover, that many Americans accept as socially constructive in a nation that cannot feed its populace and is running out of vital nonrenewable resources.

Our side, you see, only performs surgery; theirs always deals in death.

Van Horne goes on:

The cost of maintaining the children of the poor comes to well over \$1 billion a year . . . We have long since exceeded our optimum minimum population. Poor families breed more promiscuously than affluent families.

There is another liberal argument, much used. Dr. Edelin speaks often of the deaths from illegal abortions he has seen and explains that his choice is between the life of the fetus and the life of the mother. But, in most cases, what he is really doing is taking the life of the fetus in order to preserve the freedom of the mother to be unburdened by a child. Not the same thing. The name of this game is the Ethics of Convenience, and the rules of the game preclude admitting exactly what's going on.

I asked an obstetrician what they do with fetuses who are still alive after an abortion. "Well, they can't really breathe," he said. "Their air sacs are not sufficiently developed. There is some squirming around and gasping and respiratory movements, but in three or five minutes it stops."

"That must be sort of demoralizing to watch," I said.

"Yes," he said, "It is."

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A pediatrician said, "they talk about 24-week viability—but you can get premature infants who live at 20, 22 weeks. Rarely, but you can get it."

One of the many things which makes late abortions demoralizing is that we have, in modern Western society rejected infanticide as a solution to social problems. Unfortunately, as the age of the aborted fetus increases, it gets to look like a baby. Our instincts tell us that these are babies, and that what we are allowing has more to do with infanticide than with contraception.

"Look," another doctor said, "doctors can't decide when life begins. I don't know who can—but we can't make the decision. Give us the rules and we'll do what we're supposed to do."

He is, of course, right. Dr. Edelin is no more guilty than the state of Massachusetts which refused to enact *any* abortion law after the Supreme Court decision. He is no more guilty than the Supreme Court which begged the question, than the community which refuses to acknowledge that the death of a human being is a fundamental ethical issue.

Perhaps doctors are *least* equipped to make such judgments. Their training has educated them to go against their own early instincts—to cut into flesh, to inflict pain, to mutilate in order to cure. In a way, they are trained to be less susceptible to their own gut reactions, less likely than the rest of us to accept the appearance of things. To doctors, if the law says an unborn child is only fetal tissue, it is fetal tissue. Tell them to maintain life in its most tortured form, and they maintain life. In Nazi Germany, among psychiatrists in Russia, it has not been difficult to convince doctors that what is legal is ethical. And why should they be expected to be moral philosophers? A jury, on the other hand, ignorant of fine points and medically uninformed, responds to Dr. Edelin's statement that "they had a fetus in the mortuary" by saying: No—what they had was a human being in the pathology lab.

And there is more coming down the pike. The Right-to-Life people may be troublesome, but someone ought to pay attention to what is happening. What we have now is chaos in terms of fetal research, salvageability of aborted fetuses, legal actions, and the issues of guardianship and consent. To say nothing of the absence of an ethical philosophy.

Until now, liberals have been able to sustain their antideath self-image by insisting that, in routine cases, abortions only remove fetuses with no chance for independent life from mothers who have the right not to be used as incubators.

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That branch of medicine, however, which deals with treating fetal life has progressed so far that, as a doctor told me recently, "In the not so distant future we will be able to maintain life outside the woman's uterus perhaps as early as 12 weeks after gestation. But what kind of baby would it be?" he asked. "What kind of damage to the central nervous system would have been done?"

What will we do when that time comes, I wonder. Who will be responsible for what is born? Will we keep it or throw it back into the sea? Or will we kill it, quickly, before it gets away?

The Cui Bono of Abortion

M. J. Sobran

GEORGE BERNARD SHAW was an ardent opponent of the free market in general, but he singled out the economics of medicine for a special blast. Our present arrangements, he argued, "give a surgeon a pecuniary interest in cutting off your leg." "I cannot knock my shins severely," he went on, "without forcing on some surgeon the difficult question, 'Could I not make better use of a pocketful of guineas than this man is making of his leg? Could he not write as well—or even better—on one leg than on two? And the guineas would make all the difference in the world to me just now. My wife—my pretty ones—the leg may mortify—it is always safer to operate—he will be well in a fortnight—artificial legs are now so well made that they are really better than natural ones—evolution is toward motors and leglessness, etc., etc., etc.'"

His point was not that doctors are corrupt. On the contrary, he considered that most of them chose their profession out of high-mindedness, however corrupt some of them might become in time. His point was rather that the economics of the situation could not be better designed to corrupt. Under the circumstances, "we shall be dismembered unnecessarily in all directions by surgeons who believe the operations to be necessary solely because they want to perform them." If it is profitable to mutilate, doctors will tend to mutilate, even needlessly, whenever a suitable pretext affords itself. And again, this is so not because they are wicked but because the situation is fraught with temptations. To put it as simply as possible, people sin more often when tempted than when not tempted.

Now the application of this to abortion is plain enough. We are told that the abortion decision should exclude the community as a whole, being a matter properly decided "between the woman and her doctor." Note that these are the two parties who have the greatest interest in killing the unborn child. (There are those who deny that

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the unborn child is a child, apparently on the theory that it is possible to be just a little bit pregnant.) The woman will be relieved of the burden of motherhood; and whatever else it is, it is a burden; while the doctor will make two hundred dollars or so for performing a very simple operation (simple at least in the early stages).

Thus there is something like a bounty on the lives of the unborn. It is profitable to kill them, as witness the proliferation of abortion clinics. No doubt the morals of those who operate them vary greatly; but in some places they scandalize even those who favor permissive abortion. A young woman reporter in Detroit submitted a urine specimen she said was hers, though in fact it was her boyfriend's, and was told by the clinic that it tested positive: she was pregnant. She actually went through the operation (I believe it was of the suction kind) before publishing the story. An uproar ensued, and new restrictions were passed, so that abortions in Detroit can now be performed only under rigorously controlled conditions. An abortionist is forbidden by law to collect his fee without actually killing a child. Thanks to that reporter, other young women are getting their money's worth.

Now I do not think abortion is ever morally justified. Not in cases where the child has been conceived in rape or incest, not even to save the mother's life. But these are extremities of temptation at which I do not think it is appropriate for the community to punish abortion beyond reaffirming its dismay at the killing of the unborn. A woman must be heroic to choose to die, if it comes to that, rather than permit the death of the child she is carrying. And none of us has the right to demand heroism of her in such a case, or to punish her for taking the unheroic course. Cases involving rape, incest, and deformity are of a different order. They do not pose threats to the mother's life. If the child's supreme right—the right to live—does not threaten her life, I can see no justification or excuse for sacrificing it to some lesser consideration: her convenience, comfort, or even emotional equilibrium. Yet the law, even before the Supreme Court decision legitimizing almost all abortions, never punished very severely in these cases: seldom if ever was a woman jailed, or even tried, for getting an abortion. The wrath of the law was directed against the abortionist: and quite properly, in my opinion. It was he who took advantage of the woman's undeniable misery. Hundreds of thousands of illegal abortions occurred annually, which is taken by some abortion advocates as proof that where there's a will there's a way—though it is equally arguable (and to my mind more probable) that the number of illegal abortions could have been diminished drastically by making

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the penalties stiffer: life sentences for abortionists, say. The mother's part in seeking an abortion may be fairly described, in most cases, as a crime of passion; but not the abortionist's. He is after profit. His is a crime of calculation. He weighs the consequences, and if the risks are too great, he will seldom or never perform an abortion.

But as things now stand, abortion is as safe (for the *doctor*) and as profitable as any other form of minor surgery. He finds that although abortion is still controversial, he may take the lucrative side of the controversy without legal, and with considerably reduced social, penalty. And the mother is rid of an unwanted child without even having to carry it to term—without even having her neighbors or parents know that she is carrying it at all.

As little as Shaw do I want to attack the medical profession. I dislike many doctors, but I have no confidence that the ones I like refuse to perform abortions or that the ones I dislike eagerly undertake them. Nonetheless, it is odd that one so rarely hears a generalized accusation against the medical profession. For here we have a truly explosive public issue, with violent passions on both sides; we live in a time when it is acceptable to smear the motives of your adversaries; the medical profession itself is often the object of cynical attack; and of course we are regularly told that anti-abortionists are emotional, irrational, superstitious people who are rude enough to violate the sensibilities of their neighbors by flaunting pictures of bloody fetuses. Columnist Harriet Van Horne even tells us that they are bloodthirsty! The striking fact is this: that even the most simplistic anti-abortionists confine their objections to the nature of the act ("abortion is murder"); while pro-abortionists feel free to accuse anti-abortionists of being motivated by misanthropy. (Most of them are too honorable to do so, but the ones who aren't, like Miss Van Horne, know they may let fly their abuse without fear of reproach from those on their side of the argument.)

Why do we not hear wild accusations against the medical profession for its acquiescence and (in some cases) its participation in the killing of the unborn? Because those who oppose abortions are too civilized to make them. Just as they are too civilized to tolerate abortion.

Do I mean to say, a reader will ask, that pro-abortionists are *less* civilized than anti-abortionists? Yes. No doubt there are exceptions; but I appeal to my reader's own experience. Is it not true, by and large, that the abortion foe seems to be *pleading* with his fellow citizens? *Begging* them, as it were, to look up and notice something? Even if he is Catholic, he does not appeal to the authority of his

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church, or to any peculiarly Catholic doctrines. Even if he offers those gory pictures (which I hate, and wish he would not use to make his case), does he not say, in effect, "Look here: can we deny that this poor creature is one of us? Can we fail to give him our protection?"

And is it not true, by and large, that the pro-abortionist replies by accusing him of emotionalism? Of being actuated by some sinister ecclesiastical force? Of trying to impose his private views on all his neighbors? Of seeking to abridge the rights of women? Of hard-heartedness toward the poor?

In brief, the strategy of the anti-abortionist is to persuade; that of the pro-abortionist, to ostracize. When motives are attacked, they are the motives of the anti-abortionist. Not all pro-abortionists are guilty of these tactics; yet even the highminded ones rarely bother to restrain rhetorical extremists like Miss Van Horne. Numerically, they may be mostly civil people; yet effectively, they are dominated by their worst representatives, the Steinems and Abzugs.

Columnist Nicholas Von Hoffman, who opposes both abortion *and* legal prohibitions, has lately remarked on the snobbery and anti-Catholicism of many abortion advocates. Abortion foes do tend to be Catholics, in many cases "ethnics": of Irish, Italian, Polish extraction, people of the working classes. Michael Harrington has termed the poor "the other America"; but ethnic Catholics are the *other* other America. They get by financially; they mind their own business; they generally obey the law. But they are volatile when they feel seriously imposed upon. On an issue like abortion, they tend to be outspoken in their revulsion, and thrust an ugly picture before you, to invite you to *share* their revulsion. They are tasteless that way. With all their imperfections, they make a handy target and symbol for advocates of abortion.

If there were more unappetizing foes of abortion, we would hear of them. The advocates would see to that. If anyone got as fat and rich preventing abortions as some do performing them, we would be reminded of it daily. Given the present level of controversy, the taint of venality would be attached to any man who spoke against abortion. Yet where is the equivalent argument on the other side? Where is the anti-abortion tract that dwells indignantly on the huge profits available to the diligent abortionists? Nowhere. I have never seen the economic incentives to abortion mentioned in any but a cursory way. The real horror is in the deathly act itself, and the literature reflects this. Abortion foes make remarkably few accusations, especially con-

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sidering how many might be made—and how many are viciously made against themselves.

Let us waive the central moral issues and ask instead: What's in it for them? Consider even the most vulgar of the abortion foes, the ones Miss Van Horne likes to dwell on. Say they are the bloodthirsty bigots she depicts them as. Well, then, that fact still doesn't explain their fervor. Why do they march and picket to prevent bloodshed? Because they lack compassion for the poor? Do they want the poor to have *more* babies? This is hardly credible; but the Van Hornes of this world don't want explanations, they want demons. But perhaps, it may be suggested, these people protest abortion because they are Catholics. To which it may be answered: What follows? Why the fervor? Why the supererogation? Their bishops, after all, frame their imperatives negatively. "Don't get abortions, and don't support those who favor abortion"; not "Hit the streets." Then why do they hit the streets? Because (answers the pro-abortionist) they are eager to impose their own sectarian values on the rest of us. But then we must ask why they did not picket hamburger stands in the days when they were forbidden to eat meat on Fridays; why they do not boycott drugstores that sell birth control devices.

No, the Catholic opposition to abortion is different. It is more nearly like the Catholic protests of the Fifties, when bishops ordered their people not to patronize bookstores that sold, among others, a few notoriously racy titles, or not to patronize movie-houses that sometimes showed Brigitte Bardot films. But these were issues on which non-Catholics might have agreed, especially if they had not been required to agree with *Catholics*; but as things were, Catholics, by these actions, probably aroused more anti-Catholicism than cooperation. And there was a further, crucial difference: these boycotts *were* actuated by the hierarchy. The energy of the Catholic portion of the anti-abortion movement comes from laymen. Today's clergy and bishops are relatively diffident about their opposition.

It has been said that anti-Catholicism is the anti-Semitism of the intellectuals. However this may be, it is true that both intellectuals and many Protestants view Rome as a fountain of reaction and superstition. The campaign to make anti-abortionism a "Catholic" position is intended to embarrass Catholics and their potential allies alike. Catholics must now bend over backward to show that they are not trying to "impose" their "values" on others, while the non-Catholic who opposes abortion must dissociate himself from Rome by prefacing his opinion with some phrase like "I'm not Catholic, but . . ." Imagine one who favored continued U.S. support of Israel feeling

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constrained to say, "I'm no Jew, but . . ." It sounds abject, as if deferential to a prevailing bigotry.

I can understand certain kinds of anti-Catholicism. The Roman Catholic Church is a powerful institution of conservative tendency; it stands opposed to important contemporary trends. And those who favor those trends have every right to object to and to oppose Catholic influence. But there are honest and dishonest ways of doing so. Making it sound as if everyone who hates abortion is a votary of the Vatican is no more honorable than hinting that every proponent of socialism is an agent of Moscow. It is worse. It is snobbish and dishonest as well.

And incoherent. Those who are anti-Catholic justify themselves, and distinguish themselves from anti-Semites, by pointing out that Catholicism is a voluntary rather than a racial affiliation—yet they impute intellectual passivity to Catholics, a charge which, as I have argued, fails to account for the passion of Catholics in the abortion debate.

All this comes at a touchy moment for Catholics in America. Many of them, especially those thought of as "ethnics," are ceasing to be Catholic—or, as they might say, becoming Catholic in new ways. They are assimilating, getting "with it," hiding the rosary and the crucifix, neglecting the holy water and the votive candles, getting "into" politics, "raising their consciousness," emphasizing the socially redeeming features of their religion rather than the embarrassing dogmatic parts of it. Dan Berrigan puts down the birth control issue as "mickey mouse," and treats transubstantiation as *passé*. Garry Wills writes a book celebrating Berrigan-types, including a Protestant and a Jew, but leaves one mystified as to the doctrinal content of his faith (though with the clear impression that it hardly matters to him). Andrew Greeley hauls out the Virgin Mary only when feminism is in the air, and she makes Catholicism seem a little trendier than the next denomination.

All these types (they seem to be mostly Irish) are as fierce toward Holy Mother Church (a phrase they wouldn't be caught dead using) as toward the nation whose sins they march in protest against. "She's a whore, but she's our mother," says Phil Berrigan. But these are the extremists. Others are more quiet, diffident in their embarrassment. John Kennedy pleaded with Protestant ministers to disregard his religion as "an accident of birth." When an abortion bill was placed on a referendum in Michigan several years ago, the Attorney General, Frank Kelley, up for re-election, was asked where he stood. "With a name like mine," he replied, "naturally I'm against abortion;

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but if it passes, I'll bow to the wishes and demands of the law." (Accident of birth, fellas.) Similarly, when a rider was proposed to a recent Senate bill, to prevent the use of Federal funds for abortions, Senator Edward Kennedy said that though "personally, I'm against abortion," he would oppose the rider. That "personally" is hard to make sense of. Nobody says "personally, I'm against infanticide—but it's your baby." Obviously it was a dodge: it meant, "Being the Irish Catholic Senator from Boston, I can't very well come out for abortion, but with this pro forma disclaimer, I will give my effective support to it." Profiles in Prudence.

I see similar patterns in many Catholics of my acquaintance, some of them priests (and one of those, as it happens, named Dougherty). I recently saw a televised discussion of abortion featuring a Jewish woman, a Catholic politician, and a defrocked Jesuit, whose name was O'Rourke. Needless to say, the only one who favored abortion was the Jesuit. But his manner was interesting. When the politician said that the Catholic Church should make a "prophetic witness" against abortion, O'Rourke replied, "Yes, it should make a prophetic witness—instead of lobbying against the rights of American women." Yet the Church had made such a witness—partly in the act of defrocking him! Here again is that familiar phenomenon, the Catholic (usually Irish) whose Church is acutely embarrassing to him, but who cannot bear simply to walk away.

But here I lay aside the question of the Catholic Church's self-understanding, its "contract" with its members, a source of great puzzlement to me, and move on to what is being sought for abortion. Here O'Rourke's position is interesting. He did not exactly *favor* abortion, exactly; he merely seemed to treat it as a regrettable necessity, like amputation, which would fade out of the picture on the happy day when social justice prevailed in the land.

Unfortunately, the doctor who has an interest in abortion, like Shaw's doctor considering whether to cut off the leg, is only too likely to find a necessity where only a subjective uncertainty exists. A California doctor, writing shortly before the Supreme Court's decision, complained that psychiatrists have licensed "therapeutic" abortions on nothing more than a hunch that the mother would commit suicide—and psychiatry, whatever may be said for it, is nearly worthless as a predictive science. How much more lax will abortionists themselves be in prescribing abortion?

What is being sought for abortion, in a word, is respectability. Our public policy is now neutrality toward abortion—and neutrality means tolerance. But it is not even real neutrality. Abortion is one of

those things that apparently cannot be permitted without being encouraged. There are the dynamics of the abortion industry itself. Moreover, there is now the availability of public funds—thanks to men like Edward Kennedy.

In whose interest is it to have permissive abortion? Obviously, the woman's (and her husband or boyfriend's) who does not want the child; and the doctor's. That is true of abortion considered as a merely private matter. But what about the public aspect of the problem? In whose interest is it for the government to promote and pay for killing the unborn? That depends upon which unborn are killed. It is too early to determine this question with any finality. But I suggest that one answer is implicit in the terms of the debate itself.

Here are some representative arguments for allowing abortion:

1. "For every early physiologic process interrupted [*sic*], we are preventing a candidate for our *relief* rolls, our *prison* population, and our growing list of *unwanted* and frequently battered children." (My emphasis.)

2. "If you have a hopelessly decayed tooth, you'll be better off having it extracted. Similarly, if you are pregnant, poor, unmarried, and frightened at the thought of having a child, you'll be better off having your pregnancy terminated [*sic*], *if that's what you want*. Not otherwise." (Emphasis in original.)

3. I would add Senator Jacob Javits' protestation that the aforementioned anti-abortion rider would constitute "outrageous discrimination" against the poor.

Now in these and a hundred other editorials and public arguments I could cite if only I saved my clippings, there is a curious emphasis on a special class: the poor. Furthermore, I do not think I am stretching a point in saying that "the poor" in our recent public discourse is usually a euphemism for the black urban poor. When we speak of their proliferation, with the consequent clogging of the relief rolls and prisons, I can only wonder by whom they are really "unwanted." To put my suspicion bluntly: publicly funded abortion is a device for limiting the number of black people.

Note argument No. 2. Why is the condition attached to the pregnancy clause ("... *if that's what you want*. Not otherwise."), but not to the decayed tooth analogy? "If you have a hopelessly decayed tooth, you'll be better off having it extracted— *if that's what you want*. Not otherwise." Put that way, it sounds silly. Obviously, if you are young, unmarried, poor, pregnant, frightened, and (shall we say) Negro, you're better off unpregnant, almost by definition. If you don't want out, you must also be crazy. The argument is so

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loaded as to make its own qualification otiose. And if abortion is morally neutral, why, get an abortion. But if the child unhappily conceived has a right to live, then not all these conditions, nor a hundred more, can justify killing him.

I am utterly unmoved, except to derisive cynicism, by all this factitious indignation on behalf of the poor. Had Senator Javits merely said the rider amounted to "discrimination," I might have believed him sincere. But "outrageous discrimination"? Hardly. He is merely throwing words around. Anyone who wanted to befriend the poor that much would renounce and give away his own wealth: he would *become* poor. He would treasure each of them, like Damien the Leper, willingly sharing their plight. That is a great deal. But if we can't do that, let us at least do a small thing for them: Let us avoid lying to them. It would be more decent to do something like what William Shockley proposes: pay them to abort, saying, "Look. You don't need this baby, and we don't either. Nothing personal, but why don't you let us abort it? Here's \$500 if you say yes. Otherwise you'll just have to make out the best way you can, because none of us is going to make sacrifices to sustain anyone so feckless and useless to us as you."

That of course would be monstrous. The only thing to be said in its favor is that it would be a little less monstrous than our present policy, which is an assault on the very minorities toward whom it feigns benevolence.

APPENDIX A

(The following are the complete texts of the Human Life Amendments introduced early in the 94th Congress. Senate Joint Resolution 6 was introduced by Senator Jesse Helms of North Carolina; S.J.R. 10 by Senator James Buckley of New York, with cosponsors Senators Hatfield, Eastland, Bartlett, Curtis, Helms, Young, and Garn. Senator Buckley also introduced S.J.R. 11.)

S.J.R. 6

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"Article—

"SECTION 1. With respect to the right of life guaranteed in this constitution, every human being, subject to the jurisdiction of the United States, or of any state, shall be deemed, from the moment of fertilization, to be a person and entitled to the right of life.

"SECTION 2. Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

S.J.R. 10

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"Article—

"SECTION 1. With respect to the right to life, the word 'person', as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function, or condition of dependency.

"SECTION 2. This article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.

"SECTION 3. Congress and the several States shall have power to enforce this article by appropriate legislation within their respective jurisdictions."

S.J.R. 11

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

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“Article—

“SECTION 1. With respect to the right to life, the word ‘person’, as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

“SECTION 2. No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

“SECTION 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.”

APPENDIX B

(The following article by Lutheran Bishop Per Lønning of Borg, Norway, was first published in the Norwegian journal Kirke Og Kultur, vol. 4, 1974. Bishop Lønning holds doctorates in philosophy and theology from the University of Oslo, and has lectured at numerous American colleges and universities, including the University of California, the University of Minnesota, and Luther Theological Seminary. The Bible and the Abortion Problem was translated into English by Rev. J. Melvin Moe, and published as a pamphlet by ForLIFE, Inc., of Minneapolis, Minn. It is reprinted with permission here, in slightly abridged form.)

The Bible And The Abortion Problem

In a newspaper controversy following the declaration of the Bishops Meeting in the autumn of 1971, the social physician, Berthold Grünfeld, upbraided the bishops for having argued as physicians and not as theologians. Instead of viewing human worth on the basis of the Bible, he charged, they had sought to do so within the framework of a medical problem:

Is the fetus, biologically viewed, an independent being, and to what degree can it be said to be identical with the human being who in due time will come into the world?

In my reply at that time I indicated that our basis for human worth cannot be repeated every time the Church participates in an actual debate. In many instances it must be expedient to presuppose the conviction as to human worth, inasmuch as this conviction—not least within the cultural circles of our western culture is anchored in most people, and then point out the conclusions of this conviction in relation to the actual problems. What is lacking among the vast majority is not the idea of human worth, but a clear and logical application to the questions which daily challenge the same human worth.

However, I shall grant that my opponent of that time is right in insisting that the Church *also* has the obligation to set forth reasons for its conviction:

Why do we maintain a human worth, and why is the conviction of the human worth of the fetus an undeniable part of this conviction!

Even though one may well believe in human worth without believing in the Bible, one cannot possibly believe in the Bible without believing in human worth. And there is no doubt that faith in the Bible gives belief in human worth an anchorage and a perspecuity which it would not have without the Bible.

The fact that we find the idea of human worth is also *outside* of the Bible is really in the most beautiful accord *with* the Bible, more particularly with the Bible's vision of creation. "God created man in His own image . . . male and female He created them"—these words from the first chapter of the Bible are the very heart of the theme: human worth.

What lies in the words, "in the image of God," has been quite effectively elucidated by the so-called I-Thou philosophy of the twentieth century. Philosophers such as Martin Buber, Eberhard Grisebach, Gabriel Marcel and others emphasize how the encounter with a living "Thou" differs from the encounter with the dead "It." In the encounter between person and person there lies the possibility of experiencing life's meaning: the sacred, binding interdependence. Heart opens for heart. That man is created in the image of God means that the experience of standing face to face with a living "Thou" is a reflection of the very experience of God.

Even if most people are not able to display this experience in conscious reflection, the true experience of brotherliness contains an unconscious encounter with

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God. And it contains the very condition for the possibility for men to be able to perceive God. Such concepts as God's "goodness," "love," "kindness," "severity," "faithfulness" and so forth would on the whole have conveyed no meaning if we did not know these attributes from our encounter with human beings. Nor would such designations for God as "Father," "King," "Lord," "Shepherd." The concept materials necessary for our being able to speak about God are not drawn from the lifeless world of "things," but from the living world of fellowship. The knowledge of God is not meta-physics (a knowledge acquired via physics), but meta-confrontation (a knowledge acquired via the confrontation with the "Thou").

Man's likeness to God obviously does not consist in appearance or in anatomical structure. The likeness must be understood on the basis of our confrontation with the sacred, inviolable Thou: It lies in the ability for free and self-determined devotion, for love in the fullest sense. An experience of the divine—though consciously ever so dim—will therefore be present in every human being who has not destroyed his own capacity to react humanly. If man himself attempts to interpret his experiences within the framework of an atheistic system of reference this does not preclude that God is "indirectly" present in such a person's experience of being human.

Another matter, about which I shall say no more here, is the possibility that an atheistic philosophy, especially when carried forward through several generations, will have a narrowing down effect on the whole experience of being human within a cultural circle, in that it gives fortuitous modes of thought a free hand, even such modes of thought as appeal to inhuman flights from responsibility.

Allow me—for the sake of not being misunderstood—to interrupt my thought process for a moment to make clear that what is said here has nothing to do with what is traditionally called "natural religion." The basic claim within such a religion is that man in every area of culture, independent of revelation and contact with organized worship of God, is able to have an adequate knowledge of God. My purpose is not to blot out the difference between a belief in God founded upon a divine word of revelation, and a universal notion of God founded upon human feelings of contact. The religious Thou-consciousness which grows out of the encounter with one's fellow human beings does not imply the conscious God-orientation which the Bible calls "faith." In the final analysis it does not say who God is and what He wants to do with me. Man, as he offers himself to man, is a complex and self-contradictory being. It may be difficult to distinguish clearly between genuineness and unguineness in a fellow human being, and no less difficult in oneself. What is self-abandonment and what is self-assertion in this and that particular choice of action? I perceive contradictory motives behind my maneuvers. Where does the front line between the noble and the ignoble run just now?

To perceive God in man is to see a face in the fragments of a broken mirror: the whole is bound to be piecemeal and divided, sadly piecemeal and divided. That man is created in God's image and not in the devil's may often be more than difficult to maintain. The very foundation for our conviction concerning human worth is not the object of proof, but only of conviction. The image of God in man never becomes any sure scientific knowledge; it will always be the object of faith. Faith, hope, and love, but not for scientific investigation.

Powerful words concerning human worth are to be found in a number of places in the Bible. We find a beautiful and poetic interpretation of the creation narrative in Psalm 8. Here, among other things, we are told concerning man: "Thou hast made him little less than God, and dost crown him with glory and honor" (vs. 5). In the New Testament we have the tremendous statement that not even the whole world can compare with the value of a single human soul (Matt. 16:26). Here it should be noted that the word *psyche* in the original does not as a matter of course call forth the same notions as the word *soul* in modern Norwegian. As far as the meaning is concerned, it would be better to translate it "life" or "self," for the

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word does not denote a limited part of man in contradistinction to other parts, but the very life-center, the living "I." To "lose one's life" actually means to destroy one's true "I," to forfeit one's life, to throw it away into nothing. Besides what the word says about "To be or not to be, that is the question" (Shakespeare), it indirectly says something about the equal-worth of human beings. If gold, honor and conquests are as nothing compared to one *soul* then we are also told that the differences between human beings are to be regarded as immaterial. "There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female . . ." (Gal. 3:28).

In the very conviction of faith that the Son of God came as a man among men there is a new, strong confession as to human worth. *So* much does God care for man, *so* related does He regard Himself to be to us that an incarnation (God entering into human flesh and blood) became His offer to the world.

Let this suffice as a basis for "human worth" in general. The question arises whether this "worth" also can be extended to the fetus. If so, are there direct scriptural words for this?

One may, of course, operate with indirect scriptural support and say: The human worth proclaimed in the Bible cannot be consistently maintained and is in danger of being forgotten in tomorrow's world, *unless* it also includes the unborn human life. Personally, I regard this as a strong and unshakeable assertion. The Church has made several attempts to present the basis for this claim in the course of the abortion-debate in recent years. If the assertion is valid, we will already on this basis be justified in saying: The Bible demands that also the fetus be included in our consciousness of human worth.

A direct stance on the part of the Bible to the abortion problem of our day is, for many reasons, not to be expected. We are confronted with a problem-situation which did not exist in biblical times. Even if the technical possibilities of performing abortions existed, the desire for abortions cannot have occurred to any extent worth mentioning. Law and decorum provided a relatively effective protection of the unmarried woman against sexual overtures. Polygamy as a tolerated institution made it possible and obligatory in an emergency for a man who made an unmarried woman pregnant to marry her, even if he was under obligations elsewhere. For those who were married, many children were regarded as a blessing from Yahweh. A large family was beneficial for the family economy.

Besides this there developed a deep-rooted awe of life as a creative mystery. That man could or desired to intervene in the course of creation on the side of death would have been utterly absurd in ancient Israel—and no doubt in the world in general at that time. It was important for man to be allied with life and fertility—and with the Lord of Life.

Therefore, the Bible on the whole does not reflect on a problem such as the one mankind has become entangled in today. However, approaches to reflections on the status of the fetus are to be found. The "embryonic fetus" which will not be born and live is pitied for its misfortune. "An untimely birth is better off than he" is an expression for the direst misfortune (Eccl. 6:3; cf. Job 3:16; Ps. 58:8). "They will have no mercy on the fruit of the womb: their eyes will not pity children"—such is the characterization of cultured atrocity (Is. 13:18). The reference is to enemies who kill even pregnant women. What is remarkable in this statement is that atrocity against the unborn is regarded as even more serious than that perpetrated against the mother. To deny the human being even the right to be born is regarded as the height of barbarity.

In Psalm 139 we find this remarkable and deeply reflective text:

For Thou didst form my inward parts, Thou didst knit me together in my mother's womb. I praise Thee, for Thou art fearful and wonderful. Wonderful are Thy works! Thou knowest me right well; my frame was not hidden from Thee, when I was being

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made in secret, intricately wrought in the depths of the earth. Thy eyes beheld my unformed substance; in Thy book were written, every one of them, the days that were formed for me, when as yet there was none of them. (Psalm 139:13-16)

The parallel drawn between the womb and "the depths of the earth" is one with which we are familiar also from the ancient Orient. It is a meaningful expression for the consciousness of the individual birth as part of a universal miracle of life. My birth is not an incidental, isolated phenomenon. The individual human life is a direct result of the great creative mystery.

Furthermore, the main point in this text is that God's concern for man and God's plan with man are traced back to the time before birth. The fetus is not "hidden" to God; that is, it is not a nothing which He overlooks and has not yet placed into His purposes. For God begins with the individual being's existence already from its conception in the mother's womb. The human worth of the fetus can hardly be more forcibly emphasized than here. The Psalmist's view of man and that of the modern agitators of abortion cannot be reconciled. This much is obvious.

* * * * *

Some time ago there was a hullabaloo in some parts of the pro-abortion press because a certain Christian youth magazine had compared today's advocates of abortion to those who in ancient times burned their infants "as an offering to Molech" (cf. II Kings 23:10 and Jer. 7:31 with references). That is, they burned their infants to the glory of the idol in order thereby to gain prosperity and well-being as a compensation. The comparison is no doubt crass and was probably done somewhat hastily and without sufficiently stressing the main point. It should not, however, be brushed aside without further ado.

Surely there were parents in ancient times who found themselves in difficult and unhappy circumstances, and who thought they had found a last recourse for gaining happiness for themselves and their families; otherwise they would not have resorted to such a dreadful alternative. Presumably the sacrifice involved children who were much too young to realize what was taking place and therefore to experience any anxiety; and we presume that they were put to death in a humane manner considering the circumstances. The point is that they sought to make life, happiness, and a living standard secure by sacrificing life. This was the very nerve of Molech worship. To be burned is not in itself a more inhuman fate than to be sucked or scraped from a womb. The only difference between the Molech sacrifice and the more than thirty daily abortions performed in Norwegian hospitals is, as far as that goes, the moment in time when it occurs.

The circles that otherwise cry for "Information, information, information" are strangely wary of information when there is an invitation to speak openly about what is taking place in the abortion hall, and about the experimentation with living fetuses already under way in a number of "civilized" nations. A report from the deliberations of the Swedish Parliament Dec. 15, 1971 announces among other things that "since 1954, fifteen scientific periodicals have reported experiments which used fetuses removed by Caesarian section and placed alive into a vessel of liquid where they are diffused by different elements. These elements, then, have passed into the body of the fetus and in different ways changed the metabolism of the fetus. These experiments ranged in time from 30 to 107 minutes. At least fifty fetuses are reported. They have been from 18 to 21 weeks old" (p. 176 f.). The otherwise quite sexual-liberal Danish weekly, *Rapport*, for March 12-18, 1973, contains a report concerning Swedish and Danish experiments with fetuses which is also frightening. One of the headlines reads: "Experiments with abortions have been made as far as up to 28 weeks—and by then they are able to take hold of a hand, pee, as well as

APPENDIX

whimper. . .!" Concerning this barbarism in the name of science our sexual-informers see to it that we are *not* informed. And he who attempts to present troublesome facts must be content with being labeled as one who has "debased the debate."

If we can only make crystal clear what the comparison involves, it is not unjustified to bring the polemics of the ancient prophets against Molech-worship into the argumentation against unlimited abortion "freedom." In the deepest sense the matter involves the same question: Whether it is right to ally oneself with death when it appears advantageous for the sake of circumstances in one's life. The answer must be: Only if death proves to be the last possibility for averting death. Life can only be sacrificed when life is at stake. The more in number and the more relative the values are which we in a pinch place higher than life the more we devalue life itself. Death marches on in the footsteps of our modernized civilization; it clutches rivers and fjords, air and soil; it extends its arms into the operation-rooms in our well-reputed hospitals. Death and those who support it are taking sides against the Creator.

Therefore, the Church today must speak with prophetic severity. The prophetic severity differs from the pharisaical in that it takes its position solidly with the guilty, and as an accomplice, and in that it proclaims forgiveness and salvation for sinners who might repent. We are accomplices in the development of the consumer mentality and the competitive spirit which drives modern society into the arms of the forces of death. If Christian people have opposed the abortion evil in isolation from other areas, they have not done much to combat the mentality that has propelled the increase of abortions. For this has to a great extent been, and is, our own. In the striving for comfort, status and independence we have not given much to "the others." Nor have we been diligent in our efforts to pass on to others those impulses of the Spirit that can create security, confidence, and the spirit of sacrifice in the home. We have not even always been diligent in utilizing those impulses ourselves, even though we should be the first to know where they may be found.

We all have our share in the abortion landslide. And in regard to those who have been directly involved in these matters, we must be extremely careful in generalizing our judgment. Some—perhaps many—may have acted in sheer egotism and gross foolishness. Others have acted in weakness and have become victims of circumstances over which they had little control. All of them have been pushed in the direction in which they have allowed themselves to be driven, by a society with an impaired moral judgment; they have relinquished their responsibility in the great, collective irresponsibility. To all of them, God's Word must be declared, not only the Word which exposes what we have done and calls the deeds by their right names, but also the Word that points to forgiveness:

Though your sins are like scarlet, they shall be as white as snow; though they are red like crimson, they shall become like wool. (Is. 1:18)

However, for a nation that continues upon a course which is at enmity with life and with the Creator there is no forgiveness. A law which legalizes "abortion on demand" would be a *yes* to the voices which would rob the embryonic human life of that last frail vestige of legal protection, and would indisputably serve to increase the tendency towards backsliding which should be one of society's foremost tasks to halt and to turn around. Such a law—and every law which in the present situation must be foreseen as leading to similar results—is the well-defined position for a pagan view of man *against* not only the Christian vision of human worth but against our whole humanistic western tradition.

About the Foundation . . .

THE HUMAN LIFE FOUNDATION, INC. is a new, independent, non-profit, non-sectarian organization chartered specifically to promote and to help provide alternatives to abortion. The Foundation intends to achieve its goals through educational and charitable means, and welcomes the support of all those who share its beliefs in the sacredness of every human life (however helpless or "unwanted") and are willing to support the God-given rights of the unborn, as well as the aged, the infirm—all the living—whenever and wherever their right to life is challenged, as the right to life of the unborn is being challenged in America today. All contributions to The Human Life Foundation, Inc. are deductible from taxable income (according to the Internal Revenue Code: Section 501(c) (3). The Foundation will automatically send receipts for *all* contributions received (as required by law) as soon as possible. The Human Life Foundation, Inc. is chartered in the State of New York, and is not affiliated with any other organization or group.

Additional copies of this publication are available as follows:

Single copies	\$2.50
10 copies	\$20.00
100 copies	\$150.00

(Bulk prices on request.)

Published in the public interest by

The Human Life Foundation, Inc.

150 East 35th Street

New York, New York 10016

