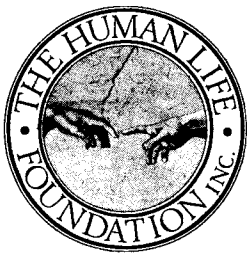
the HUMAN LIFE REVIEW



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. . . about THE HUMAN LIFE REVIEW

This is only the third issue of our review, yet it already takes on a character of its own. Our original conception was to treat the various "life" issues serially: the first issue would "cover" abortion (certainly the most immediate and controversial problem); a second would deal with euthanasia, then the problems of the aged generally, world population, and so on.

It is not happening quite that way. While this issue begins what we now see as a continuing discussion of euthanasia, we also have more (and we think significant) material on the abortion question, all of it growing more or less naturally out of what we have previously published. The two questions are, obviously, interrelated to a degree that we had not at first realized ourselves—and both are easily related to a wide spectrum of other matters —a fact impressively demonstrated in these pages by Mr. M. J. Sobran (who, we are pleased to announce, joins us as a contributing editor with this issue). In each issue, Sobran has given us an article "on abortion." Each one (most especially the current example) has ranged far and wide across social, cultural, religious and ethical boundaries—and touched on just about all of our originally projected "life" issues—without ever leaving (for long, at least) the basic questions involved in the abortion problem. We believe that this not only makes good reading, but also makes good sense in terms of the broad range of concerns we hope to express in this journal, and we are persuaded to continue along these lines in future issues.

The reader response to our second issue (Spring, 1975) was gratifying, and we again express our regrets that it has not been possible for us to answer all the letters received. In due course we hope to include a correspondence column (and, space permitting, book reviews as well). We also hope to set up a regular subscription service, but this remains beyond our means at the moment (currently we regularly send copies of this review only to those who have supported the work of The Human Life Foundation, Inc., *but of course each issue can be ordered individually by any interested person at the price listed on the cover).*

The editors continue to welcome all comments and suggestions, which, we assure you, will be given careful consideration.

THE HUMAN LIFE REVIEW

SUMMER 1975

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INTRODUCTION

MR. MALCOLM MUGGERIDGE writes us that he is "greatly impressed" by our review (a compliment we greatly appreciate), and adds: "It has long been my opinion that the abortion-euthanasia issue with all its implications is the basic one of our time."

It was our intention in this issue to concentrate on euthanasia, but Mr. Muggeridge seems to be right (as he so often is): we have found it difficult indeed to separate abortion and euthanasia, and so have ended up considering them both together, for the reasons he elaborates so beautifully in our first article. He is followed by Eugene Ionesco, a playwright of world reknown, who vividly demonstrates that, once the door is opened on the abortion-euthanasia controversy, it is inevitable that a great many other thorny problems will also come out (including death itself—the ultimate problem of us all).

There follows a fascinating discussion of the *legal* problems that abortion, euthanasia and related "life" issues pose for the medical man—problems the layman probably has never thought of, but which doctors must now face with (literally) deadly seriousness. (The author, Dr. Helmut Ehrhardt, is a well-known authority on the matters involved, and first presented this analysis to the World Congress for Medical Law.)

By now the reader will agree, we hope, that the scope of our continuing discussion has broadened very considerably, and will therefore appreciate the late General Thomas A. Lane's article on the overall problem of world population and its effects on our civilization. It is a thoughtful and moving testament, being the last article he wrote, completed (we're told) while he himself was in a hospital shortly before his death last April.

We hope you will also find Professor Martin Scharlemann's article of unusual interest. Frequently we ask learned friends to comment on articles before publication: this one produced a great deal of comment, including this query: "Is it any longer possible to speak publicly as [Prof. Scharlemann] does here?" What our friend means, in essence, is that the professor speaks in an "old fashioned" way, i.e., as if he took Christianity seriously, and believes that his readers do too. We asked our associate, Dr. Harold O. J. Brown (himself an ordained minister) to comment on this "problem," which he did, as follows: "In the United States we espouse the principle of separation of church and state. But this has never meant, in a country where most of the citizens belong to one community or another in the Judeo-Christian tradition, that specifically Christian voices have no right to be heard in the determination of public policy. Christian spokesmen often take pains to speak as though they were secularists, in order not to appear to promote specifically Christian views in a secular society. By so doing, they have deprived the nation as a whole of the wisdom and insight

they have drawn from their spiritual heritage. Professor Scharlemann, a Lutheran pastor, teacher and New Testament scholar, approaches the problem of euthanasia from an explicitly Christian and Lutheran perspective. . . . [but] the insights he offers should be of interest even to readers outside his spiritual tradition."

Next comes the irrepressible M. J. Sobran, who again demonstrates his remarkable ability to propound the different view. This time, the question is: Who has the *right* to speak out on abortion (and related issues); as usual, Sobran's arguments are surprising, informative, and profound.

Dr. Brown provides an illuminating comparison of the abortion decisions handed down by our own Supreme Court and the West German high court, which are radically different not only in the conclusions reached, but also the basic premises involved. No doubt the main reason that the German court's momentous action has received so little attention in America is that (to our knowledge) no substantial translation of the decision is as yet available; Dr. Brown has therefore given us his own translation of the major parts of the summary recently published in Germany. He also gives his view of a new report on the effects of legalized abortion in the U.S., and follows it with yet another translation, from the German, that details results of legalized abortion in Poland. There is still more. In our last (*Spring*) issue, we published a rather unusual statement on abortion by Bishop Per Lønning, of Borg, Norway. Since then, the Norwegian parliament has passed a permissive abortion law, and Bishop Lønning has resigned in protest, for the reasons he gives (see "Letter from Norway").

We began by saying that it has proved difficult for us to separate abortion from euthanasia. We are not the only ones. Wm. F. Buckley Jr. recently did a *Firing Line* television program on abortion, but (much like this issue) the arguments swirled off in many other directions: population, birth control, euthanasia—even suicide. We reprint the transcript here, with Mr. Buckley's permission (see *Appendix A*). The participants were Mrs. Margot Hentoff (whose article "Let's Stop Deceiving Ourselves About Abortion" appeared in our *Spring* issue), Mr. Norman St. John-Stevas, a well-known public figure in England, and Fr. Joseph O'Rourke, a Jesuit priest until his recent expulsion from that order. (Fr. O'Rourke, in the course of the discussion, made certain statements about New York's Terence Cardinal Cooke, about which, in the pursuit of accuracy, we queried the Cardinal's office: the reply you will find in *Appendix B.*)

We conclude this issue (Appendix C) rousingly, with a statement by Senator Thomas F. Eagleton of Missouri, delivered before the closing session (July 8) of the senate hearings on abortion. The Senator goes to the heart of the matter: when *life* is in question, on which side should the *state* come down? On that moral question we close, satisfied that we have provided a rich blend of facts and opinions, and hoping you will agree.

J. P. McFadden
Editor

What the Abortion Argument Is About

Malcolm Muggeridge

GENERALLY, when some drastic readjustment of accepted moral values, such as is involved by legalized abortion, is under consideration, once the decisive legislative step is taken the consequent change in *mores* soon comes to be more or less accepted, and controversy dies down. This happened, for instance, with the legalization of homosexual practices of consenting adults.

Why, then, has it not happened with the legalization of abortion? Surely because the abortion issue raises questions of the very destiny and purpose of life itself; of whether our human society is to be seen in Christian terms as a family with a loving father who is God, or as a factory-farm whose primary consideration must be the physical well-being of the livestock and the material well-being of the collectivity.

This explains why individuals with no very emphatic conscious feelings about abortion one way or the other, react very strongly to particular aspects of it. Thus, nurses who are not anti-abortion zealots cannot bring themselves to participate in abortion operations, though perfectly prepared to take their part in what are ostensibly more gruesome medical experiences.

Again, the practice of using for experiment live fetuses removed from a womb in abortion arouses a sense of horror in nearly everyone quite irrespective of their views on abortion as such.

Why is this, if the fetus is just a lump of jelly, as the pro-abortionists have claimed, and not to be considered a human child until it emerges from its mother's womb? What does it matter what happens to a lump of jelly? What, for that matter, is the objection to using discarded fetuses in the manufacture of cosmetics—a practice that the most ardent abortionist is liable to find distasteful? We use animal

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Malcolm Muggeridge, one of Britain's best-known authors, is a prolific writer whose articles and books have achieved international acclaim since the 1930's. He was editor of *Punch* magazine, and a correspondent for several newspapers (and currently reviews books for *Esquire*). Mr. Muggeridge is also a familiar British television personality. His latest works include the best-selling *The Green Stick* and *The Infernal Grove*, the first two volumes of his autobiography, *Chronicles of Wasted Time*. This article originally appeared in the London *Sunday Times*, and is reprinted here with permission, in slightly abridged form.

fats for the purpose. Then why not a fetus's which would otherwise just be thrown away with the rest of the contents of a surgical bucket?

It is on the assumption that a fetus does not become a child until it is actually delivered that the whole case for legalized abortion rests. To destroy a developing fetus in the womb, sometimes as late as seven months after conception, is considered by the pro-abortionists an act of compassion. To destroy the same fetus two months later when it has been born, is, in law, murder—*vide* Lord Hailsham's contention that "an embryo which is delivered alive is a human being, and is protected by the law of murder . . . any experiments on it are covered by the law of assault affecting criminal assault on human beings."

Can it be seriously contended that the mere circumstance of being delivered transforms a developing embryo from a lump of jelly with no rights of any kind, and deserving of no consideration of any kind, into a human being with all the legal rights that go therewith? In the case of a pregnant woman injured in a motor accident, damages can be claimed on behalf of the child in her womb. Similarly, in the UN Declaration of Rights of the Child, special mention is made of its entitlement to pre- as well as post-natal care. It is a strange sort of pre-natal care which permits the removal of the child from its mother's womb, to be tossed into an incinerator, or used for "research." or rendered down for cosmetics.

Our Western way of life has come to a parting of the ways; time's takeover bid for eternity has reached the point at which irrevocable decisions have to be taken. Either we go on with the process of shaping our own destiny without reference to any higher being than Man, deciding ourselves how many children shall be born, when and in what varieties, which lives are worth continuing and which should be put out, from whom spare-parts—kidneys, hearts, genitals, brainboxes even—shall be taken and to whom allotted.

Or we draw back, seeking to understand and fall in with our Creator's purpose for us rather than to pursue our own; in true humility praying, as the founder of our religion and our civilization taught us: Thy will be done.

This is what the abortion controversy is about, and what the euthanasia controversy will be about when, as must inevitably happen soon, it arises. The logical sequel to the destruction of what are called "unwanted children" will be the elimination of what will be called "unwanted lives"—a legislative measure which so far in all human

history only the Nazi Government has ventured to enact.

In this sense the abortion controversy is the most vital and relevant of all. For we can survive energy crises, inflation, wars, revolutions and insurrections, as they have been survived in the past; but if we transgress against the very basis of our mortal existence, becoming our own gods in our own universe, then we shall surely and deservedly perish from the earth.

The Inalienable Right to Live

Eugene Ionesco

THE HEAD DOCTOR of a Zurich clinic who withheld medication and nourishment from incurably ill patients who might have lived another month, a year, or two, has been released from jail. He still has to answer to a court of law but, although fired from his position, is again free to treat his private patients. The Swiss Medical Association is defending him. Numerous petitions have been submitted on his behalf. We have the right, say the undersigned, to demand that we be permitted to die when we want. That is one point of view. However, requesting death to cut short suffering can be likened to suicide, which is condemned by religions. Do we have the right to commit suicide?

Worse yet, scientists and doctors are assuming the right to make this decision for others. That is the same as murder. The doctor in question assumed this right when he refused to prolong the life of patients who had not specifically asked to be allowed to die. Hospitals and the medical profession are asking us to take this step from suicide to authorized murder. A sign of the times.

After the liberation of France an SS "hero" was put up against the wall. He begged, he pleaded on his knees, he defended himself desperately before he was executed. This soldier, a murderer to be sure but nevertheless brave in battle, was, when faced with his own death, turned into a blubbering wretch.

Each evening a priest visits the cells of condemned men to give comfort. Their lives hang on the hope of a reprieve. The priest avoids the cell when he learns that a plea for clemency has been denied. At the last moment the condemned prisoner knows—fifteen minutes before his execution—that his plea for mercy has failed. He is instantly

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Eugene Ionesco, a major international playwright, was born in Rumania and now lives in Paris. His numerous plays, written in French, have been translated and performed in 27 languages; he is also author of many essays and short stories. A member of the Academie Française, he was decorated a Chevalier in the Legion of Honor, and received the Austrian Prize for European Literature in 1971. This article, which first appeared in the *Deutsche Zeitung* of Stuttgart, was also published by the *Atlas World Press Review*, and is reprinted here with permission. (*Atlas World Press Review, 1180 Avenue of the Americas, New York, NY, May 1975.*)

turned into an agitated, collapsing bundle of humanity that has to be propped up and forcibly dragged to the place of execution. And when a condemned man is notified that his sentence has been commuted to life at hard labor his joy knows no bounds.

Famous authors, humanitarian organizations, legal, medical, and academic societies, and all manner of well-intentioned souls have lobbied for years to outlaw the death penalty. And most countries have done away with capital punishment.

Why the present turnabout? What is the point of letting the murderer live when the innocent patient is executed? A sentence of death is the ultimate penalty. In the seventeenth century a tragedy that did not end with the death or murder of the main character was merely a tragicomedy. In many novels we read of condemned men who—when the early morning hour for execution has passed—are gripped with unspeakable joy because they have been granted at least another twenty-four hours of life.

There are cases of doctors incurably ill, often with a disease in their area of specialization, who nevertheless allow themselves to be lulled like innocent children by considerate colleagues who offer impossible hopes for recovery. I also know the case of a gravely ill woman who for years bravely bore her suffering. Finally the surgeon brought her up short: "You have survived your ailment seven years. What more do you want?" The woman wanted nothing more—her will to carry on left her. She returned home and died within a few days. I wonder what this brutally frank doctor would have done were he struck down by the same disease.

We have often heard of doctors who are emotionally drained by the death of their patients. Poor doctors! Perhaps they should eliminate their patients more quickly to be relieved of this trauma. Then they could devote their full efforts to helping the sick die expeditiously. Doctors will then be like the executioners of old who did not give the condemned "another minute."

To look death in the eye you have to be either a Christian or a Stoic. Even then the Mother Superior of Bernanos dies a terrible death, wracked by fear despite her strong faith. Something else must be added. There are too many sick people in hospitals—too much bother for doctors and nurses; their burden must be made lighter. We know what goes on in hospitals. Sue me if you will but we know what goes on: indifference, irregular doctors' hours in the overcrowded wards, negligence, and, again, indifference.

One of my colleagues of the Academie Française recently wrote in a newspaper that one has to talk to the sick about death, that one

has to help them in dying. What idiocy! Who in these understaffed hospitals has time for that? Can you call a priest to each patient's bed? There are no longer enough priests. The few who remain have all they can do converting jazz and pop singers to the Church.

And can you imagine how a doctor or a nurse would go about preparing a dying patient for death? Go ahead, ask them. They'd laugh in your face. There's too much to do as it is. What more do you want? It's much easier to stop the treatment or to administer a shot. All of these incurably ill take up entirely too much space and too much time in dying.

One should let any person live who can still take comfort in the rays of the sun, the occasional visit of a child or a relative. Let live the one who is still warmed by memories and how the windows of the room light up at dawn. Who knows of the dreams of an unconscious patient? What does it mean to take the life of a terminally ill patient? Who is incurable?

We are born incurable. Even Christ on the cross complained that God had forsaken him. Joan of Arc recanted and was burned as a redeemed heretic.

Only yesterday we did our best to keep up the spirits of a terminally ill patient. But today a new approach is taking shape: We cannot evade the issue of dying, but it should be death with dignity. How considerate! The entire propaganda, the whole temper of our times, is based on lies and deceit; every truth gets twisted around, nothing is cast in its true light, we are living a lie. Lies are our daily bread, and instant communication spreads them around the world. The political process is in the main the learning of lies; the end justifies the means and the means are lies.

But now the white lies that kept hope alive in terminally ill patients are considered inexcusable. And all this in the name of "human dignity," which at other times we mock and spit upon.

A number of facts tell a different story. The life of a dying hospital patient must be terminated because the bed is needed for others. That fits the pattern—legalized abortion, euthanasia, the killing of infants born deformed. Recently a British doctor urged publicly that newborn babies not be recorded officially until several days after their birth so that a determination as to their viability could be made. Does that not have the eerie ring of the Hitlerian death camps—only those still able to work are preserved a bit longer?

If we agree to the principle that terminally ill patients should be allowed to die, just where do we draw the line? After the hopelessly sick and the unborn, would we consider terminating cripples, the

aged, the insane, misfits, and drifters? And then red-haired children and those with curly hair? The danger lies precisely in where you draw the line on death sentences.

Many millions have been killed in concentration camps, which still exist in several countries. Hostages have been killed since time immemorial. At the moment schoolchildren are being slain in the Middle East for the express purpose of wiping out a race. Those who hold views other than our own are eliminated, to say nothing of those killed in wars, atomic bomb massacres, and other bombing raids. All these raise the basic question whether we kill simply for the sake of killing. Could all of the ideologies, including the one that advocates so-called "death with dignity," be masks behind which we hide our joy in killing? I really believe that is the deeper meaning of the principal preoccupation of modern man.

Let me return to euthanasia. Clearly the value of life has sunk precipitously. There are 3 billion of us on this earth. Possibly there are too many of us to value life as much as we once did. In addition totalitarian systems have destroyed humanity and the dignity of the individual. Humanism is coming apart at the seams.

Millions brought into the world are sacrificed for idealistic societies and for inhuman societies in which life is not worth living. Today's society is assuming the form of a mindless, insensitive monster. Society is the Moloch that feeds on its children—that is the state, the collective.

In truth, however, we are all—as numerous as we may be—unique souls, unique human beings. That is true of all living things. No two cats are alike, no two tigers bear the same markings on their fur. Stand in the street and look at the people! None is like the other. They are all the same and yet so different. The creativity of the Creator is infinite. The only truth is in the individual except when he submerges himself into the mass and loses himself in a totality. Then he is no longer himself and loses his personality and his worth.

Similarly, no moment in the life of any person is like that of another. This evening or tomorrow everything can change. In pain and suffering can be found the eternal renewal of that which is good and beautiful in creation. The poor, the moderately well off, the rich, all cling to life. That is, they want to be.

Did Georges Pompidou perhaps ask that his life be ended to ease his suffering? Like all others, despite his pain, he clung to life. It was said that he was brave. No one has yet defined with any assurance whether bravery or cowardice is involved in living or in ending one's life. It is impossible not to love one's state of being. There have been

many miracles on this earth. But the greatest miracle of all is life. Jesus performed the miracle of raising Lazarus from the dead. He himself arose from the dead. And what do religions promise? Immortality, resurrection, eternal life. I want to say something quite banal—something that can still be said today but might not mean much tomorrow: Killing is a crime.

What is the greatest crime of all? Not to help someone whose life is in danger. And that is just what a number of doctors are doing, safe in the protection of society's indifference and changing values. It is dangerous to criticize doctors. We are in their hands. But Molière dared criticize them. Even Jules Romain mocked them. Today you dare not do it anymore. They are part of the power structure.

Yet I ask myself, in the future what will be the state of mind people will find themselves in when they go or are delivered to the care of a hospital?

Abortion and Euthanasia: Common Problems

The Termination of Developing and Expiring Life

Helmut E. Ehrhardt

The illegal termination of pregnancy is a crime of manslaughter in the [West German] Penal Code. It is a question of developing life. A relaxation of the protection afforded by criminal law in this area leads almost necessarily to the question of the need and worthiness of expiring life for protection. Is it permissible for the physician to "release" an incurably sick person from his suffering? May he terminate life "unworthy of living"? Particularly when it is the express desire and decision of the patient? What are the possibilities and the limits of legal regulation of the physician's conduct in borderline situations? The following deals with a comparative examination of the problems that pose themselves to the physicians as a consequence of a more or less extensive withdrawal of the state from responsibility for developing and expiring life.

The title of this article is still taken as a provocation by not a few of our contemporaries. For them, the concept "euthanasia" is indissolubly bound up with a chapter of Nazi crimes of violence. In the dissenting opinion from the judgment of the Federal Constitutional Court of February 25, 1975 with respect to the reform of §218 of the Penal Code (see the summary and discussion of this verdict in this issue), we read: "Above all it is erroneous, if not fanciful, to connect the time-limit rule [for abortion] with euthanasia or even the 'destruction of valueless life' in order to reject it on those grounds, as has happened in public discussion." This ignores or forgets that the "mercy death" projects of the Nazis had little or nothing to do with euthanasia in the sense of individual assistance to the dying. By contrast, it was and is possible to talk of the termination of pregnancy, even before its legal liberalization in eastern and more recently in western countries, without any aftertaste of demagoguery.

THE MANIFOLD and difficult legal questions in connection with abortion and euthanasia demand a comparison. In both cases we are deal-

Helmut E. Ehrhardt, M.D., Ph.D., is the Director of the Institute for Legal and Social Psychiatry at the University of Marburg in West Germany. This article was originally an address to the Third World Congress for Medical Law (held in Geneva in August, 1973). It was revised to take into account the new abortion laws passed by the West German Bundestag in June, 1974, and their nullification by the German Federal Constitutional Court in February of this year; it appeared in *Politische Studien* (Vol. 26, May/June 1975) and is here published with permission in our own translation, slightly abridged by the elimination of passages mainly of interest to German readers.

ing with acts of killing: in abortion it has to do with developing life, and in certain forms of euthanasia with expiring life. From the perspective of systematic law, therefore, it is appropriate to compare the state of the problem in two areas of the destruction of life. Furthermore, it is impossible to neutralize the emotionally-loaded nature of both themes by attempting to isolate them as far as possible from one another.

Abortion of Offspring: Laws and Proposed Laws

The legal evaluation of abortion has been transformed all over the world in an astonishingly short time. After the Soviet Union—for the second time in its history—placed abortion at least during the first three months chiefly within the woman's discretion, in 1954, the other countries in the eastern bloc followed along with more or less generous and variously applied conditions for abortion, among them the DDR [German Democratic Republic, i.e., East Germany]. Not until the law of March 9, 1972 did the DDR place the decision about an abortion within the first 12 weeks entirely in the woman's hands, demanding only that the procedure be carried out by a physician in an obstetric-gynecological institute.

In Denmark, a new law which took effect on October 1, 1973 makes abortion available virtually without restriction in the first three months, after the pattern of the time-limit solution. In the other Scandinavian countries, conditions of varying narrowness are prescribed. [*Ed. note:* In May, 1975, Norway passed a new law equivalent to the time-limit rule for abortion on demand. See the correspondence of Bishop Per Lønning in the present issue, pp. 94-96.] In 1967, Great Britain introduced criteria for abortion, with strong emphasis on social aspects, that practically correspond to abortion on request (Abortion Act, 15 & 16 Eliz. II, C. 87). After hot debate, the French parliament voted on January 17, 1975, to grant abortion on demand within the first ten weeks. This legal resolution is for the present limited to five years as an experiment. The Constitutional Council in Paris has found this law to be consistent with the constitution, because it "allows a limitation in the principle of respect due to every human being from the beginning of life, mentioned in Article 1, only in an emergency and only under the prescribed presuppositions and limitations." In Italy, the result of last year's referendum on divorce has encouraged interested parties to follow the same path for the legalization of abortion. To general astonishment, the constitutional court in Rome recently declared abortion for medical reasons legal and left the decision to a panel of physicians. The court, however,

explicitly rejected all other criteria. The Federal Assembly of the Swiss Confederation, in a resolution of September 9, 1974, provided for a referendum on the popular petition of December 1, 1971 for the decriminalization of abortion. At the same time it presented the draft of a law providing for a broad definition of criteria permitting abortion. In March, 1975, the Federal Council [upper house] struggled for three full days to reach a solution, but so far without success. There is agreement only on the fact that the present regulations are acknowledged to be in need of reform. As early as 1949, Japan had, for economic and demographic reasons, legalized substantial freedom of abortion. More recently, a more limited rule prescribing indications is being considered.

According to § 97 of the Penal Code for Austria of January 23, 1974, abortion by a physician during the first three months is not punishable. The government of Land Salzburg petitioned the Constitutional Court in Vienna to abolish this provision. This petition was rejected in a decision of October 11, 1974. According to the view of the Constitutional Court, the "traditional fundamental rights valid in Austria" protect only against state intervention. But here there is no question of state intervention. The court is also of the opinion that the protection of life guaranteed in Article 2 of the European Convention on Human Rights does not include unborn life.

Perhaps the most important ruling within recent decades on the complex of questions surrounding abortion is to be found in the two decisions of the United States Supreme Court of January 22, 1973, which apply to the whole territory of the United States. The Supreme Court arrived at a time-limit rule of astonishing perfection. The course of pregnancy is divided into three trimesters. During the first trimester, the woman, in conjunction with the physician she consults, makes the decision alone; in the second trimester, legal restrictions may be imposed only in connection with the health of the mother, and only in the third trimester—when the child is capable of life outside the womb—may legal measures for the protection of developing life intervene, thus for example permitting abortion only in the case of acute danger to the mother's life and health. Both verdicts were based on the conclusion that there is a "constitutional right to an abortion" for the woman. However, the Court does not want this "basic right" understood as "absolute." It emphasized that the American constitution does not guarantee the fetus' right to life, as otherwise there would have been a different judgment.

On April 25 and 26, 1974, the German Federal Diet had to make a decision on proposals for a Fifth Law for the Reform of the Penal

Code. This law seeks a restructuring of the penal legislation applicable to abortion. . . . The vote of April 26, 1974, with 247 voting for the time-limit solution, was a small plurality but not an absolute majority. The Federal Council rejected it, and in the compromise commission no unity could be achieved. In the second reading, the law was passed by the Federal Diet on June 18, 1974, with 260 votes for, 218 against.

The German Court Corrects

The state of Baden-Württemberg protested to the Federal Constitutional Court, which in a stay granted on June 21, 1974, enjoined the application of the time-limit rule until the resolution of the principal matter. Until then, a broadened indication rule was in effect, with the previous procedure for approval for medically-indicated termination of pregnancy. In its judgment of February 25, 1975, the Federal Court found the time-limit solution to be unconstitutional and at the same time defined the framework within which the indication solution consequently called for was to be applied. The fear that the scope now left to the lawmaker has become too narrow is unfounded. Medical, fetal or genetic indications, as well as the ethical or criminal indication, were explicitly declared to be admissible. Over and above this, the "social" criterion, restricted by the court to "hardship situations incapable of being expected [of the pregnant woman]," was recognized. In spite of the court's efforts to achieve precision in precisely this point, practice will founder on the lack of objective criteria. To this extent, there is no cause for the fear that the future legal development in our country will have to lag behind international legal developments toward the liberalization of abortion as a result of this decision from Karlsruhe. In the meantime, it has been shown that an indication rule including social criteria can lead in practice to the same results as a time-limit rule. In the future, the woman seeking an abortion in the Federal Republic will hardly be "disadvantaged" by comparison with women in England or France, quite apart from whether one holds that just and desirable or not.

What is the significance, then, of a verdict from the highest judges in such a fundamental question? Certainly the priority of the basic right to life and the indivisibility of the state's duty to protect life have been removed from the smokeclouds of relativism by the legislation under discussion. The reasoning behind the verdict is good, in many points excellent, and in any case better than the emotionally-charged dissenting vote. But what are of-age citizens to make of it, for the great majority of whom the whole argument is incomprehensible

and will remain so? They see that only six of the eight judges hold the time-limit rule to be a violation of the constitution. Thus one can hold quite a different opinion, which is indeed the case for almost all members of the ruling government, in addition to the two dissenting Karlsruhe judges. Our professional opinion makers have already made it clear that this majority opinion reflects only the purely private, conservative-reactionary ideas of the six judges, and to this extent should not be taken seriously. The dissenting vote—it is suggested to us—is really the judgment that clarifies the constitutional situation on abortion in accordance with the demands of our age. Thus this verdict of the Federal Constitutional Court will not alter the fact that—once again—a taboo has been broken. However the future law will look, it will remain rooted in so-called public opinion that "abortion is permissible, but one has to preserve the appearance of legality."

The Nasciturus as a Legal Entity

Among jurists who feel themselves bound to the principle of legality, it is generally agreed that developing life deserves and requires protection. The reasoning of the Brandt-Scheel government explaining its proposal of 1972 speaks of "the principle of the inviolability of developing life, which—despite all recognition of its intimate connection to the mother's life—represents an independent legal value not subject to free disposition . . ." In the same paragraph, the human dignity of the pregnant woman, as well as her right to a free development of her personality, are opposed to the right of the unborn child.

No absolute priority can supposedly be granted to either one right or the other. In the restructuring, one is concerned with solutions "that take into account the value judgment of the constitution." In very similar fashion, the Supreme Court of the United States emphasized the right and duty of the state to protect "the potentiality of human life" on the one hand and the pregnant woman's "right of privacy" on the other.

The Error of the Supreme Court

In contradiction to the Supreme Court, we must first of all hold firmly to the fact that the designation of the *nasciturus* as "potentiality of human life" is biologically false. The embryo is more than a potentiality of life: he is human life in the process of development, a development that is completed in purely somatic terms only after the passage of about two decades. From the perspective of developmental

biology, the difference between the *nasciturus* of the last weeks of pregnancy and the newborn is by no means so weighty. We can only take note of stages of development within one and the same course of life, and the road from the "little person" *(Personchen)* to the personality is still a long one.

Both the not-yet-born and the newborn, ultimately, have in common the fact that they cannot independently assert their right to life. In absolutely equal fashion they are dependent on the protection of the community of justice: they have a claim to justice. Is it possible to relativize or even negate the need for protection and the legal claim resulting from it on the part of one and the same living being in one or more stages of its development? It is possible, for various reasons of practicability or opportunism, but without even one biologically or juristically convincing argument.

The present state of our knowledge of human developmental biology—evidently misjudged by the United States Supreme Court—has corrected many old ideas about the *nasciturus* as a legal entity. If the pregnant woman, with or without the physician she consults, is granted the "constitutional right to an abortion," it is the delegation to another of the decision about the value of the life of a living being that has no possibility of self-representation. This delegation takes place "without respect of persons," without respect to intellectual competency or character because—in spite of biological differentiation that one can hardly overlook—before the constitution all are equal.

With the question of the value of life and its judgment we encounter the first probem common to abortion and euthanasia.

Competition of Basic Rights?

If it is true that "developing life is to be equally respected, as a matter of principle, with born life" [from the law voted by the Bundestag April 26, 1974—cf. above], then the following question is raised: is the basic right of the pregnant woman to a free development of her personality, the American right of privacy, even mentionable in competition with the right to life of the *nasciturus?* No one will be able seriously to doubt that pregnancy and the duties of motherhood limit a woman's possibilities of self-development. In addition to this limitation, however, motherhood unquestionably opens up entirely new dimensions of personal development. The primacy of the basic right to life over against the basic right to a free development of one's personality, unquestioned everywhere else, has here

been challenged with respect to developing life. Thus developing life is by no means respected equally with born life.

In the explanation of the draft of the governing coalition we read: "Because of the indivisible connection of the developing life with that of the mother, it is justified and necessary to take the responsibility of the mother more into account than previously and for this reason to structure the protection of the penal code for developing life differently from that for born life." Thus the state wanted to abdicate its responsibilty for developing life during a period of three or more months, and delegate it to the mother. The state can do this, and not a few states have done it, but then you cannot talk about "the inviolability of developing life" or "equality of respect for developing and born life," because that is nothing less than false labeling.

By withdrawing the penal provisions for the protection of developing life, the state leaves to its citizens, especially to women, a much greater measure of responsibility. The consciousness or sense of responsibility that would have to accompany such a development is presupposed as a "basic attribute" of the mature citizen. However, the threat of punishment and the moral condemnation associated with it has failed as an appeal to responsibility in the case of all too many people. Now the state wants to withdraw from its responsibility, the moral value judgment is dropped, the pejorative terminology "abortion"—like "immorality" in sex laws—is eliminated, and all that remains is a medical procedure which, by law, the health insurance organizations must cover. Certainly this is progress in the direction of "emancipation," but is it an "increase in the quality of life"?

Time Limits and Indication

The distinction between time-limit and indication solutions in the legislative efforts to regulate abortion is only partially appropriate, and is confusing. Many an indication model contains more time limits than any time-limit model. The draft laws presented to the German Bundestag for decision uniformly see pregnancy as beginning with the termination of the implantation of the fertilized egg. Since implantation is to be expected some time from the eighth to the twelfth, sometimes the thirteenth, day after conception, here we run up against the first great unknown. By defining the commencement of pregnancy as the fourteenth day after conception, a determination that cannot be empirically verified in the individual case, the lawmaker can leap this hurdle. He can also gloss over the problematic

issue of making a distinction between the beginning of life with conception and the beginning of pregnancy with implantation.

Still, this does not accomplish much, because the computation of all the other periods stands or falls with the point of conception. As is well known, there are no exact methods for the determination of the time of conception or of implantation. Therefore we are completely dependent on the statements of the pregnant woman. Every gynecologist knows how undependable these are, even with the best of intentions. And naturally such statements are all the more questionable on the part of many women if they wish an abortion. The significance of the time limits and the fact that it is impossible to establish them objectively will certainly quickly have become common knowledge.

The indeterminability of the time limits threatens the credibility of any legal regulation within the framework of a so-called time-limit model. How are we to justify the fact that a termination of pregnancy up to the ninetieth day is a legal medical procedure, but on the ninety-first, ninety-third, or ninety-fifth day the same procedure will be threatened with confinement for up to three years? [*N.B.* German law distinguishes between various degrees of deprivation of freedom, including a less severe form designated here as "confinement."] Quite apart from the fact that no human being can determine these days with precision, it is impossible to understand how the passage of a few hours can change a legal operation into a criminal one. The value or the quality of embryonic life, at all events, does not change so rapidly.

With the time-limit problem we encounter an additional similarity between the arguments for a legal regulation of *abortus artificialis* on the one hand and those for euthanasia in the sense of aid to the dying on the other.

More Quality of Life?

Regulation of the termination of pregnancy in terms of indications is less problematic and more practicable than a time-limit solution only if one confines oneself to a few indications that are capable of precise specification. Any attempt to establish a "social indication," no matter how it is defined, leads to insoluble difficulties. First, who is going to determine that such an indication exists? Physicians and above all psychiatrists rightly refuse to accept responsibility for a definitive statement, whether a social indication is present or not. Consequently, other agencies have to be brought in, about the adequacy of which there are again differences of opinion. In the draft

legislation for Switzerland, referred to above, provision is made for a "qualified, graduate social worker." The social indication is in the last analysis concerned with the "improvement in the quality of life" so often cited today. We can only be amazed at how easily this neo-German political slogan rolls from the lips.

To judge what constitutes an improvement in the quality of life for a particular individual is presumptuous. For one woman it may be a child, for another a second car. The child and the car can hardly be considered equivalent alternatives in a society based on law. The verdict concerting the social indication is thus decided in the interpretation of the pregnant woman's right of privacy. If we take this to be of equal standing with the right of the unborn to life, then any discussion of social and other indications is superfluous.

Medical Indications

A legal regulation of medically-indicated abortion only is to be desired. It also seems well-founded to expand the concept of medical indication from one limited to organic pathology in the narrow sense by including psychological and social points of view. But it is just as difficult as it is necessary to secure such an expansion by an appropriate procedure of evaluation. The relatively few cases of genetic or embryopathological indication can be counted with the medical indications. Things get difficult with the more or less veiled attempts to expand the medical indications by referring to the definition of the concept of health in the preamble to the constitution of the World Health Organization (WHO). In it, health is defined as the maximum of bodily, psychological and social well-being for everyone, conceived as a normative ideal, achieved within the framework of individual and social givens and possibilities. If we are going to argue on the basis of the literal text, then we can spare ourselves a discussion of indications. Certainly pregnancy is, for most women, an impairment of the theoretically possible maximum of their physical, psychological and social well-being. In principle, we must note this: the farther we go beyond organic pathology in our indications, the more questionable every diagnostic and prognostic statement becomes.

As far as the ethical, criminological (rape) indication is concerned, today there is much more unanimity of opinion than even ten years ago, but only on principles. The decisive problem, i.e. how the rape is to be proved, is constantly being shoved aside. Certainly the "clear case" is the exception here. In case of doubt, there simply is not time for a legally defensible procedure to establish proof. In the case of a legal regulation according to the indication model, setting the

beginning of pregnancy with the fourteenth day after conception, the need to include rape as an indication has certainly become, to say the least, questionable.

Self-Determination as a Competing Basic Right

The number of illegal abortions—admittedly undetermined, but certainly high—is the real basis for all efforts to expand the legal possibilities for abortion. Whether a far-reaching legalization is the appropriate means of reducing the total number of abortions and raising the sense of responsibility for developing life is doubted, and for good reasons. In the most recent discussion it is noteworthy that the advocates of a generous liberalization predominantly argue on the same level as fifty years ago. The fundamental alteration of the state of the problem in consequence of modern means of contraception is largely swept under the rug. The "mature citizen of the state" is given the concession of immature behavior, of an "emotional state of emergency" with at least diminished accountability at the time of conception. In the case of undesired consequences of this "unreflected" behavior, then the right of self-determination—momentarily suspended—is supposed to justify the correction of the situation by the elimination of just those consequences. If we make the effort to compare in individual cases the ability of a woman to agree—and thus, her freedom of decision—at the time of conception and at the time of the decision to bear the child or to have an abortion, then all too often there can be no question of an "independent resolution." It is not surprising, when we are dealing with a decision that is so unusual and so weighted with emotion. And this brings us to another problem common to the interruption of pregnancy and euthanasia, the question of the freedom of choice [*Freiwilligkeit*].

As the laws of different nations mentioned above indicate, it is possible to neutralize such a conflict in decision-making. Perhaps such a procedure will even show itself to be partially "adapted to its purpose." But this would not change anything at all in the abysmally questionable nature of every regulation of this type, from either the biological or juridical perspective. All of the "liberal" laws and draft laws are so muddled in many of their detailed specifications, so unlimited in their possibilities of interpretation, and so easy to evade, that in practice they must lead to difficulties. This is exactly the situation in which we find ourselves with the attempt to regulate so-called euthanasia by law.

Pearl S. Buck, the mother of a "child who never grew," has thought deeply about our problem and believes: "Euthanasia is a beautiful,

mild-sounding word; it veils its danger like all mild-sounding words, but the danger is nonetheless there."

Our difficulties with the concept of euthanasia are rooted in history and in facts. Unfortunately, they constantly allow for a tendentious misuse of the word in one sense or another. First of all, it is necessary to hold firmly to the distinction made in the heading of this section between a) euthanasia in the sense of assistance in dying (*Sterbehilfe*), and b) the elimination of life "unworthy of living." Even in the frequently cited case of a malformation of the brain, characterized as "mentally dead" or even as "soulless," there is a fundamental difference between whether the physician gives assistance in dying by refraining from "artificial" prolongation of life or whether he simply "does away with" or "eliminates" this being as unworthy of living.

In the realm of assistance in dying properly, so called, it is not sufficient to differentiate between active and passive behavior. In legal discussion as in that in moral theology, the shortening of life is the decisive criterion for all measures of assistance in dying. On the basis of medical experience, however, it is necessary to say that there are narrow limits to any attempt to create logical or legal norms and a typology. The doctor-patient relationship, especially at the deathbed, is too complex, too personal, to be grasped in a moral or legal conceptual framework. It is against this background that the following attempt to create a structure is to be seen.

A. Euthanasia in the Sense of Assistance in Dying

Common feature: it is always a question of the dying, i.e. of people whose imminent death seems impossible to avert within human judgment, but which can almost never be predicted to the day or hour. The physician's decision of conscience in the concrete individual case and the factual situation—often extremely complex—leading up to it is to a great extent impossible to organize into moral and legal categories:

a) Assistance in dying without shortening of life. This is the "purest" form of euthanasia and is the self-evident duty of the physician, ethically and legally free of problems.

b) Assistance in dying by permitting to die. This is abstention from a possible, very limited prolongation of life: passive euthanasia. There are legal problems: failure to render aid, manslaughter through negligence (etc.).

c) Assistance in dying with shortening of life as a side-effect. The side effect—independently of intent—may be more or less desired and more or less unavoidable. Also called "pure" or "indirect"

euthanasia. In moral theology, this comes under the principle of double effect. Its legal evaluation is in dispute.

d) Assistance in dying with deliberate shortening of life. Also called "direct" euthanasia, brought about by the physician actively or passively (by omitting certain actions), expressly or tacitly desired by a competent dying individual, and performed on the individual incapable of making a decision with or without the approval of his next of kin. Legally this comes under the heading of assistance to suicide (not punishable), manslaughter out of sympathy of other mitigating circumstances and manslaughter on request.

B. Elimination of Life "Unworthy of Living"

Common feature: it is not a question of dying individuals, even though their life expectancy may be more or less limited. Since it is not a question of assistance in dying, concepts such as "euthanasia in a broader sense" or "limited euthanasia" are misleading. There are three groups:

a) Children with cerebral malformation ("monsters") and idiots;

b) "Incurably" mentally ill persons (organic psychoses, severe organic damage to the brain after injury or in old age;

c) Racially, politically, or economically "unwanted" and consequently "unworthy" life.

C. "Artificial" Prolongation of Life

This is a special problem—even in relationship to "assistance in dying by permitting to die," mentioned above—and is at the same time an equally "negative" form of euthanasia represented by "artificial" prolongation of life and suffering. We have reference to those patients with whom natural death is only delayed by means of extraordinary technical effort, although there is no prospect of a cure, or "at best" the gravest handicaps and perpetual debility are to be expected.

Assistance in Dying and Shortening of Life

Euthanasia in the sense of assistance at death is an altogether legitimate medical concern. The relief of pain, of respiratory difficulty, and of other oppressive conditions suffered by one who is struggling with death is a self-evident duty of the physician, even when his actions are no longer determined by the thought of preserving life. However, only those measures of assistance in dying are free of

ethical and legal problems that do not reduce the consciousness or shorten the life of the dying patient. This "uncomplicated ideal case" is not very interesting for the physician in practice, because it does not demand any decision that might burden his conscience. However, every doctor knows that, for example, the type and dosage of medication for the relief of intense, prolonged pain can influence the consciousness and length of life of a dying person in a manner that varies greatly depending on the individual and the situation and that generally can be predicted only in a vague sense or not at all.

While the unavoidable double effect of relief of pain and clouding of consciousness is accepted today in moral theology as well, there is division on the question of a possible shortening of life. It can be an undesired, sometimes unexpected, sometimes rather probably predictable side-effect of the medical measures of relief. Even with this relatively clear situation jurists are of different opinions. We should not deny the theoretical relevance of the juristic considerations that are raised in this connection. Nevertheless, they are some distance removed from the concrete situation at the deathbed. Only too often there is a lack of convincing criteria for the distinction between assistance to the dying without shortening of life and that which brings it. Here we clearly discern the limits of attempting to examine medical procedures from the sole perspective of conformity to justice.

The question of time, the time limit, plays a role in the question of assistance in dying that is just as dubious as it is in the case of termination of pregnancy. When life is gradually fading away in a natural manner, even the doctor who is very familiar with his patient's condition cannot predict it to the day, certainly not to the hour. If the patient receives medication to support circulation and respiration or against pain, this can postpone death without thereby making it possible to predict the time of death any more accurately. We may leave aside the exceptions in which today's possibilities of reanimation with all their technical perfection are applied, especially because they only complicate and accentuate the problems. Fundamentally and generally we determine that in the case of *interruptio*, as in that of euthanasia, there are no objective possibilities of proof within the legally significant time-periods that would permit anything like a precise determination of the beginning or end of life. (*i.e., the baby will be born or the patient have died before legal proof can be established. —Trans.*)

Killing on Request

Killing on request or with consent for some kind of altruistic mo-

tives is—from a psychological standpoint too—certainly different from the other familiar varieties of killing in criminal law. A comparison of the penalties for this delict in the criminal law of different countries reveals astonishing divergencies. They go all the way from the possibility—at least theoretical—of complete immunity from punishment, for example according to the Swedish penal code adopted in 1965, or a minimum punishment of three days in prison according to Article 36, 114 of the Swiss penal code, to imprisonment for at least six years under Article 579 of the Italian penal code. These considerable differences in the estimation of the punishment deserved reflect simply the lack of assurance faced with medical comportment that is hardly possible to grasp adequately in its personal and situation uniqueness. According to legal doctrine and practice that is generally agreed upon internationally, neither the correct recognition of effective help in view of the extreme suffering or acute imminence of death, nor sympathy—no matter how well founded—nor the express wish of a dying person capable of making his own decisions offer justification for medical measures that shorten life.

This is the point of departure for all efforts for a legal regulation involving a more or less far-reaching acceptance of life-shortening measures of assistance to the dying. After different attempts leading to nothing, it was first of all the precise proposals of Binding and Hoche shortly after the First World War that led to a broad and lively discussion. Binding had proposed an orderly procedure involving the presentation of a request, a declaration of agreement—as far as possible—, a decision by a mixed commission, and the like. These proposals were not taken over by any of the influential textbooks of the day, either in penal law or in psychiatry. They could not gain acceptance in the projects for penal code reform [in Germany] either before or after 1933.

Anglo-American Initiatives

About ten years later a strong movement arose, first in England and shortly afterwards in the U.S.A., with the goal of legalizing mercy-killing. A Euthanasia Society was founded in England in 1932 and in the United States in 1938. The English prepared a proposed law that was submitted to the House of Lords in 1936. The proposal provided for a rather complicated procedure and was rejected (by a 35 to 14 vote). Four of the peers were of the opinion that the proposed procedure, with its plethora of legal formalities, would disturb the calm of the deathbed too much. In the United States, as well, the legislatures of different states have also dealt with similar proposals,

although without achieving any results. In 1952 a petition to the United Nations was organized with 2,513 signatures by personalities, some of them prominent, from the most varied areas of life and science in the United States and England. The petition demands an amplification of the Declaration on Human Rights by adding the "right of hopeless suffering people to voluntary euthanasia," but so far without success.

If we compare the German efforts to legalize euthanasia after World War I with the later attempts in England and America, we note above all that in our case—corresponding to the proposals of Binding and Hoche—"mentally dead" children or "monsters" and "hopelessly" insane adults were included in the consideration. The program of the British Euthanasia Society, by contrast, from the beginning and without change to date, has limited itself to "assistance in dying with deliberate shortening of life" in the legal sense of "killing on request" and has concentrated its efforts on this. The original program of the Euthanasia Society of American also took up the problem of involuntary euthanasia by including "hopelessly defective infants" (Williams). However, evidently it soon turned onto the course followed in Engand, probably in the correct perception that there would be much greater legal difficulties involved in sanctioning involuntary euthanasia, which logically would also have to be extended to the "hopelessly handicapped" old and mentally sick.

Only recently there was again a world-wide discussion of our subject in connection with the trial of the Dutch physician Dr. Postma van Boven. She had killed her seventy-eight-year-old mother, who was in great suffering, in accordance with the mother's frequently expressed desire, by an overdose of morphine. According to Dutch law this is surely not a lawful procedure, but it was demonstratively approved by large segments of the population. The Dutch Health Service has now proposed new guidelines, which have been confirmed by the Royal Society for the Promotion of Medical Science. Accordingly, certain measures of euthanasia are to be allowed in the case of the incurably ill, when the process of dying has begun and death is to be expected in a foreseeable time.

The Limits of Law-Making

A comparative examination of the different proposals for a legal regulation of voluntary euthanasia impressively reveals the doubtfulness and the limits of such legisation. First, there is the problem of diagnosis and prognosis, just as in the case of the indications for abortion. Whether and when a disease is "incurable," and "hopeless,"

whether and when it will lead to death is a great deal harder to determine than a layman is inclined to suspect. Given today's possibilities of fighting pain, unbearable pain as a rule cannot be a reason for active euthanasia.

In the case of the most severe and apparently unequivocal conditions of sickness, the physician sees himself confronted with the question of voluntary consent. He knows only too well that there are amazingly few human beings who want to be killed here and now in the full consciousness of the import of their decision. Prior expressions of one's will, no matter how fault-free their legal form, cannot be determinative in such a case. When things get serious, many people just come to think differently than when they were in health. That is a simple fact of experience. Of course there are personalities who stand by the decision that they made earlier, after mature consideration, and who in addition have the good fortune to possess their full powers of decision at the critical moment. But can such exceptions be made the basis for a generally binding, legal regulation? Can the physician desire such a regulation?

Now we have to look with anticipation for a future decision of the United States Supreme Court on the question of the lawfulness of voluntary euthanasia. If there is really a constitutional right to an abortion, then it will hardly be possible to dispute such a right with respect to voluntary euthanasia; on the contrary, the latter can be much more strongly supported, because, theoretically at least, one can begin with the power of the person directly concerned to make a free decision.

Value and Quality of Life

A human being who is thinking of suicide evidently doubts the meaning and value of his life, regardless of his reasons. Is there any use in going on? Can this life still offer me anything? Will the quality of this life continue to go down hill, or can I still hope for an improvement in the quality of life? The candidate for suicide poses these and similar questions to himself and often to others as well. Such questions may be merely the expression of a depressive illness without any real basis, but they can also be very well founded. Many people lack the strength and decisiveness, and many would like to delegate the deed itself and at least part of the responsibility to a doctor. Old experience teaches us that precisely when they are helpless, many people expressly or tacitly expect the doctor to take such a momentous decision for them. It is precisely this that makes the legalization of assistance in dying with accompanying shortening of

life so problematic for the relationship of confidence between the physician and the patient. Is it possible simply to exclude from such a rule patients who have a more or less evident loss of the power of decision? They play the greater role in medical practice, they appeal in a still higher degree to our sympathy, they are "at the mercy" of their doctor, who is supposed to act on their behalf and in accordance with their wishes—which he generally does not know precisely. And this places us squarely in the middle of the problematic complex of a so-called destruction of life unworthy of living.

If we inquire what people implicitly or explicitly have everywhere always called life "unworthy of living," and still speak thus today, we come up against the monstrous births and completely idiot children, also designated as "mentally dead" *(geistigtot)*. Here it is always "the others" who deny that the existence of such beings has any real value of life, because the "mentally dead" are themselves unable to take any stand on such a question. Something that is new in our age is the denial that life has value when it is a case only of bodily deformity. It surfaced for the first time, rather astonishingly, in the Luttich trial of the van de Putt couple (cf. J. Graven). It involved the killing of a mentally normal child born without arms, in other words of an amputation-deformity following use of thalidomide by the mother during pregnancy. In contrast, the "incurably" ill mental patients, organic psychoses, and brain damage fall into the "traditional" circle of persons whose value of life was and is questioned.

Diagnosis: "Worthy of Life"?

The judgment of the value of life in the cases and groups mentioned is based first of all on widely accepted ideas about an individual's capacity to experience reality, seen as the presupposition for the course of a life at all worthy of living; these ideas are hardly capable, rather altogether incapable, of being made precise. We could speak of a psychological or psychopathological criterion, which by its nature must always be contingent upon the individual.

An altogether different consideration enters in when we judge the individual's value of life on the basis of his usefulness to society or, conversely, his lack of value on the basis of the cost of keeping him. It is only a step from this economic argument to other "social ideals" as the standard for evaluating the value of life: national health, racial purity, superhumanity *(Herrenmenschentum)*, breeding of an elite, etc. Thus it is understandable that in the ideology of National Socialism, above all during the war, racial, economic, and political "desirability" became the decisive criteria of the value of life. Racially,

politically, or economically "unwanted" life was also "valueless" life and therefore could or had to be sacrificed in the interest of "higher" ideals and goals.

By identifying "euthanasia" with "Nazi atrocities"—no matter how logical and understandable this may be—we block the way to a clarification of the basic issues. Let us lay aside for a moment the rejection of euthanasia from the perspective of Christian ethics and ask what else speaks against the legalization of a "limited destruction of life unworthy of living." In this, we can start with the proposals of Binding-Hoche, or, more recently, of Catel.

Theoretically, a state structure oriented around the principle of legality could offer an adequate guarantee against the perversion and misuse of such a law to eliminate racially, politically, or economically "unwanted" life. However, no matter how legally irreproachable the procedure, it could not eliminate the questionable nature of the "selection," the problematic judgment of the value of life in an individual case. The old advocates of "limited euthanasia," like the new ones, are at one in the decisive mistake of holding the value of life to be an objective thing that can be delimited empirically and scientifically. Over against this, we must insist that a human being's value of life can only partly be made the object of medical diagnosis and prognosis, because to a great extent it lies outside the level of cognition of all experimental science. What this means for the doctor is that his total judgment of the value of life always exceeds his competence, which is drawn primarily from his factual knowledge. He should see the problems involved with such transgressing of limits and guard himself against them.

For the practical application of the law, it is not the seemingly clear extreme cases that are decisive, but the "borderline cases," which are much more numerous in our area. And this is precisely what cannot be excluded in advance if a law is to be carried out on a broad basis. But when it is a question of life or death, then a society based on law cannot buy any "uncertainty in borderline cases." This can only be done in a state based on power, in which the rights of the person have to take second place to some kind of "social ideals."

The "Killing Assistant"

If we assume for the moment that the possibility of a defensible "selection" of cases of "worthless life" has been achieved and legally regulated, then we face the merciless question as to who is to act as the "killing assistant" here. Many physicians, including those who feel no special religious commitment, categorically reject such kill-

ing. To ask them to carry out such "eliminations" repeatedly or even regularly would be an irresponsible presumption. In the case of doctors who indicate that they would be ready to take part, there arises in all seriousness the question of their professional suitability and of their character.

With this we have once again encountered a problem common to abortion and euthanasia. It is not by chance that so many gynecologists reject the allowing of abortion without medical indications [*Over 80% of the members of the German Medical Association voted against it in their October, 1973 convention.—Trans.*]

Is the killing of a newborn with a grievous deformation of the brain that much worse than the killing of an embryo that would, in all probability, become a healthy adult? How great is the difference between the "professional [illegal] abortionist" so despised today and the "legal abortionist," especially when the latter is not at all badly paid for it? Anyone who repeatedly or regularly kills "worthless" life is no more capable of remaining untouched in character by it than the gynecologist, for whom abortion is part of his daily routine. With any relaxation of the decree against killing the "killer" becomes a psychological, socio-ethical and socio-pedagogical problem.

Prohibition of Killing and the State

If all of the civilized nations were so reticent about any relaxation of the injunction against killing, and the relativizing of the protection of life necessary for the community, there were good reasons, and not only religious ones. It is for this reason that people are struggling so frantically to present the legal liberalization of abortion not as a deterioration but as an improvement in protection for developing life. This is an argument whose shabbiness will hardly permit it to stand. The state is taking the easy way out. It is delegating its responsibility to the doctor, the pregnant woman, the dying patient. It is the same with anti-authoritarian education: the children do as they please, and it is the parents' perfect right not to be concerned about anything.

The Old Testment Decalogue, like the Hippocratic Oath, has to be seen as a product of its time and naturally of the social conditions of the region where it arose. Thus the progressives in the abortion affair, as in the question of euthanasia, unanimously explain to us the relativity or meaninglessness of traditional catalogues of norms in our modern world. Against this interpretation of individual authors, which has been accepted by the Supreme Court of the U.S. with reference to abortion, the World Medical Association, in the "Geneva Covenant" of 1948 and the "Declaration of Oslo" on termination of

pregnancy (1970) did nothing but confirm, in today's language, what old Hippocrates said. Apparently the view still prevails among doctors that "respect for life"—which it is not necessary to take as broadly as Albert Schweitzer did—is in need of special care and encouragement, even and especially on the part of the state, as a principle of social ethics. For the state to retreat in its criminal law with respect to abortion or euthanasia burdens the physician with greater responsibility, forces him to ever more frequent and more difficult decisions of conscience. For this reason it is not at all surprising that so many critical doctors are not very enthusiastic about such an increase in their "freedom to decide."

Population and the Crisis of Culture

Thomas A. Lane

THE ALARMS being sounded about dangers of overpopulation pose some crucial moral problems for our civilization. They raise the kinds of issues which measure the rise and fall of peoples.

We are heirs of a civilization which for two millenia has satisfied the deepest longing of the human spirit for truth and wisdom; and which has brought the world to a flowering of art and science unprecedented in history. We have believed that the truth would make us free. Today that civilization is challenged by a new wave of materialism which attacks on many fronts. Perhaps the population issue will prove to be the critical challenge.

Population pressure is not a new phenomenon. Because of the perishability of food supplies and the hazards of flood and drought, mankind has always lived at the edge of famine. China and India had recurrent famines when they had half their present populations. Famine was a problem not of population but of food supply.

A culture capable of increasing food supplies faster than people had no need for concern about population growth. In the history of the West, nations have felt constrained to accelerate population growth.

The response of nations to population pressures has varied with national cultures. Crisis situations were met according to the ruling philosophy of the society. Some have practiced infanticide, others polyandry. Some have developed religious or cultural customs of sex separation to encourage celibacy.

The relevant Christian philosophy of the West is based upon con-

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cepts of an omnipotent God and immortal souls. The rule of God means that His will must guide human society, that human wisdom lies in conforming society to God's law.

The immortality of the soul means that persons are not merely transient bits of life which glow and fade on this earth but enduring members of God's community who must be treated in the light of an eternal accountability.

Why punish the innocent?

From these premises, Christian philosophers have concluded that the will of God is revealed in the natural law and divine revelation. They have found in the laws of nature an expression of divine will, as pagan philosophers had done in earlier ages.

This Christian view of the human person as a member of God's kingdom means also that life is sacred. The opportunity of the soul to earn eternal happiness may not be arrested by taking innocent life. Abortion and infanticide have therefore been abhorrent to Christian society as the worst of crimes. The sufferings of a community must be borne by the adult population which has a capability of contending with the causes. Christian philosophy does not tolerate the punishment of the innocent unborn for the mistakes of responsible adults.

The strictures of Christian philosophy are reflected in the laws of the West. Infanticide is murder. The English common law on abortion was based upon the prevailing knowledge of the development of the child in the womb. It was then believed that the child was ensouled at the time it stirred in the mother's womb, thereby becoming a person, and that before this event, the fetus was just flesh in preparation for the event. Accordingly, the child in the womb was recognized in law as a person from about the sixth month.

In this century, with the decline of Christian influence in the ruling ranks of the West, a competing concept of man and his environment has influenced the laws of nations. The secular state embraces the materialist perception of man as a transient animation of matter. When it has banished God, man represents the highest intelligence in the universe; therefore, man is God. The collectivity, acting through its rulers, uses people to its service as human wisdom may direct.

Thence we have the use of terrorism, the massacre of the innocent, to win political advantage; the liquidation of millions of citizens because they could not be converted to the new Marxist materialism; the reversal of Christian concepts of responsible human behavior. If man is, like a cabbage, merely an animated bit of matter, the execution of an anti-communist in the communist state is analogous to

pulling a weed from a garden. And in the secular state, abortion is merely a convenient means of avoiding the social burden of child-rearing.

Convenience is today's norm

The anti-Christian philosophy of materialism has made extensive inroads into non-communist societies, chiefly in the intellectual ranks and in the ruling classes. Whether overtly or covertly, influential elements of society are moving away from the foundations of Christian philosophy, impelled by political expediency or intellectual conceit to reject discipline and accommodate the counsel of convenience or comfort. There is not even a dim recognition that the discipline of today assures the happiness of man by affirming his adherence to enduring human values.

The effects of political expediency and intellectual conceit are most apparent in questions of population control. A conscious effort is being made to detach American society from its Christian culture. The thesis advanced is that a world population explosion threatens to exhaust food resources and debauch human society with universal poverty unless effective control measures are promptly adopted. Advocates point to India and China as illustrations of the social conditions to be avoided.

The thesis holds further that population control requires fertility control. Modern drugs or contraceptives or surgery will separate sexual intercourse from reproduction so that the population may enjoy sex while the state controls reproduction; and thereby the threatened impoverishment of society will be avoided. Because contraception may prove ineffective, abortion must be accepted as the backup of birth prevention. To achieve these aims, traditional concepts of sex, marriage and family must be modified.

To sustain this thesis today, we have in our society the extensive resources of the drug industry and of a burgeoning pornographic industry, the commitment of federal funds for "family planning" to include contraception and abortion, the use of federal "education" funds to further sex education in federally supported school systems, the power of a sector of the medical profession which derives income from abortion-related services and commands the support of the American Medical Association and the endorsement of nominally Christian clergymen who profess to see in abortion a compassion for the mother who would be embarrassed by childbirth.

There is no corresponding organization of wealth and intelligence to defend the Christian heritage of the nation. Only the people seem

to care. In state after state they rejected the proposals of the population planners for more liberal abortion laws, until the Supreme Court acted arbitrarily to sanction abortion for the whole country. Once again, as so often before in history, it is the intellectuals who are corrupted by error. In such marshalling of wealth and profit against our culture, politicians accommodate the corruption of society.

Are abortionists doctors?

In these times, the traditional oath of Hippocrates, predating the Christian era by four centuries and so recently abandoned by our medical profession, is a crucial witness to the error of our population controllers. That oath pledges medicine to assist life. Executioners may destroy life but doctors may not. The oath recognizes the natural law and the proper limits of human intervention in the human life process. Medicine may properly be used to help the processes of life where disease or natural defect inhibit the achievement of a healthy condition, but these medical powers of intervention must never be used to diminish the health (life) of the patient.

It should be apparent that a medical profession guided by the Hippocratic Oath can win and deserve the confidence of the people. But what happens when the medical profession abandons that oath to accept an executioner's role in society? A doctor can kill any adult very simply and quickly by administering certain injections, just as a veterinarian puts a sick dog "to sleep." If doctors conceive that they have a rightful power to kill a sick human just as the veterinarian kills a sick dog, and for similar purposes, the whole mentality of the medical profession is changed. It is no longer exclusively the harbinger of life but is now equally the harbinger of death. A sick person cannot know in which capacity the doctor approaches. The relationship of doctor and patient is fundamentally changed.

It does seem that our medical profession has been incomprehensibly casual in so fundamentally changing its position in society, merely to capture the dollars available to an executioner. It is making the mistake illustrated in the regime of Adolf Hitler in Germany when planners conceived that they could improve the race by eliminating the unwanted element.

The role of government has also been drastically changed by this new venture into population control. In Christian societies the gift of life comes from God, not from the state. The Supreme Court decision on abortion is the sign of a government moving away from the natural law and divine guidance to establish the rule of expediency as seen by men.

Thus, the legalization of abortion marks the turning of American society from the guidance of Christian philosophy to the guidance of materialism. The Court is seeking to force a change of culture, against the will of the people. It is impelled to this course by the false judgment that abortion is a necessary adjunct of population control.

Expediency gives false measure of the discipline abiding in the people of God. Without faith, reason is dead.

The unguided choices of man recreate the chaos of Babel. This society, so concerned about overpopulation, is maudlin about life. It subsidizes the production of children, legitimate or illegitimate. It spends fortunes to aid the sick and the crippled, to transplant hearts and kidneys, to prolong life for a week or a year. It abhors death, so it will not execute murderers, even to save the lives of the innocent. The effect of its policy is to destroy the promise of life, to foster cowardice, to encourage criminality, to shrivel the human spirit.

If a farmer had a hen which destroyed its eggs, he would wring its neck, eager to end such an aberration of nature. What then can be said of a society which teaches its youth that the inconvenience or the social embarrassment of bearing a child can be avoided by abortion? That is a rule to bring madness to young women who think so lightly to thrust aside their responsibility for life. Though medical procedures may keep the woman from ever seeing her aborted child, the mind cannot be denied what it knows.

What can be said of John D. Rockefeller II who so zealously advocates the moral irresponsibility of abortion? What can we think of a Supreme Court which rules that women may destroy the child in the womb for reasons of convenience or for no reason at all? These are the products of minds alienated from God and history, living only in the confines of their own disordered perceptions of mankind, marching boldly to thrust their wretched conceits upon the people.

There is no prospect whatsoever of healing these growing neuroses of our society in a culture of materialism because such a culture is at war with the very nature of man. Only when society returns to a culture philosophically in harmony with man's role as a creature of God can it achieve that unity of mind and spirit for which men yearn. The way of wisdom is at hand, ready for use. It is engraved in the distilled experience of our Judeo-Christian civilization. It remains for an aroused people to command our political leaders to restore our traditional culture as the foundation of all law and custom and to cease the guerrilla warfare they have been waging against it. This is the only cause which can unify America.

The Sanctity of Life: A Lutheran View

Martin H. Scharlemann

THERE was no Alamogordo, with its ghastly atomic roar, to presage the development of modern medical wizardry. As a consequence, irrevocable revolutionary changes in the field of biomedicine have quietly and rather quickly overtaken our culture by the steady accumulation of countless individual discoveries and innovations. Each one of these served as a separate link in a chain of causality forged together so powerfully as to tempt men to want not only to invert the Creator-creature relationship but even to remove every consideration of God and His Law from the whole province of life.

Nowhere has this tendency manifested itself more subtly than in the development of technological means designed to extend human life beyond those points which were once thought of as the outermost natural limits of existence. In terms of solid scientific achievement, at this moment medical science is able to prolong some forms of human life almost at will. At the same time it has available the know-how to curtail life abruptly and almost painlessly. The power to do either or both of these raises a whole host of difficult questions that affect the very nature of ethical inquiry.

In point of fact, the quality of human life as such may well be endangered by developments which could be used to heighten the "terror of humanity."[1] The quantative changes brought on by advances in the technology of extending or extinguishing human life are so great as to alter even the kind of questions that need to be asked. For the sake of basic orientation, we might accept the distinctions suggested by Henry David Aiken's *Reason and Conduct*[2] as adapted by Jerry B. Wilson to the writing of his *Death by Decision.*[3] Both men speak of the following four levels of articulation in matters of morality: the "expressive-evocative" kind of language; the level of "moral" discourse; the "ethical" plane; and one known as "post-ethical." The last of these could much more appropriately be called

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"hyper-ethical," since the metaphysical or theological basis of personal commitments is the subject matter of this kind of discussion, and such considerations range beyond reflection on matters of pure ethical import.

The very complexity of the problems generated by the quiet revolution in biomedicine makes it imperative to grapple with the issues of life and death from the vantage point established by thinking in terms of the sanctity of life rather than those inherent in convictions about the quality of life. The frontiers of the scientific enterprise have been pushed far beyond what were once thought to be the naturally fixed limits of the problems relating to what is euphemistically spoken of as euthanasia. At the moment it is impossible to detect where the exact borders lie in this kind of inquiry. As a matter of fact, there is every reason to wonder whether there are any parameters that can even be indicated with some degree of certainty at the level of moral or ethical discourse. One of the by-products of this new situation has been the growing awareness that a quick expressive-evocative kind of response at the very first level of discourse may at times touch the very heart of the matter just because it is articulated as the spontaneous judgment of faith rather than that of careful calculation, so avoiding the pitfall of turning a mystery into a problem.

The present discussion, therefore, comprises an attempt to consider the subjects of life and death as they meet under the label of euthanasia in light of the conviction that life is holy, in the biblical sense of that word. Seen from that perspective, holiness is not primarily an ethical concept; at its core it is a term which connotes uniqueness. Israel of old, for example, was known as an holy people because it had a singular service to render among the nations of the world.[4] *In the same way, human life is deemed to be holy when it is seen as a phenomenon quite distinct from the rest of organic life, even that of the animal kingdom.* Sanctity of life also points to the faith-assumption that God created man to respond to Him by way of personal trust, rather than on the basis of rules and regulations.

The debate surrounding the issue of euthanasia is concerned with more than the question of what is human or with what is termed "quality of life." The questions raised by inquiries into the principles appertaining to the subject of "mercy killing" can be dealt with most adequately from a theological perspective which accepts God as Creator, Redeemer and Sanctifier. This is another way of saying that the relationship of death to life and life to death, within the limitations of human comprehension, can be seen most clearly when examined with the aid of the belief that God is Triune, not only in a

strict dogmatic sense but also by way of the manner in which He deals with men. Our procedure, therefore, will be to examine the subject referred to under the general rubric of euthanasia within the parameters set forth by the biblical revelation. That is to say, we shall attempt to move beyond the range of mere ethical considerations to the kind of discourse that results from the acceptance and the application of the concept known as "sanctity of life."[5]

In this way it will be possible, for one thing, to avoid the trapdoor of having to formulate a host of specific rules as a way of answering some of the more incisive questions arising from the advances made by contemporary medical technology. This course of action will also serve as a reminder that life, like freedom, is such a complex phenomenon that it defies full definition. That insight, in turn, will help to create an awareness of the fact that the solutions to the problems stemming from the contemporary situation resist all efforts at neat formulation. For that very reason it becomes even more important to develop those essential theological insights which will assist persons who deal with matters pertaining to life and death in becoming more aware of their need to arrive at their own sanctified judgments, knowing from the outset that there is forgiveness for mistakes made in this area of human responsibility.

Euthanasia as "Mercy Murder"

What has been observed so far obviously applies to a whole spectrum of issues, ranging from abortion to euthanasia. The present enterprise, however, is limited to dealing with problems relating to euthanasia, understood here in its active sense as the deliberate shortening of life by the application of a death-accelerating measure. As has already been indicated, "mercy killing" is a synonym for this way of terminating someone else's life. Such action is to be distinguished from the decision to allow death to occur by discontinuing the use of what have been called heroic and extraordinary means for officiously prolonging biological life in the case of persons suffering from irreversible coma, or "brain death."

Having posited a definition of euthanasia which identifies it as mercy murder, it will be useful to expand on the view that life is holy. To think in terms of the sanctity of life is to see the issues surrounding the question of mercy murder as lying beyond the reach of mere functionalism, pragmatism, and even ethical utilitarianism. To think of *living* as a sacred privilege is to move the whole discussion to a range even beyond the assertion of the Declaration of Independence that life is an "unalienable" right with which the individual is endowed by

his Creator. For that very Creator has revealed Himself to be also man's Redeemer and Sanctifier. To do full justice to the notion of the sanctity of life calls for a tripartite consideration motivated by the fundamental belief that men were created to live in relationship to that God who has revealed Himself as being Three-in-One and One-in-Three. That is to say, the present discussion of euthanasia will revolve about the activity of each of the three persons in the Godhead. The work of each is referred to, respectively, as that of creation, of redemption and of sanctification.

Anyone committed to the easy rationalization of the physician and legislator who argued that the controlled practice of euthanasia in the case of mentally retarded children could save Florida billions of dollars in tax money[6] might do well to reflect on the fact that many of his fellow citizens are motivated by the conviction that man still bears within him evidence of that image in which God created him. While the individual is, to be sure, totally devoid of that righteousness with which Adam was originally endowed, he is still the kind of being that God's Spirit can move to respond in trust. This conviction bears down heavily on the awareness that life itself is a gift so precious that it may be taken only at the risk of falling under the judgment which insists that any man who willfully takes the life of another person thereby forfeits the right to his own.[7]

The God of Life created man to live and not to die. Death, therefore, is inimical to what God originally had in mind for His creation. Hence any talk about "death with dignity" really amounts to a contradiction in terms. It consists of engaging in unholy rhetoric; for death entails destruction, separation, and loss. There can *be* no dignity in this, since it is clearly antagonistic to the original purpose of God. That is one reason why most people fear dying. What is left to them of God's image cries out in resistance to that alien power which opposes the very notion of living in the presence of one's Maker. In terms of a familiar distinction that goes back to Aristotle, death is not part of the substance of man but is an accident of his being. Death, therefore, cannot be a part of life, all rhetoric to the contrary notwithstanding.[8] There is a finality about death which runs counter to everything in and about man as a being created for life.

To have been created in the image of God means that men were designed to live in response to Him. Whatever dignity they have is an alien one. It is a given. It is not some quality intrinsic in man; nor is it an ideal toward which the individual can strive. Man has life by way of an endowment which he neither chooses nor deserves. Accordingly, any reference to the worth of the individual is meaningful only if it

serves as a reminder that whatever value he has is derived from his relationship to God. No human being has autonomous significance. In point of fact, even under the conditions of that primordial bliss in Paradise, as described in the opening chapters of Scripture, man was to live for God also in terms of the prohibition that he was not to eat of "the tree of the knowledge of good and evil."[9] The very pronouncement of that command was a way of reminding man that his life was not a self-contained unit.

But, as the story continues, man decided to act in defiance of this limiting reminder. He chose to rebel rather than to obey, and the consequences of that insubordination are even now all about us. They include the many subterfuges men employ to have mercy killing made legal by way of arguments which are cloaked in the most humanitarian terms, beginning with agitation for what might be called "passive euthanasia."[10] A case in point might be the molecular biologist to whom the editor of *Commentary,* Norman Podhoretz, refers as seriously suggesting that no newborn infant should be declared human until it has passed certain tests regarding its genetic endowment. "If it fails these tests," asserted this unnamed biologist, "it forfeits the right to life."[11] Here one can see the "quality of life" philosophy at work with a vengeance to negate and reject the very basis on which life can be viewed as holy. This is an example of yielding to the temptation of wanting to be like God and so becoming the absolute master of both decision and action.

An approach limited to considerations of quality inevitably tends to move in the direction of eliminating everything that cannot be classified as somehow useful, if not in a directly utilitarian sense, then at least in terms of some kind of philosophic aestheticism grounded in a system of humanistic values. It has been suggested, for example, that mongoloids are too defective to have the right to life. They do not meet certain standards considered to be acceptable. They cannot ever hope to approximate any kind of full life and so may be a burden to others. But once solutions to the issues of life and death are sought along this path, where does the posse stop? Many people are blind, deaf, or lame; some have missing limbs; some are prone to madness. If mongoloids may be put to death painlessly, why not these other imperfect products? Why is not every one who falls short of top quality done away with, including all diabetics? Who dares to set himself up as the arbiter of quality, determining its ingredients and then applying the yardstick agreed upon? Most of the advocates of euthanasia would be singularly unhesitant to impose their own views about life and death on others if they were even given the chance.

Man was not made to die like a dog in a ditch. There is a qualitative difference between the howling of an animal struck by a car and the suffering and hurt which afflict man. The latter is capable of suffering ethically just because he was designed to live in response to his Creator. Suffering and death are "meritoriously endured," as St. Augustine once put it, "for the sake of winning what is good."[12] Of man it is said that God chose to breathe into him His very own breath to turn him into a living being. When death, therefore, is described only in terms of "the total stoppage of the circulation of blood, and the cessation of the animal and vital functions consequent thereupon, such as respiration, pulsation, etc.,"[13] that may not be saying enough, for this is a view of man's nature which identifies him as being part of the animal kingdom. While the animal is depicted as also being endowed with *nephesh* (soul), man is described as being unique in the sense that he was given God's own *ruach* (spirit).[14] Hence dying is described as giving up one's spirit.[15] For that reason, two new definitions of death have been suggested to open up the possibility of discussion in greater depth. These are known respectively as "brain death" and, even more specifically, the kind of irreversible loss of consciousness which results from the destruction of the cortex.[16] It would seem that this crushing loss renders impossible any kind of response even to one's Creator. Under the conditions brought on by the obliteration of the cortex, it would appear to be almost impossible to distinguish between a living patient and an unburied corpse. Here the application of the principle of double effect is rendered less complex, for a person suffering this kind of extinction of consciousness is dead in the most elementary sense of no longer being capable of responding within the parameters inherent in the concept of the image of God.

Even biological death, viewed as such, represents a defeat for the medical profession. For essentially life is, to use a Pauline term,[17] somatic. William Wordsworth and his Platonic mentors may have found some comfort in their views of the immortality of the soul in the sense that, at death, the soul is liberated from the body as a prison.[18] But such a view of life is light years removed from the biblical insistence on the resurrection of the body. Belief in the latter, as opposed to the former, rests on the assurance that sanctity of life embraces man in his totality: body, soul and spirit.[19] St. Augustine once put this observation in his own quaint way when he wrote:

> Now, undeniable as it is that the departed souls of good and holy people are now living in peace, it would still be so much better for them to be

> alive in their own bodies in good health that even those who hold that it is beatitude to be utterly bodiless have to prove this opinion at the price of a lie in their souls.[20]

Accordingly, the life of a person may not be thought of apart from considerations of his solidarity with the created universe. Perhaps the Bristol Conference of Faith and Order went too far in speaking of nature as "man's sister;"[21] yet the phrase makes a valid point. For when man fell into sin, to quote Milton,

> Earth felt the wound, and Nature from her seat,
> Sighing through all her works, gave signs of woe
> That all was lost.[22]

Paul, the Apostle, could somehow hear the dark language of nature's pathos as he listened to its eager anticipation of man being set free from the burdens of existence. In some mysterious way creation seems to be aware of the fact that it was intended to be mastered by man, made in the image of God, in order to pass from the physical and perishable stage to the spiritual and imperishable one, but that man's disobedience thwarted this divine purpose. Hence the created world engages in that symphony of sound referred to by the Apostle as "groaning together in travail."[23] Death and corruption are alien powers that seem to triumph everywhere except for that human destiny which is associated with the resurrection of the body.

Undoubtedly, it is an intuitive awareness of this solidarity which accounts, in part, for the kind of mystical pantheism which is one of the leading motifs in Russian literature. A recent articulation of it is found in Vladimir Maximov's *Seven Days of Creation.* It reads as follows:

> Listening closely to his grandson's perceptible breathing, Pyotr Vasilievich felt more and more certain with every step that he himself, and the world about him, were one and infinite. It was no longer mere supposition! He knew that the ascending spiral, in which he would soon complete his part of the journey, would be continued by the next Lashkov, his grandson—Pyotr Nikolaevich—who would assume his allotted share of the burden in this mysterious and ennobling cycle.[24]

Death may well have "a thousand doors to let out life," as Philip Massinger observed,[25] but it is hardly that gracious. It does not represent the moment of absorption into some quietly ascending spiral. It consists of raw destruction and disruption. It places the individual, all alone, on the final step of his confrontation with man's Creator. There he must give an account of what he has been and done. No one

has a right to decide when that moment is due for any man except the Creator Himself, whose permissive will allows an alien power to work towards man's death, because the creature must pay this part of the price for his rebellion against his Maker. A dying man is not, therefore,

> Like one who drapes the drapery of his couch
> About him, and lies down to pleasant dreams.[26]

He was made to be more than "a brother to the insensible rock and to the sluggish clod." Instead, he was created in the image of God for a life of response. That renders life holy and singles out death as being a demonic power. Hence no one ought to expect of another that he throw away his life or that it be taken from him as though it were the "careless trifle" referred to by Malcolm in describing King Duncan's violent death.[27] Dying is the potential negation of man's having been fashioned in God's image. Death would be stark tragedy had God not arranged for a super-victory by way of redemption. That is another part of the subject under discussion. To it we must now turn our attention.

In View of Redemption

The word "euthanasia" once meant an easy and happy death.[28] Seneca could even speak of suicide as a double adventure, a fitting climax to a brave and upright life.[29] As late as the publication of Lord Byron's *Euthanasia,* in 1812, the word was used both of easy dying and of the medical care required to make death more comfortable. But by the end of the nineteenth century, various movements had sprung up whose aim it was to have mercy killing legalized. From then on "euthanasia" began to take on a different hue. More and more it became a word for the taking of life in order to end suffering. It is this understanding and application of the term which needs further treatment in light of the fact that God the Creator also chose to be man's Redeemer. He came as the One who fulfilled the role of that mysterious personage known to the faithful as the Suffering Servant of Isaiah.

In reflecting on this paradoxical figure it is impossible to escape the conclusion that the prophet was allowed to gaze into the very heart of the mystery known as the Godhead; for his description of victory by suffering on the part of God's Servant "overshoots all that Israel, all that the true Israel, all that any individual in Israel ever was. . . ."[30] The prophet's vision became incarnate in Jesus

Christ, who suffered in order to overcome the contradiction between what is and what ought to be. In carrying out this task of redemption, God's Anointed left for mankind not only a paradigm of meaning for individual suffering, but also the possibility of identifying with the Lord's suffering by way of one's own agony, pain, and decrepitude. The infirmities of men can be turned into individual Good Fridays to be succeeded by the Easter of glorification. The total elimination of pain and suffering as an ideal of medical technology may well fly in the face of this fundamental consideration, since it would deprive men of the occasion to complete the sufferings of Jesus Christ, as the Apostle Paul once put it.[31] After all, the Lord did not suffer in order that His followers might escape such an ordeal, but that they might learn from Him what pain or illness may mean in God's dealings with His children.

It is this kind of thinking which constitutes the background for the second item in what is currently known as the Christian Affirmation of Life, adopted in August 1974 by the Board of Directors of the Catholic Hospital Association. It reads:

> I believe that Jesus Christ lived, suffered, and died for me, and that His suffering, death, and resurrection prefigure and make possible the death-resurrection process which I now anticipate.

There is another side to all this, however. Proceeding from the assurance that life is holy, we can only conclude that suffering is an intrusion into human life. It "operates under another law," as H. Richard Niebuhr once put it.[32] In the last analysis, man was not brought into being for the purpose of enduring pain and deformity. He was made to enjoy a full life. It was sin that brought in death with its brood of vultures that feed on life, defacing and devouring it. Redemption is the story of how God has dealt and is still dealing with this issue, offering men the certainty of life everlasting.

It is one of the strange paradoxes of history that the greatest advances in the care of the sick and aged have been made in Western culture which, over the centuries, has come most strongly under the influence of the Christian religion with its stress on life hereafter. While this development may seem somewhat incongruous, it is not beyond explanation when seen as another expression of the sanctity of life. The connection between healing in this life and a concern for what follows in the hereafter may be seen in its most direct form in the story of the paralytic whom friends arranged to lower through a roof for the purpose of bringing him into the presence of Jesus. First

his sins were forgiven; then he was instructed to take up his bed and walk.[33]

Healing miracles such as this one are recorded for us to make the point that illness is a stranger to God's ultimate intent with and for fallen man. Part of the "good news" consists in proclaiming that God is the Lord of the living and not of the dead. Jesus healed people to underline the privilege that had come their way by His mighty demonstrations that enabled them to anticipate their total restoration to life. This awareness of the divine purpose, made manifest in the words and works of Jesus Christ, offered the kind of motivation which persuaded men to pursue the art of healing as a way of implementing the paradigm offered in the miraculous deeds of the Great Physician.

In contradistinction to the tenets of secularized medicine, theology does not view the skill of prolonging life as constituting the last chapter in the story of the individual concerned. Christian doctrine has seen in the miracles performed by Jesus—even in those that involved the raising of Lazarus and Jairus' daughter—penultimate actions designed to give substance to the thrill of anticipating the ultimate solution to all of life's problems by way of the resurrection scheduled for the end of time. The persons whom Jesus healed and those whom He brought back to life were "gathered to their fathers" in due time and now await the sound of the last trumpet. The very assurance offered by Jesus' performance of miracles understood as next-to-the-last interventions of life's very Lord has made it possible to speak of death as a sleep and to call graveyards "sleeping places" (cemeteries).

Death as a sleep in this Christian sense, however, has nothing in common with the same term as used in other contexts. It expresses a point of view quite different from the attitude of Socrates, who, if we may believe Plato's description, welcomed death as a friend.[34] To speak of death as sleep in the realistic language of revelation is to signify that it is a temporary episode between life here on earth and an unending destiny beyond, with the certainty of complete fulfillment for those who accept life as a sacred gift from their Creator, Redeemer and Sanctifier. For that reason the movement from this life to that of eternity by way of death is not to be understood in terms of discontinuity. Even as the person who awakes from his slumbers is the very one who went to sleep in the first place, so the person who lies down to be embraced by death is the same one to be awakened to his eternal destiny at the resurrection of all men.

With these things in mind, existence assumes the character of being something precious, given for purposes of fulfilment in terms of ser-

vice. That accounts for the determination to preserve it and so prolong it. Such an understanding of life necessarily precludes the thought of terminating existence willfully by way of either suicide or mercy murder.

In his moving literary legacy, *Stay of Execution,* Stewart Alsop came to the conclusion that "a dying man needs to die, as a sleepy man needs to sleep, and there comes a time when it is wrong, as well as useless, to resist."[35] But that moment is not of man's making. Death with dignity, if there be such a thing, cannot take precedence over the sanctity of life. Nor is the physician's responsibility to relieve suffering *per se* necessarily more important than the prolongation of life itself. Least of all ought the principles applying to euthanasia to be infused by notions of individual autonomy and of suffering as little as possible.

The presupposition that life is holy also takes into account the consequences flowing from the work of the Holy Spirit, with whom individuals are endowed at their baptism for purposes of showing what they already are by God's action; namely, saints. Of Him it is said that even now, during the time of our earthly career, He constitutes the down-payment of the age to come. Hence the Nicene Creed calls Him the Lord and Giver of Life.

For living in response to God's will, the Spirit's presence is of incalculable importance for developing an appreciation of what may occur in that dim region lying between life and death, particularly when it comes to the point of deciding whether or not to prolong the life of a person in a coma. In most instances it is impossible to determine by any ordinary means whether the patient has the capability of comprehending and/or reacting to what goes on around him. Under such conditions it is of crucial importance to keep in mind that, in a patient's relationship to God, the Spirit has been given the special task of formulating "sighs too deep for words" in such a way as to serve the purposes of intercession at the throne of grace.[36] This activity of the Spirit may help to account for the fact that, after they have come out of their unconscious state, some persons can remember certain phrases from prayers said for them at their bedside by pastors or members of the family. They can recall such acts of kindness even though at the time of such petitions there was no perceptible hint of personal awareness on the part of the patient. It would, therefore, most certainly be contrary to God's will to have the life of such an individual snuffed out while lingering in a comatose state. Such mercy killing would be a blasphemous intrusion into a sacred relationship prevailing quite beyond the farthest reaches of

human knowledge and consciousness.

The presence of the Spirit must also be taken into account for a fuller appreciation of the possibilities available to the patient suffering from those various infirmities that attend old age. Even an invalid, totally bedfast, can pray; and that is always like the lifting up of holy hands at the time of the evening sacrifice. Rather than considered to be useless and an unnecessary burden, such a person ought to be regarded as so precious in the sight of God that the Creator Himself was willing to arrange not only for full redemption in Jesus Christ, but also for a life in the Spirit ready to give expression to God's mysterious presence in a petition like the one that goes under the title "A Prayer in Bed." It reads:

> Dear Lord, one day
> I shall lie thus and pray
> Stretched out upon my bed,
> Within a few days or hours
> Of being dead;
> And I shall seek
> Then for right words to speak
> And scarce shall find them,
> Being very weak;
> There shall hardly be strength
> To say the words, if they be found, at length.
>
> Take then my now clear prayer,
> Make it apply when shadowy words shall flee,
> When the body, busy and dying,
> May eclipse the soul.
> I pray Thee now, while pray I can,
> Then look, in mercy look
> Upon my weakness—look and heed
> When there can be no prayer
> Except my need![37]

Such praying is the activity of a life that is seen as sacred because it is so intimately bound to God by His Spirit, even when a person is no longer able to say the desirable words. Who, then, with any feeling for the sanctity of life, would want to cut short such holy converse by some means of mercy killing?

The Spirit, moreover, resides not only in individuals. He was also given, on Pentecost Day and ever since, to the Church as a whole to identify it as the community of God's gracious presence. Two words currently are used in ecumenical theology to refer to the double heart-beat of the Church's life, which thrives on the presence of the Spirit: *ekklesia* and *diaspora*.[38] The former indicates the act of gather-

ing around Word and Sacrament in worship; the latter signifies the responsibility to "disperse" for service to those in need, particularly to those who belong to the household of faith.[39]

Of all the fears that haunt the ailing and the aged as they face the prospect of leaving life, none is greater than that of being left all alone with the machines and personnel that make up modern medical technology. At this point, the Christian community of which the individual is invited to be a part can render a number of valuable services. For one thing, the general prayer in the traditional order of the Sunday service calls for special petitions on behalf of those who are lonely, afflicted and dying. Moreover, few tasks are more noble than that of regularly visiting those who are ill and feel forsaken. In point of fact, here is one of the specifics mentioned in the final judgment scene of Matthew 25, where the Son of Man, on His return, is depicted as saying to those on His right, "I was sick and you visited me." When these persons profess that they can not recall doing such a thing, their heavenly King, we read, will say to them, "Verily I say to you, whatever you did to one of my brothers here, however humble, you did for me."[40]

Any person in need of comfort and consolation is another Christ, so to speak, to the person able to engage in calling on the sick and the dying. Lingering illness and/or the infirmities attendant upon old age offer the opportunity for this kind of service in its most God-pleasing form. An organized program of such visitation constitutes one of the most eloquent testimonies of the Christian faith even and, possibly, especially to those who do not belong to the assembly of the faithful.

No Christian community dare ever neglect the use of the means of grace in preparing the terminally ill for their journey to that "undiscovered country, from whose bourne no traveler returns."[41] Word and Sacrament, of course, do not work like magic; yet they have a power that is sacramental: they offer spiritual strength and consolation for that one journey which each individual must travel all alone, except for the Good Shepherd, who has promised to attend him on the narrow path through the valley of the shadow.

The medical advances made within recent decades, as these pertain to the issues of life and death, have made it imperative to examine the possibilities created by this turn of events at the level of "hyper-ethical" discourse. The medical profession itself, through its Judicial Council, has found it necessary to say in so many words that "the intentional termination of life of one human being by another—mercy killing—is contrary to that for which the medical profession

stands and is contrary to the policy of the American Medical Association."[42] Even the American Bar Association has found compelling reasons for redefining death as follows: "For all legal purposes, a human body with irreversible cessation of total brain function, according to the usual and customary standards of medical practice, shall be considered dead."[43]

In light of these necessities it is obviously appropriate to evaluate the issue of euthanasia, understood here as mercy killing, on the basis of the concept that life is holy. The chief reason for this approach is to keep an area suffused in mystery from being reduced to the level of a problem. A simple framework for our discussion has been provided by the Christian teaching that God is Triune and, therefore, deals with men as their Creator, Redeemer and Sanctifier. Seen from this vantage point questions relating to euthanasia may not escape the need to think of man as having been made in God's image, created to live in response even in cases of suffering at a depth even below that of normal unconsciousness. Within this context death can be thought of only as the enemy of life. It is an alien power which the Creator permits to wreak havoc among men with a view to achieving His ultimate purpose of redemption to life everlasting.

In the meantime, and amid all the vicissitudes of life, God's Spirit is at work as the agent of life to create a sense of community among those who receive Him, and to aid the ailing and the aging not only during their hours of loneliness but also in their moments of inarticulate sighings. Illness and infirmity provide the occasion for others to render the services of visitation and intercession as a way of easing the fears attendant upon the prospect of dying. Death is an experience in which the individual, in response to the Creator's beck and call, is brought to a full confrontation with His Maker as Judge. No human being, therefore, has a right to set the striking of that hour, since it lies properly only in the hidden counsels of God. Any suffering endured offers the opportunity of identification with Jesus Christ, who came to turn men's Good Fridays into Easter.

Some Derivable Principles

On the basis of the kind of "hyper-ethical" discourse in which we have been engaged, it becomes highly desirable to attempt the formulation of a few principles that may serve as general guidelines in the application of the fundamental consideration that life is holy.[44] Ten of them follow herewith:

1. No one ought to employ the instruments of contemporary medical

technology in such a way as to reduce the elements of mystery surrounding issues involving life and death to the level of purely scientific investigation lest there be an even greater "thingification" of man in a culture already too highly secularized.

2. Life can be complete only where its somatic aspects are taken into due account. Hence every effort needs to be made to understand illness and death also in terms of their physical dimensions.

3. Each patient, no matter how infirm and socially useless, deserves to be accepted as a being created in the image of God. The very conviction that he is just that will affect the attitude manifested by medical personnel.

4. No person enjoys autonomy of existence. He may, therefore, not be treated as though he were a unit of matter disposable either on his own terms or on the basis of the judgment of others who may be tempted to view an incurable patient in terms of convenience or utility.

5. While suffering is an intrusion into life, its presence provides the occasion for others, particularly members of the family and of the Christian community, to attend the sick and the dying as a way of exhibiting the kind of care which will help the patient to retain a sense of worth in the lives of others. These acts of kindness will help to relieve the kind of loneliness which may be tempted to ask that life be shortened prematurely and painlessly.

6. The region between life and death is so wrapped in mystery that no one ought forcibly to interrupt the movement of man's spirit as it may be communicating by way of God's Spirit with His Creator and Redeemer as a way of responding in trust and yearning.

7. Death must be understood as being not merely a physical or social phenomenon but a crucial spiritual event for each person. The Church's means of grace, therefore, ought to be within easy availability for purposes of consoling the dying and preparing them for the high adventure of crossing over into life eternal.

8. The principal of double effect becomes operable in the choice of alleviating excruciating pain at the risk of shortening life. The former takes precedence over the latter in view of the prospect of resurrection to everlasting life.

9. Only under the most exceptional circumstances ought a physician, solely on his own authority, make the decision that the time has come to put an end to the use of "heroic and extraordinary measures" for keeping some semblance of life going.

10. Any decisions made in this complex area and any actions taken that may later appear to have been wrong can be redeemed by that forgiveness which is available to all who ask for it from their Creator, Redeemer and Sanctifier.

NOTES

1. This expression occurs within the body of Helmut Thielicke's discussion of euthanasia in his *Theologische Ethik* (Tuebingen: Mohr, 1964), III, p. 440.
2. Alfred A. Knopf, Inc. (New York, 1962) pp. 66-87.
3. Westminster Press (Philadelphia, 1975) pp. 48-49.
4. Cf. Leviticus 19:2 ff.
5. A comparison of what follows with Jerry Wilson's reference to this kind of terminol-

ogy (*op. cit.*, pp. 51-52) will quickly reveal a radically different approach.

6. Reference is here made to the remark of Walter Sackett, Jr., a Florida physician and legislator, to the effect that "death, like birth, is glorious—let it come easy" as well as to his argument that mercy killing applied to the mentally retarded would save the State of Florida billions of dollars. The former reference is from Milton Sernett, "The 'Death with Dignity' Debate." *The Springfielder,* March 1975, p. 274; the latter was reported in the *Florida Times-Union,* Jacksonville, Fla., Jan. 11, 1973.
7. Cf. Genesis 9:6 for the basis of the consideration that man was made in the image of God.
8. Paul Ramsey takes vigorous issue with this kind of rhetoric in his essay, "The Indignity of 'Death with Dignity,'" *Hastings Center Studies,* May 1974, pp. 48-49.
9. Genesis 2:19.
10. Cf. Joseph Fletcher, *Moral Responsibility* (Philadelphia: The Westminster Press, 1967), p. 154. There the author discusses the literal significance of his term "dysthanasia," replacing it with "antidysthanasia."
11. Norman Podhoretz, editorial in *Commentary,* May, 1972.
12. *The City of God,* XIII, 8.
13. *Black's Law Dictionary* (4th edition) as quoted by David Hendin in *Death As a Fact of Life* (New York: Warner Books, Inc., 1973), p. 36.
14. Genesis 2:7.
15. Cf., e.g., John 19:30.
16. Cf. Robert M. Veatch, "Welcome Definition . . . or Dangerous Judgment?" in *Hastings Center Report* November/72, p. 11.
17. As, for example, at Romans 12:1.
18. *Ode: Intimations of Immortality.*
19. Cf. 1 Thessalonians 5:23.
20. *The City of God,* XIII, 19.
21. *New Directions in Faith and Order—Bristol 1967.* Faith and Order Paper No. 50 (Geneva, 1968) p. 17, in the famous sentence: "Nature has become so much his servant that man forgets she is also his sister."
22. *Paradise Lost,* IX, 780-782.
23. Romans 8:20-23.
24. *The Seven Days of Creation,* Alfred A. Knopf, (New York, 1975) p. 415.
25. *A Very Woman,* Act V, Scene 4.
26. William Cullen Bryant, *Thanatopsis,* 1. 80-81.
27. Shakespeare, *Macbeth,* Act I, Scene 4.
28. Cf. Jerry B. Wilson, *op. cit.,* pp. 17-45 for a history of the usage of the term.
29. *De Ira,* Section 15.
30. John Bright, *The Kingdom of God,* Abingdon Press, (New York, 1953) p. 151.
31. Colossians 1:24.
32. *The Responsible Self,* Harper and Row, (New York, 1963) p. 150.
33. Cf. Mark 2:1-12.
34. *Phaedo,* Jowett translation in *The Dialogues of Plato,* Clarendon Press (Oxford, 1953) pp. 476-7.
35. J. B. Lippincott Co. (Philadelphia, 1973) p. 289.
36. Romans 8:36.
37. This prayer of unknown authorship was found in the purse of an elderly woman who passed away after a long and debilitating illness.
38. See Edmund Schlinck, "The Holy Spirit and the Catholicity of the Church" in *Ecumenical Review,* April 1969, p. 98.
39. Cf. Galatians 6:10.
40. Matthew 25:40.
41. Shakespeare, *Hamlet,* Act III, Scene 1.
42. *Journal of the American Medical Association,* No. 227, January 7, 1974, p. 728.
43. *U.S. News and World Report,* June 16, 1975, p. 64.
44. Dr. Irvine Page of Cleveland, Ohio, recently articulated a need that haunts many members of the medical profession: "It boils down to the fact that most ethical decisions must be made by the doctor himself, and he should have help. The decisions will usually be *as good as the character and training of the physician.*" (Italics added); from *U.S. News and World Report,* June 16, 1975, p. 64.

Abortion and the "Right to Speak"

M. J. Sobran

WHO has the right to speak on abortion?

It is a measure of our general glibness on the subject of public discourse that this question will sound odd to most people. "Why," it will be said, "anyone! We have a First Amendment that permits everyone to speak on everything!" True enough; it *permits* us; but it does not *authorize* us. Everyone has the right to speak his mind on the subject of warts, for that matter; but it is the dermatologist who will be listened to, for he is presumed to speak with authority. I say *presumed;* for he, like any of us, may be wrong, or may know no cure so efficacious as that which some old crone down the road has been prescribing for many years. But the more complex and sophisticated society becomes, the more it relies on credentials. It is possible for a man to go to school for many years and yet to err now and then. But in our society, education generally confers authority, which is not merely the right to speak without restraint, but the right to claim attention, belief, and even obedience from your audience.

It is clear that no society could function efficiently if there were no system for locating authority. If, on every subject, we were required to consult the opinions of all our fellow citizens, and to form a rational judgment as to which opinion was most likely true, we would never get far. As it happens, we have ways of according presumptions in favor of such and such persons: experts, authorities, priests. We may all have an equal right to our opinions, but these men are "more equal than others," to use George Orwell's famous phrase. When we have warts, therefore, we go straight to the man who, we are officially assured, understands the nature of the skin, its disorders, and how to cure them; we don't bother canvassing the mass of men and weighing their various views on the matter. And if the doctor doesn't know, we usually assume that nobody else knows either.

Surely all this is obvious enough. We naturally tend to think that they have the best right to speak on difficult and technical subjects who have given them the longest study and practice; and to set these

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men apart from the rest of us we give them honors, titles, formal licenses, and so forth. Now there is in all this, almost inevitably, a certain element of superstition. We take things on faith. We trust to more than we can know. In fact we call a man an expert, not because we are really qualified to say so, or we would be experts too, but because we are told, we hope and (again) trust reliably, that he is. Who tells us? In the case of a doctor, a board of experts. But how do we know *these* men are experts? It begins to be complicated, and I do not want to carry this much beyond that observation, except to add (lest anyone suppose I am merely trying to debunk all "so-called" experts) that there are many good reasons for making this general assumption. Common sense inclines us, when we cannot take the trouble to settle a question for ourselves, to take the judgment of the community, until we find reason to think it wrong. Consequently, in many matters we judge the value of a man's opinion, not by what we can determine of its value by ourselves, but according to his social position.

According to Boswell, Samuel Johnson once remarked, "When people see a man absurd in what they understand, they may conclude the same of him in what they do not understand. If a physician were to take to eating of horse-flesh, nobody would employ him; though one may eat horse-flesh, and be a very skilful physician." That is true enough. But there is something else to consider. Given the authority doctors enjoy, it is possible that if they were to take collectively to eating horse-flesh, others would imitate them. They would confer *respectability* on horse-flesh. Take another example. I read lately that a Federal agency, perhaps the FCC, plans to begin requiring those who endorse products on television actually to use the products they endorse. If Mickey Mantle tells us that he drinks Lite beer, he must in fact drink it—even off-camera. Now this strikes me as silly. Nobody considers Mickey Mantle an authority on beer, or Joe DiMaggio an expert on coffee-grinders. People who buy products endorsed by celebrities do so for what I call sacramental reasons: they want to create a symbolic link between themselves and people they idolize. If I drink Lite beer (I may say to myself), I'll be a little bit like Mickey Mantle; even if he doesn't really drink it off-camera. I know it's silly, so I won't admit it openly, but I can't help feeling that way, just as I can't help feeling I may be missing something if I don't check my horoscope in the morning, or just as I feel I'm taking a chance if I drive a great distance on Friday the Thirteenth. Social prestige of any kind generates a certain irrational respect and even awe. Some years ago, Marlon Brando remarked on this: what's funny about fame, he said in effect, is that as soon as you acquire it, for

any reason, people start asking your opinion about abortion, the income tax, and the United Nations; and what's even funnier, he added, is that you start giving answers.

From what I have said so far, one might think that social prestige is more or less rational when conferred formally, as by education, but edges over into the irrational when acquired by popular celebrity. But it is not quite that simple. Consider such social graces as are embodied in standards of English usage and grammar. Rules of elegance ain't functionally necessary; a man may say ain't and be a very skilful physician, though this is contrary to the prejudice of educated people. "Every man of any education," says Johnson, "would rather be called a rascal, than accused of deficiency in the graces." One may go further. Even those classes of people who say *ain't*—and I take this habit of speech to be a class distinction—would, I think, be wary of a doctor who said it. There is, even now, a great deal of authority attached to social status as such. We still know what used to be termed our "betters," and we even expect them to act the part. A great deal of education consists in acquiring, not only knowledge, but what sociologist Erving Goffman calls "ritual competence"; and we are judged by this at least as much as by what we think of as substantive matters. We expect our physician to have a decisive manner, a command of arcane terms (if he speaks of our "tummy" we want it clear that he is talking *down* to us), and such appurtenances of authority as a uniform (preferably white); all of which are extraneous to the rather narrow knowledge and skills for which we consult him. In return, we pay him a deference far beyond what is rationally due to the same knowledge and skills. In a secular society in which health is heaven, doctors are priests. They are the technicians of the only salvation that is commonly and publicly acknowledged.

Doctors therefore enjoy a certain amount of authority beyond what their fellow-citizens enjoy when they speak on any subject, including abortion. Insofar as a doctor speaks about medical subjects, there is reason to respect his opinion, unless we know some reason for discounting it. But insofar as he draws on his prestige as a doctor to invoke respect for his non-medical opinions, he is appealing to superstition.

We are naturally interested in a doctor's, especially a gynecologist's or obstetrician's, views concerning abortion, because they are well placed, in a sense, to know what it involves, what it is like, and so forth. Yet it is clear that they are specially authorized, rationally speaking, to pronounce on the technical side of the matter; as to the moral side, they have little to tell us. In fact we come here to a curi-

ous twist in the subject. When a man stands to gain by abortion, as so many doctors do, we ordinarily take his advocacy with a grain of salt; and by the same token his opposition to it should increase our regard both for his integrity and for his opinion, which is formed and offered in the teeth of his own self-interest. And that suggests another line of thinking about the right to speak.

The following letter recently appeared in *Time:* "I am 83 years old, living in an excellent nursing home, but with failing sight and hearing like Shakespeare's seventh age of man. *I am in a position to say this:* Shouldn't compassion, common sense, and economics unite to decree that some old folks' lives be mercifully terminated? It hurts me to think of the good that could be done with the $20,000 spent on my yearly expenses" (my emphasis). Again we see that some people exercise their right to speak with a special social authority. That authority is moral. But note that in a secular society there is no officially and explicitly sanctioned class of men wielding moral authority. Clergymen no longer hold that status. Indeed it is hard to think of anyone who has *less* right to speak publicly on the subject of abortion than a Catholic priest; his views are usually discounted at once, except by some Catholics, and even they may be embarrassed when he "goes public." As Irving Kristol puts it, secular humanism is our established religion; and anyone who speaks with reference, even implicit, to religious doctrines at variance with these has committed a kind of profanation against public discourse. He will be accused of trying to "impose" his "values" on the rest of us; yet we do not consider that secularists are trying to "impose" *their* "values" on us when they not only legalize abortion, but seek to use public monies to finance it. The reason we do not so feel is that we have generally acquiesced in the establishment of this religion, granting legitimacy to *its* special values. I have noted before that in order to speak with public respectability against abortion nowadays, it is almost necessary to establish that you are *not* a Catholic.

But let us consider the letter to *Time* more particularly. If a young man were to say that we ought to kill (or "mercifully terminate") old people, because the money we spend sustaining them might be better spent elsewhere, his suggestions would likely be met with alarm, indignation, and ridicule. But when a prospective victim of such a policy speaks for it, we listen. In fact the woman who writes the letter calls attention to her special right to her opinion: "I am in a position to say this." And I believe the authority she thus claims is something more than that of an admission against interest.

Our culture is dominated by secular liberal doctrines, which derive

some of their substance, and much of their force, from Christianity; there are even many people who straddle (uneasily, it seems to me) liberalism *and* Christianity. We thus have a curious situation in which our public values can be traced historically and intellectually to a source which is itself taboo. The situation is typified in the way many liberals like to quote "all men are created equal" as if it were a complete utterance in itself, when in fact it is part of a much longer sentence which they would be embarrassed to quote in its entirety: embarrassed, because it goes on to speak of the Creator who does the equal creating. Yet it is hard to see any way of justifying "all men are created equal" without bringing a Creator into it; it seems rather obvious that men are no more created equal than they are created six feet tall.

More to the point, its Christian provenance means that "Western civilization awards its highest cultural prestige to victims," as John Murray Cuddihy has put it. It is the generic victim who, like the suffering Christ, speaks with greatest moral authority. An old woman can advocate killing old women—beneficiently, of course. She suffers; she has the right (is "in a position") to speak. "It helps," Cuddihy adds archly, "even if we are not ourselves victims, if we can 'claim relationship with' accredited victims."

Who is the victim in abortion? That is what the abortion argument is all about, really. It is obvious that if the unborn child is a child, he is the victim. The strategy of pro-abortionists, at this level, is to deny that the unborn child is a child, by terming him a "fetus," a conveniently Latin word (if our language were Latin they would find some imposing English word). And of course the strategy of anti-abortionists is to emphasize the humanity of the unborn child.

But the pro-abortionists have the upper hand in this aspect of the public debate. Who, after all, are our publicly "accredited victims"? The poor; the black; and, more recently, women. Abortion advocates have therefore gotten into the habit of speaking "on behalf of" poor black women who can't afford expensive illegal abortions. We find well-to-do editors and columnists expressing high indignation on the subject, because they can invoke the image of the young ghetto woman abandoned by the man who got her with child. Thus, in Cuddihy's phrase, they " 'claim relationship with' accredited victims": the relationship of champion, of spokesman. There are other odd angles in this. One of them is the way many pro-abortionists have of co-opting concern for the child, by making it sound as if existence, as the child of a poor black woman, were a curse, abortion a blessing, and the anti-abortionist's insistence that a child be permitted to come

to term in such squalor a form of social callousness. Implicit in this too is an upper middle-class horror and incomprehension of Negro ghetto life that has a more sinister side. As with euthanasia, we find the view emerging that if life is pain and woe, it is kindness to kill. This is clearly a self-serving view, since it enables those who hold it to convince themselves that they are being altruistic in eliminating people who are (as it happens) inconvenient to them. I must confess that when I listen to some pro-abortionist rhetoric, I feel almost a sneaking admiration for Hitler's integrity: at least he never pretended that he was doing his victims a favor.

It is awkward to speak for the unborn child. He is not only helpless, but also, in worldly terms, worthless. If Christianity is true, then he is the test case of human dignity: he whom nobody wants. But if Christianity is false, and if a life is to be held worthy of sustenance and protection only insofar as it serves the purposes of others—those who have power over it—then we may proceed to eliminate a whole range of undesirables, beginning with the unborn. At first, of course, we must give humane-sounding reasons: those we kill will be better off dead, society will be better off, and so forth. Later, when we are in the habit, we may drop the formalities. I note that in the past few years, not only abortion, but euthanasia, publicly sponsored sterilization of minorities (partly for their own good, of course), and killing deformed infants have all found more or less respectable public advocates. Another "discredited domino theory" has been undiscredited.

Thus it will be seen why the pro-abortionist slogan about the abortion decision being left between "a woman and her physician" has such rhetorical potency. It is the woman who is held to be "victimized" by pregnancy, and it is the physician who is assumed to be authoritative in medical affairs—and abortion, holds the secularist, is, so far as the public is concerned, a stricty medical matter. The moral aspect is held to a "private"; indeed many pro-abortionists are eager to call it not the moral, but the "religious" aspect, the better to trivialize it and remove it from the realm of public deliberations. The principle that the state is not to establish a religion has been subtly extended to mean that there is to be no public religious authority. To advert openly to religious doctrines is now felt in many quarters to be a positive breach of civility. Perhaps, in a sense, it is. And perhaps, on such matters, it is necessary now and again to risk incivility, rather than to tolerate civil slaughter. Unfortunately, many Christians have been cowed into keeping their mouths shut. They have been taught that, as Christians, they have no right to speak.

Columnist Nicholas Von Hoffmann has remarked on the snob-

bishness of many advocates of easy abortion, on the way they call attention to the religious, ethnic, and class status of their opponents as a way of discrediting them. Oddly enough, pro-abortionists are almost uniformly people who denounce the invidious use of such personal data in any other area of life. Evidently they feel that their symbolic solidarity with "accredited victims" at the other end of the social ladder from themselves gives them the right to snub those in between. Margot Hentoff has remarked penetratingly on a similar phenomenon in the case of Harriet Van Horne, who seems to think that because she opposes killing in Vietnam, she cannot possibly be guilty of favoring killing when she advocates abortion in America. (See *The Human Life Review,* Spring, 1975.)

In his wise little book *The Abolition of Man,* C. S. Lewis takes up the problem of the secularist (whom he terms the moral Innovator). Such people, he observes, ". . . will be found to hold, with complete uncritical dogmatism, the whole system of values which happened to be in vogue among moderately educated young men of the professional classes during the period between the two wars. Their scepticism about values is on the surface: it is for use on other people's values: about the values current in their own set they are not nearly sceptical enough. And this phenomenon is very usual. A great many of those who 'debunk' traditional or (as they would say) 'sentimental' values have in the background values of their own which they believe to be immune from the debunking process. They claim to be cutting away the parasitic growth of emotion, religious sanction, and inherited taboos, in order that 'real' or 'basic' values may emerge." They draw on traditional moral wisdom erratically, invoking it when it suits their purposes, disparaging it altogether when it does not, without noticing the inconsistency. The abortion advocates use the slogans of life's sanctity when it comes to war (especially to war against regimes they approve of); why not when it comes to the unborn child? Or, to drive the question to a deeper level: in what sense can life *ever* be sacred to them? They have been guilty of what I call logical thimblerigging. Of their reverence for life it may be truly said: Now you see it, now you don't. The most effective way to deal with them is to force them to give the ultimate grounds for their reverence for life when they do profess to feel it, rather than exploiting such reverence in the rest of us haphazardly, according to their convenience. My guess is that this turn in the debate will, if rigorously pursued, force their hand: i.e., deprive them of their right to speak with any authority at all.

Abortion: Rights or Technicalities?

A Comparison of Roe v. Wade with the Abortion Decision of the German Federal Constitutional Court

Harold O. J. Brown

In January, 1973, in the decision Roe et al. v. Wade and the closely related decision Doe v. Bolton, the Supreme Court of the United States held unconstitutional the statutes of Texas and virtually every other state concerning abortion, mandating a situation in which abortion (1) may not be regulated during the first trimester of fetal life; (2) may be regulated during the second trimester only "in ways that are reasonably related to maternal health;" (3) may be regulated or even proscribed during the final trimester "except where it is necessary, in appropriate medical judgment, for the preservation of the life of the mother."

This third provision is generally construed to permit abortion for considerations of mental health, age, family, and sociological factors, as well as for considerations related to danger to a woman's physical health in the narrow sense. In other words, Roe v. Wade effectively established abortion on demand beyond question prior to "viability," set at approximately six months, and makes it very difficult to prevent or punish abortion for any reason at any time prior to live birth (for the criteria of maternal health are so broad that it would be difficult to establish in court that they had not been met[1]).

In June, 1974, the West German Federal Diet (*Bundestag*) passed the *Fifth Law for the Reform of the Penal Code* (5. StrRG), which included a substantial revision of § 218, the law relating to abortion. In essence, the revision declared abortion performed by a physician within 12 weeks of conception (one trimester) at the request of a pregnant woman *straffrei,* i.e., free from punishment. Later abortions could be performed, up to the twenty-second week (not quite two trimesters), for reasons of maternal health ("medical indication") or

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fetal deformity ("eugenic indication"). Abortion later than 22 weeks after conception was not permitted.[2] Eight months later, the Federal Constitutional Court, by a six-two margin, ruled that this *Fifth Law* does not meet the requirements of the Federal Constitution and is therefore null and void with respect to termination of pregnancy on demand prior to 12 weeks after conception.[3] The provisions of the older version of § 218, permitting abortion only for certain narrowly-circumscribed reasons, are to remain in force during the first trimester as well (decision of February 25, 1975).

To put the matter simply, the United States Supreme Court in Roe v. Wade decreed that abortion on demand is an unchallengeable right during the first six months of pregnancy and available with minor qualifications during the final trimester. The German Supreme Court, confronted with a revision of law making abortion on demand available during (but only during) the first trimester, declared that such a regulation is unconstitutional insofar "as it removes the termination of pregnancy from liability to punishment even when no grounds are present that have substance in the light of the scale of values of the Constitution."[4]

It is evident that the decision of the German court is diametrically opposed to that of the American one. Because the liberalization of abortion enacted by the Bundestag applied only to the first 12 weeks of pregnancy, however, it did not attempt as much as the U.S. court granted, and even that attempt, in the eyes of the German court, is incompatible with the German Federal Constitution's view of human rights and dignity.

An examination and comparison of the two decisions reveals that there is more than a difference of final verdict: there is a far-reaching difference in approach, philosophy, and awareness of the *social implications* of the decision—so great that one is inclined to wonder whether the two courts were considering the same question. Both decisions have been hotly contested, and in both the United States and West Germany movements have been launched to reverse them. Because American justice, including representatives of the Supreme Court of that day, sat in judgment within recent memory (i.e. at Nuremburg) on German citizens, and acted thereby not on the grounds of technical legal considerations, but rather on those of human rights and ultimate standards of morality, it is all the more interesting to compare the verdict of today's Supreme Court in Roe v. Wade with that of its West German counterpart concerning the *Fifth Law for the Reform of the Penal Code.* We observe that the American court is deeply concerned with "rights" technically and

legally conceived, while the German court, although not indifferent to the technical considerations of German law, appeared primarily concerned with facing the human, moral and ethical implications of the question.

Why the Courts Acted

The first difference between the American and the German decisions lies in the nature of the plaintiffs bringing suit before the respective courts. In Roe v. Wade, the principal plaintiff was an anonymous —but, we are assured, not fictitious—person in Texas, pregnant when she filed suit against the District Attorney of Dallas County in March, 1970, but admittedly no longer so in December, 1971, when the Court first heard the case, and certainly not in January, 1973, when it decided it. In addition to "Jane Roe," James Hubert Hallford, a licensed physician at that time charged with violation of the Texas abortion statutes, was allowed by the Court to intervene in her case.

Attempts to modify existing state legislation with respect to abortion had long been underway in state legislatures. As recently as November, 1972, two states, Michigan and North Dakota, had subjected the question of the liberalization of abortion laws to a statewide referendum. Liberalization was defeated by a large margin in both states. The Court was under no strong compulsion to intervene in this process of legislative decision, nor, if it did, to make a sweeping decision that would bypass completely the normal legislative process. It is vain to speculate on why this case was chosen for a Supreme Court decision, but it is interesting to note that at the time it was chosen, the abortion issue was under active consideration across the country, and that the Court's decision was to effect at one stroke the radical change which pro-abortionists were finding it difficult (if not impossible) to achieve in state legislatures or popular referenda. The decision also left *opponents* of abortion with no apparent alternative other than a constitutional amendment with which to combat it.

The German court, by contrast, acted on a petition brought by 193 members of the Federal Diet and four of the states (*Länder*) of the Federal Republic. It was thus, under the German system, under an *obligation* to consider and decide the question of the constitutionality of revisions in abortion legislation.[5] Its decision returned the question to the legislative body, where presumably another reform law will be worked out in an effort to do justice to the question of human rights considered by the German court. It is an interesting commentary on the political behavior of the two countries that not

only was the issue hotly debated in the German Bundestag, in contrast to the American Congress (which has largely sought to avoid it), but when the pro-abortion forces carried the day in the Bundestag, those delegates who had opposed it demanded review by the Federal Constitutional Court. A comparison of the two situations shows that in the German case, the initiative clearly lay with the legislature, while in the United States, not only has the legislature avoided the issue, but the Supreme Court has dramatically assumed the initiative and created a situation in which it is extremely difficult for the Congress to do anything about it.

Technical Considerations

The first 14 pages of the Supreme Court's 51-page decision are devoted to a review of the Texas statute in question and to a consideration of the plaintiff's standing. The Federal Constitutional Court's decision is considerably lengthier, and—as indicated above—that court was constitutionally required to review the revision of § 218, and hence did not need to consider the qualifications of the plaintiffs. Thus most of the German court's 90-page decision is devoted to the principles at stake. Three pages of the German decision are devoted to the technical question of whether the revision of § 218 required the approval of the Federal Council *Bundesrat*, upper house) and to the Federal Constitutional Court's ruling that it did not.

The Issues:

1. Right to Life

Passing over the technical considerations, we come to a fundamental difference between the German and the American approach. For the German court, what is at stake is the right to life; for the American, it is the conflict between the mother's "right to privacy" and the putative "compelling interest" of the *state* in protecting the right to life. At no point does the U.S. Supreme Court consider whether unborn life, subjectively speaking, *has* rights, but only whether it constitutes a value the protection of which is a legitimate *state* interest (or duty).

The German view of the right-to-life issue is historically narrower than that taken by the American court, which reviewed ancient, medieval, and modern history without considering the subjective rights of the unborn at all. The German Federal Constitution (*Grundgesetz*) explicitly established the right to life as a *subjective* human right: in other words, it does not merely provide that the state has no right to take life, but rather acknowledges that this right belongs to the human being himself.[6] This is quite a different approach from that of the

American court, in whose eyes any possible right to life on the part of the unborn would have to be derived from the interest of the state in protecting it. It is really rather remarkable that an American high court should make the individual's rights depend, in effect, on the state's interest in *protecting* it.[7] This is precisely the viewpoint that the German Federal Constitution expressly repudiates in professing a commitment "to the fundamental value of human life and to a conception of the state that stands in decided opposition to the views of a political regime to which the individual life meant little, and which for that reason abused without limit the right it had usurped over the life and death of the citizen."[8]

In comparing the German court's inquiry into the right to life with the United States court's limitation of *its* concern to what it speaks of as "compelling state interest," we should note that this terminology does not imply—as it might appear to do—that our court evaluates unborn life solely in terms of its possible *advantage* or *utility* to the state. The concept of "state interest" as used here refers rather to the right of the state to take an interest in the matter at hand, i.e. developing human life, and hence involves a limitation on the power of the state. Nevertheless, words and phrases, once established as law, often turn out to carry more and wider implications than those who coined them may have imagined. The expression "establishment of religion" was a precise technical term with a very specific meaning to the framers of the First Amendment, but subsequent courts (including the present one) have read much more into it, and have used it to establish some rather far-reaching principles and policies. What is to guarantee that the expression "compelling state interest," as the criterion to establish a right to life, may not undergo a similar and more fateful elaboration in years to come?

The German court squarely and explicitly acknowledged that it was dealing not with the question of whether or not a certain right may be derived from a constitutional document, but rather with "problems in the area of biology, especially human genetics, anthropology, but also of medicine, psychology, sociology, and political sociology, and not least of ethics and moral theology."[9] "The import and seriousness of this question of constitutional rights becomes apparent when we consider that we have here to do with the protection of human life, a central value of every legal order."[10]

The U. S. court recognized, in its preamble to Roe v. Wade, the seriousness of the issue it was attempting to resolve, but somehow avoided mention of the concept of the right to life, choosing rather to speak of "the abortion controversy":

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes towards life and family and their values, and the moral standards one establishes and seeks to observe are all likely to influence and to color one's thinking and conclusions about abortion.
>
> In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.[11]

The Supreme Court avoided even the barest suggestion that there is a *subjectivity* of the unborn child, or in other words that it could properly be considered a subject in its own right, rather than merely an object of greater or lesser value. When it introduces, however briefly, what might appear to be fundamental principles, its language becomes very subjective and experience-oriented. The German court speaks of problems in biology, genetics, anthropology, etc., and even of ethics and moral theology, as objective things in themselves, not dependent on the subjective attitudes of humans, as "fundamental questions of human existence." In other words, the German court presupposes a fundamental, objective moral order, while the American takes refuge in subjectivity. Admittedly Germans are thought to be more inclined to deal in abstractions and to treat them more objectively than do Americans. But is it too much to read into language such as that of the Supreme Court, which always puts the "one" first—one's philosophy, one's experience, one's exposure, etc. —an implicit downgrading of objective values to the level of mere individual, subjective opinion? Not only does the Supreme Court not include among those things likely to influence and color one's thinking the objective content of, for example, the Christian religion, but it does not even speak of "one's religious *convictions*,"—only of "one's religious training;" not of "one's values," but of "one's attitudes towards . . . values." The subjectivity itself becomes derivative and passive, and does not even attain the level of existential commitment. The Germans, whose immediate past history, as the Federal Constitutional Court observed, confronted them forcefully with the consequences of failure to make moral decisions, recognized that they were dealing with an issue of life, and hence of death, *Vernichtung des ungeborenen Lebens*, (annihilation of the unborn life), and made a decision on those terms. This issue our Court explicitly refused to face: "We need not," wrote Justice Blackmun, "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."[12] Obviously, if one refuses *a priori* to face the question of life, it is not plausible to consider that of the right to life.

2. The Approach to History

The difference between the approach of the United States Supreme Court and that of the German Federal Constitutional Court to the history of law is symbolized by the two little words "only" and "already." The United States court reasoned that the unborn have been protected "only" for the last century or so: "It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today (i.e., prior to Roe v. Wade) are of relatively recent vintage . . . they derive from statutory changes (One can hardly imagine the Court arguing today that the right not effected, for the most part, in the latter half of the 19th century."[13] to be a slave is "of relatively recent vintage," "only" a little over a century old.) The Germans, by contrast, reason thus:

> The penal requirement of §218 is in essence derived from §§181, 182 of the Penal Code for the Prussian States of April 14, 1851; these prescriptions served as a model for the regulation in the Penal Code of the North German League of May 31, 1870, which was taken over verbatim into the Penal Code for the German Empire of May 15, 1871.[14]

The right has "already" been recognized for over a century: should it now be abolished?

Since the German legal system is based on Code rather than Common Law, legal history and precedent are of less importance than in the American system. When the Code is not explicit, or when a revision is under consideration, the first appeal is not to precedent (after all, the immediate precedents come from Nazi "justice!"), but to a general consensus concerning justice. Although neither the present German constitution nor the German legal tradition officially establishes or recognizes the Western, Christian value system, it does, by a kind of tacit understanding, presuppose it. To a liberal, modern American, with his understanding of "pluralism," such an acknowledgment of a specific ethical-moral tradition may seem arbitrary. In the American system, however, if one appeals to precedent, by choosing a nineteenth-century precedent, one to some extent accepts the value consensus of nineteenth-century America, which was more explicitly Christian than ours is today. By going further—much further—back into legal history, one discovers precedents that are no longer particularistically Christian, but in so doing one is in effect

rejecting one value system, i.e. that of Christianity (and, incidentally, of Judaism and of *much* of pagan antiquity) in favor of certain values of pre-Christian paganism. There is something very remarkable about the policy of a court that refuses to face either the substantive issue of when life begins or the moral issue proceeding from it, the time of origin of the human right to life, and purports to rule on the basis of legal precedent. After all, if one goes back far enough along man's path from barbarism to a measure of civilization, one can find precedents for a great number of things. The precedents for slavery, as we have noted, are older than those for emancipation. What is really wrong about slavery? Is it merely that the pre-1865 precedents were overturned by military action? Surely not.

It is rather paradoxical that in the highest judiciary body of a nation that almost *divinizes* Progress, a court whose members would shudder at the thought of being reactionary, appeal is made from the nineteenth century to the first. A significant difference between the approach of the Germans and that of the Americans is that the German court appears to feel that *progress* has been made in man's ethical and moral understanding and in the embodiment of such understanding in law, and that this progress should not be reversed, while the Americans, on this issue at least,[15] seem to feel that recently developed sensitivities are suspect. Of course, what this is really saying is that the German court, having taken the position from the outset that the abortion issue involves fundamental questions concerning the nature of man and of morality, looks at the historical development in an effort to see what we have learned and concluded about them. The American court, by contrast, does not really prefer the first century to the nineteenth, but apparently having resolved to deal not with primary questions or rights, but instead with a rather derivative one, "the right to privacy," it looks to history for technical legal precedents to justify what it is, for *other* reasons, resolved to do.

3. A Question of How, Not Whether

One of the most striking things about the German decision—and one which, in the present writer's opinion, reflects unfavorably on the corresponding American one—is the undisputed ackowledgement of all parties to the controversy that it is a question of fundamental rights and that it is the duty of the law to protect and foster those rights. As the German court notes, even the now-invalidated *Fifth Law for the Reform of the Penal Code* places the legislation on abortion in the section "Felonies and Misdemeanors Against Life."[16] At no time did anyone involved in the discussion, either during the

Bundestag debates preceding the adoption of the *Fifth Law* or in the arguments before the Federal Constitutional Court, "give up the thought of the fact that unborn life deserves and requires protection. The advocates of this draft [of the *Fifth Law*] are convinced only that the Penal Code in its present form is not the appropriate means. . ."[17] In the Bundestag debates, all parties agreed that unborn life is deserving of protection from its inception. Thus the special commission of the ruling coalition *"fractions,"* the SPD and FDP, reported:

> Unborn life is a legal entity that is to be given fundamentally the same valuation as born life.
>
> This conclusion is self-evident for the stage in which unborn life would also be capable of life outside the mother's womb. But it is also justified for the earlier developmental stage, beginning approximately fourteen days after conception, as Hinrichsen among others has convincingly demonstrated in the public hearings. . . . It is the absolutely overwhelming conviction of medical, anthropological, and theological science that the whole subsequent development permits us to distinguish no further transition of corresponding significance. . . . For this reason it is forbidden to negate unborn life after the end of implantation, or even merely to view it with indifference."[18]

The point at issue for the Germans, then, was not whether the fetus is human life, nor even whether such life is deserving of protection. Both points were conceded by all parties as established beyond reasonable doubt, the first from a scientific, the second from an ethical, perspective. The dispute concerned whether the state is generally obliged to punish violations of that right by means of the Penal Code, and whether such punishment is an effective or the most effective means of protecting the admitted right of the unborn to life.

The dissenters to the majority opinion, Frau Rupp-v. Brünneck and Dr. Simon, objected strongly to the view of the majority that the state *has a duty to punish* with criminal sanctions those who violate the right of the unborn to life, but not to the view that it has a duty, in principle, to protect that right. The minority agreed with the majority of the Bundestag in holding that "positive" means of the promotion of the right to life (such as welfare legislation, counseling, etc.) were adequate and in any event more helpful than penal sanctions, which the dissenters held to be largely unenforceable. "The debates in parliament and before the Federal Constitutional Court were not concerned with *whether* there should be such protection, but with *how*."[19]

Although both the Bundestag and the Federal Constitutional Court were agreed that the unborn have a right to life, the court feared that there might be an inadequate appreciation of the moral values in-

volved on the part of the general population. It felt, however, that on such a moral issue legislators and judges should be guided not by majority opinion, but rather by constant principles of justice:

> "The passionate discussion of the abortion problem may give rise to the fear that in part of the population the value of unborn life is no longer fully acknowledged. But that does not give the legislator the right to give up. On the contrary, he must undertake the serious effort, by differentiating the threat of punishment, to attain a more effective protection of life and a regulation that will be supported by the general idea of justice."[20]

The German court was expressly concerned about the impact that an apparent effective downgrading of the value of unborn life would have on the public consciousness, and held that a mere formal disapproval of abortion on demand, while legally exempting it from punishment during the first trimester, would not be sufficient to prevent the general public from coming to the conclusion that abortion is a morally indifferent matter—that neither the political representatives nor the judges would accept:

> Admittedly in practice the criminal authorities never succeed in bringing to justice all those who violate the Penal Code. The numbers of those who escape vary among the different categories of offence. Unquestionably they are very considerable in the case of abortion. At the same time, this should not lead us to overlook the general preventive function of penal law. If the mission of the penal law is seen as the protection of especially valuable legal entities and of fundamental values of society, then this function has a high significance. Just as important as the visible reaction in the individual case is the long-range effect of a criminal norm which has long existed in its principal, normative content ("abortion is punishable").[21]

At several points in its decision, the German court took into consideration the probable influence of the legalization of abortion on demand during the first trimester (a) on the total number of abortions that would be performed, and (b) on the public's attitude towards abortion and the humanity of the unborn. Remarkably, although the social, demographic, and even ethical implications of widespread abortion have been observed since antiquity,[22] the United States Supreme Court reached its decision in Roe v. Wade on rather narrow technical grounds and disregarded—explicitly in the concurring opinion of the Chief Justice—the possibility of major social consequences.

4. Social Consequences

The Supreme Court's epoch-making 1954 school segregation de-

cision, Brown v. Board of Education, was precedent-shattering in the degree to which the court of that day took sociological factors, especially as described by sociologist Gunnar Myrdal in *An American Dilemma,* into account in determining the constitutional issues involved. Athough racially separate education might have been, formally and in theory, "equal," the Court found that it was by its nature unequal and discriminatory. Brown v. Board of Education was intended to bring about social change, and it did. Roe v. Wade, in the opinion of the Chief Justice, is presented as an insignificant decision by comparison. In remarks that will surely be remembered for their striking lack of realism, Burger wrote:

> I do not read the Court's holding today as having the sweeping consequence attributed to it by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession [in the form of the Hippocratic oath, expressly repudiated by the Court in this decision] and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortion on demand.[23]

Interestingly, Frau Rupp-v. Brünneck interpreted the American court's action in the diametrically opposite sense, namely as doing exactly what Burger said that it does not: "Thus the United States Supreme Court has viewed the imposition of a penalty for abortion performed by a physician with the consent of the pregnant woman during the first third of pregnancy as a violation of constitutional rights. Admittedly, this goes too far for German constitutional law. . ."[24] The dissenting German judges cite the United States Supreme Court incompletely, for as is now well-known, Roe v. Wade established the unqualified right of a woman to terminate her pregnancy not only during the first trimester, but during the second as well, and even during the third, with qualifications that up to the present have proved insignificant in practice. In the light of the agreement of all the German judges, both those voting against the revision of § 218 and the two dissenters who would have allowed it, as well as all parties in the preceding Bundestag debates, it is evident that the full scope of the American decision goes much "too far" for German legal thinking. Indeed, the fact that both the American court and current medical practice after Roe v. Wade have gone so much farther than either German legal or medical opinion was willing to do tends to support the concern of the German Federal Constitutional Court that the tendency of "reform" is to a substantial increase in the number of abortions and a corresponding decrease in the protec-

tion afforded unborn life, as well as a deterioration in the public's attitude towards the value of that life.

With respect to the impact of court action on the public understanding of the value of human life, the German court stated:

> The disapproval of the termination of pregnancy demanded by the Constitution must also be able to be clearly perceived in the legal structure subject to the Constitution. . . .(But if the law allows abortion on demand during the first twelve weeks) a formal legal disapproval of the termination of pregnancy would not suffice, because the woman determined on an abortion will ignore it. The legislator of the Fifth Law for the Reform of the Penal Code, recognizing that positive measures are necessary for the protection of developing life, has replaced the penal provision of the law in the case of abortion by a physician with the pregnant woman's consent with a system of counseling according to §218c. But the complete elimination of the penal sanction creates a lack of protection that completely eliminates the security of developing life in a not insignificant number of cases, in that it delivers this life over to the free decision-making power of the woman."[25]

It is evident that the Federal Constitutional Court was concerned not only to limit the number of abortions, legal and illegal, and thus in a quantitative way to increase the degree of protection afforded unborn life, but also to assure that the Diet and the courts in no way contribute, by their actions, to a downgrading of the value of unborn life in the eyes of the general public. Citing an earlier Bundestag debate, the German court observed, "The time limit rule would lead to a disappearance of the general awareness of the fact that unborn life is worthy of protection during the first three months of pregnancy. It would give credence to the view that abortion, at least in the early period of pregnancy, is just as subject to the free determination of the pregnant woman as is the prevention of pregnancy."[26]

The German court, having accepted what it called "established medical and biological fact" regarding the beginning of human life and the presence of a human *being*, thought it most important to promote respect for such life both in the structure of the law and also in the less tangible area of general public opinion. The American court, concerned with the derivative rights of the woman (derivative in the sense that they are adduced from the "right to privacy," itself not explicitly mentioned in the Constitution, but seen by the majority as inhering there) in contrast to the right to life, which is innate and fundamental, avoided having to face the implications of what the Germans called "fact" by referring to it as "one theory." Thus the United States Supreme Court did "not agree that, by adopting one

theory of life, Texas may override the rights of the pregnant woman that are at stake."[27] Likewise, the Americans took no notice of the fact that the right to privacy is not on the same level as the right to life, as the Germans repeatedly did: "A compromise that preserves the protection of the life of the *nasciturus* (the one to be born) as well as leaving to the pregnant woman the freedom to terminate her pregnancy is not possible, because the termination of pregnancy always involves the annihilation of the unborn life."[28]

Surely among the most impressive consequences of the abortion decision in Roe v. Wade is the large-scale annihilation of unborn human life, which Chief Justice Burger apparently hoped would not take place: it is hard to imagine that he would deny that what is occurring today is "sweeping." The Supreme Court's almost parenthetical reference to modern concerns such as "population growth, pollution, poverty and racial overtones" in its preamble might lead one to think that the Justices would then go on to consider the probable effect of their decision in those areas, but in fact they did not.

CONCLUSION

From all that has been said, it should be evident that the West German Federal Constitutional Court dealt with the question of a limited right to abortion on demand on the basis of an evaluation of fundamental questions concerning the nature of man and the requirements of justice, which the court held to be reflected in the *Grundgesetz*, the German federal constitution. The decision of the American court represents a deliberate avoidance of the larger moral, ethical, and anthropological questions to which the German court addressed itself. It attempts to resolve a fundamental question concerning the nature of man and the innate worth of human life as a technical issue of positive law, as a question of a right to privacy established by a Constitution in which, as the Supreme Court noted, it is not expressly mentioned.[29] The Germans took the probable social consequences, including the long-range educational impact, of their decision into account; the Americans purported to believe that there would be none, or that they would not be significant. All parties in the German issue, including the majority of the Diet that passed the reformed version of § 218 and the two dissenting Federal Constitutional Court judges, agreed on the principle that human life is a fundamental value and deserves protection, even in the stage before birth, and that abortion should be discouraged as strongly as possible: their only difference of opinion, at least the only one expressly admitted, was concerning *how* such protection might be provided in the light of the

very difficult conflict situations into which pregnant women are sometimes thrust.

For this reason the comparison between the American and German courts' thinking on the issue is especially disappointing. No one familiar with Roe v. Wade can fail to recognize that in it the highest American court has evaded the basic moral issue and resolved a fundamental question only on the basis of technical legal construction. Insofar as the Supreme Court was under no direct pressure to take this case, and certainly faced nothing to compare with the constitutional obligation for review imposed on the Federal Constitutional Court with respect to § 218, Roe v. Wade must appear as an almost deliberate attempt to reduce a fundamental moral issue to a technical one and thus make human values secondary to technicalities.

In recent discussion, much apprehension has been expressed about what will happen to human values when they are subordinated to scientific or technical considerations. Although such discussion usually envisages the problem arising in an area of science, medicine, or human engineering, Roe v. Wade is an example illustrating the way in which technical considerations can take precedence over ethical ones in the sphere of justice as well. The result, however, is precisely that so often feared: technology supersedes humanity. Here we are dealing, it is true, with a special kind of "technology," legal or constitutional, but the result is the same.

Because fundamental questions of human dignity and the meaning of life impinge on religion and theology, many have wondered whether an American court could do anything other than ignore them, as the Supreme Court did, and reach a technical decision based on precedent and the extrapolation of constitutional provisions. The fact that the German Federal Constitutional Court, not in itself a more religious body than the United States Supreme Court, has shown itself so much more vigorous in addressing itself to the moral and ethical dimensions of a problem is encouraging. Perhaps subsequent debate and discussion in the United States, both in the legislatures and the courts, will profit from this example.

NOTES

1. Cf. John Hart Ely, "The Wages of Crying Wolf," *Human Life Review* I:1, Winter, 1975.

2. *Bundesverfassungsgericht, Verfahren wegen verfassungsrechtlicher Prüfung des Fünften Gesetzes zur Reform des Strafrechts (5.StrRf) vom* 18. *Juni* 1974 (BGB1. I. S. 1297), *Uretil* v. 25. February 1975. 1 *BvF* I-6/74 (hereafter, *BVerfG*), pp. 9-11.

3. *BVerfG*, pp. 6-7.
4. *BVerfG*, p. 6.
5. *BVerfG*, p. 27.
6. *BVerfG*, p. 50.
7. Supreme Court of the United States, Syllabus Roe et al. v. Wade, District Attorney of Dallas County, decided January 22, 1973 (hereafter, Roe v. Wade), p. 35.
8. *BVerfG*, p. 50.
9. *BVerfG*, p. 49.
10. *BVerfG*, p. 50.
11. Roe v. Wade, p. 1.
12. Roe v. Wade, p. 44.
13. Roe v. Wade, p. 14.
14. *BVerfG*, pp. 12-13.
15. Roe v. Wade, pp. 14ff.
16. *BVerfG*, p. 62.
17. *BVerfG*, p. 24.
18. *BVerfG*, pp. 55-56.
19. *BVerfG, Abweichende Meinung*, p. 2.
20. *BVerfG*, pp. 88-89.
21. *BVerfG*, p. 77.
22. Cf. the present writer's essay, "What the Supreme Court Didn't Know," in *Human Life Review*, I:2 Spring 1975.
23. Roe v. Wade, 1st concurring opinion, p. 2.
24. *BVerfG, Abweichende Meinung*, p. 6.
25. *BVerfG*, pp. 71, 74-75.
26. *BVerfG*, p. 78.
27. Roe v. Wade, p. 47.
28. *BVerfG*, p. 59.
29. Roe v. Wade, p. 36.

The German Court's Decision:

A Translation of the Summary

*On February 25, 1975, the West German Federal Constitutional Court (*Bundesverfassungsgericht*) handed down its historic decision on the government's duty to protect the life of the unborn. The Court ruled on the revision of Paragraph 218 of the German Penal Law Code adopted by the* Bundestag *on June 18, 1974. The old § 218 allowed abortion for certain medical reasons, appropriately certified by a panel of physicians; the revision provided for abortion on demand during the first 12 weeks of pregnancy, with later abortions permissible only for serious medical reasons which were defined in detail by the law. The governments of three German states (*Länder*) and 193 members of the Bundestag petitioned the Court to examine the constitutionality of the new law. What follows is taken from a summary of the resulting decision, prepared for the German legal profession and published in* Neues Juristisches Wochenblatt *(1975: 13, pp. 573-587). The translation is by Dr. Harold O. J. Brown.*

Judgment

The Federal Constitutional Court, First Senate, with the attendance of the President, Dr. Benda, and the Judges Ritterspach, Dr. Haager, Rupp-v. Brünneck, Dr. Böhmer, Dr. Faller, Dr. Brox, and Dr. Simon, on the basis of the oral argument of the 18th and 19th of November, 1974, has by judgment declared as Law:

1. § 218a of the Penal Law Code in the version of the Fifth Law for the Reform of the Penal Law of June 18, 1974 is insofar incompatible with Article 2, Paragraph 2, Sentence 1, in connection with Article 1, Paragraph 1 of the Constitution and null and void, as it removes the termination of pregnancy from penal liability even when there are no reasons that—in the sense of the reasons for the decision—are substantial reasons in the light of the scale of values of the Constitution.

Reasons (Excerpts)

A. The matter of the case is the question whether the so-called time-limit rule (*Fristenregelung*) of the Fifth Law for the Reform of the Penal Code, which allows the termination of pregnancy in the first 12 weeks after pregnancy, according to certain conditions, to remain exempt from punishment, is compatible with the Constitution.

The Fifth Law for the Reformation of the Penal Code[1] created a new set of regulations for the punishability of the interruption of pregnancy, which differ significantly from previously existing law in the following respects:

Fundamentally, whoever interrupts a pregnancy more than 13 days after conception is to be punished (§ 218 I). However, a termination of pregnancy undertaken by a physician with the consent of the pregnant woman is not punishable under § 218 if no more than 12 weeks have passed since conception (§ 218a—time limit rule). Further, the termination of pregnancy undertaken by a physician after the 12-week limit is not punishable under § 218 if it is called for according to the knowledge of medical science in order to avert either a

danger to the pregnant woman or the danger of a very grave injury to her health, if this cannot be done in any other way that can be expected of her (§ 218b No. 1—medical indication), or when pressing reasons speak for the assumption that because of heredity or harmful prenatal influences the child would suffer from an irremediable injury to his health, that is so severe that it is impossible to demand of the pregnant woman that she carry out the pregnancy, and if not more than 22 weeks have passed since conception (§ 218b No. 2, eugenic indication). Whoever terminates a pregnancy without having the pregnant woman receive prior social and medical counsel from a counseling agency or from a physician will be punished (§ 218c). Likewise, whoever terminates a pregnancy after 12 weeks without having the prior certification of a competent authority that the requirements of 218b (medical or eugenic indication) have been fulfilled will be subject to punishment (§ 219). The pregnant woman herself is not punished under § 218c or § 219.[2]

B. The 5th Law RPC (RPC=for the Reform of the Penal Code, in German StrRG) did not require the approval of the Federal Council (Bundesrat=upper house of the German Parliament).

It is true that the law, in articles six and seven, amends the Penal Police Ordinance [StPO] and the Introductory Law of the Penal Law Code, which themselves were adopted with the approval of the Federal Council. For this reason alone, however, it does not yet require approval. The law amends no further legal provisions that themselves required approval.

The 5th Law RPC itself does not contain any provisions that require [the Federal Council's] approval according to Article 84 I or another provision of the Constitution. Neither § 218c nor § 219 of the PLC (PLC=Penal Law Code, in German StGB) new version regulates the establishment of authorities or administrative procedures. Rather, all that they do is to establish the material and legal presuppositions for a termination of pregnancy that is not subject to penal action. This is also true insofar as § 218c I No. 1 PLC requires that the pregnant woman, before termination, have addressed herself to an authorized counseling agency, and prescribes the object of the counseling. The establishment and arrangement of counseling agencies as well as the handing down of administrative provisions for the procedures to be adopted by these agencies are in their totality reserved to the federal states. For the same reason § 219 does not require the approval of the Federal Council when this provision provides for the confirmation of the factual requirements by an "authorized agency" prior to the carrying out of a termination of pregnancy indicated by § 218b.

It is impossible to allow the motion of the state governments, insofar as they wish to derive the decision concerning the requirement of approval from the legal principle derived in the decision of the Federal Constitutional Court on June 25, 1974, according to which a revision of law requires the approval of the Federal Council "if the amendment of material and legal norms gives a substantially different meaning to provisions concerning administrative procedure that have not been expressly altered." The factual presuppositions for a direct application of this principle are admittedly not present here. Whether it should possibly be developed in the sense of the motion of the government of the Rhineland-Palatinate may be left unanswered. Even in accordance with this view there would be no requirement for approval of the 5th Law RPC since the states retain a broad range within which they can give form to the administrative regulations that fall to them.

Lastly, it is impossible to derive a requirement for such approval from the close connection of the 5th Law RPC with the Law for the Amplification of the Penal Code, which is seen as requiring approval [by the Federal Council] with the content resolved by the Federal Diet (Bundestag). Aside from the fact that the Law for the Amplification of the Penal Code has not yet come into being, the legislator in the exercise of his legislative freedom is not prevented from dividing a legislative project into several individual laws. The Federal Constitutional Court has hitherto assumed the admissibility of such division.[3] In the decision BVerfGe 24, 199f the court left open the question whether the right to subdivide is subject to constitutional limits and where these limits lie. In any event, such limits have not been exceeded here.

The Fifth Law RPC and the planned Law for the Amplification of the Penal Code are indeed coordinated with one another, but they must not necessarily be bound up together into a unity from the technical legal point of view. The former law contains essentially only Penal and Criminal Process Law (*Straf- und Strafverfahrensrecht*). By contrast, the Law for the Amplification of the Penal Code has as its content measures concerning social and labor law. That the Law for the Amplification of the Penal Code is different in content from the 5th Law RPC is evident from the fact that the Law for the Amplification of the Penal Code, according to its literal text, is applicable to all of the solutions proposed for the new regulation of termination of pregnancy, namely the "time-limit rule" and the "indication rule."

C. The question of the legal treatment of termination of pregnancy has been publicly discussed for decades from many different points of view. In fact, this phenomenon of social life confronts us with manifold problems of a biological, and especially human genetic, anthropological, but also medical, psychological, social, socio-political, and not least of an ethical and moral-theological nature, all of which bear on the fundamental issues of human existence. It is the task of the legislator to take into account the arguments developed from these various perspectives, which are involved in manifold interrelationships with one another, to supplement them with specific considerations of legal policy as well as with experience drawn from legal practice, and on this basis to reach a decision as to the way that the legal structure should react to this social development. The legal regulation of the 5th Law RPC, decided upon after extraordinarily extensive preliminary work, can be examined by the Federal Constitutional Court only with respect to the question whether it is compatible with the Constitution as the highest law valid in the Federal Republic. The import and seriousness of the constitutional question become evident when we consider that this is a question of the protection of human life, a central value of every legal system. The decision concerning the standards and limits of the freedom of legislative decision demands a total view of the body of constitutional norms and of the scale of values decided upon in it.

I. 1. Article 2 II 1 of the Constitution protects life being developed in the mother's womb as an independent legal entity. The express inclusion of the right to life in the Constitution—otherwise self-evident—in contrast, for example, to the Weimar Constitution, is to be explained primarily as a reaction to the "destruction of life that is not worthy of living," to the "final solution" and to "liquidations" carried out by the National Socialist regime as government measures. Article 2 II 1 of the Constitution contains, in addition to the

abolition of the death penalty in Article 102, "a profession of commitment to the fundamental value of human life and to a concept of the state that places it in decisive opposition to the views of a political regime to which an individual life meant little and which for this reason engaged in unlimited abuse of the right it had usurped over the life and death of the citizen."[4]

In the exposition of Article 2 II 1 of the Constitution we proceed from the text, "Each has the right to life. . ." Life in the sense of the historical existence of a human individual exists, according to established biological and physiological fact, at all events from the fourteenth day after conception (implantation, individuation; cf. the exposition of Hinrichsen before the Special Commission for Penal Law Reform, 6th Electoral Period, 74th Session, Sten Ber S. 2142ff.). The process of development that begins therewith is a continuous process that displays no sharp breaks and does not permit an exact delimitation of different levels of development of human life. Further, it is not finished with birth: for example, the specific forms of consciousness characterizing human personality make their first appearance some time after birth. For this reason, the protection of Article 2 II 1 of the Constitution can neither be limited to the "finished" human being after birth nor to the *nasciturus* independently capable of life. The right to life is attributed to everyone who "lives"; no distinction can be made between stages of developing life or between unborn and born life. "Each," in the sense of Article 2 II 1, is "each living one," or, to put it differently, each human individual possessing life; "each" therefore means also the still-unborn human being.

In opposition to the objection that "each," in ordinary speech as well as in the language of law, generally refers to a "finished" human person, and that therefore purely linguistic interpretations speak against including unborn life in the scope of Article 2 II 1, we emphasize that in all events the sense and purpose of this constitutional provision require that the protection of life also be extended to developing life. The protection of human existence from excesses by the state would be incomplete if it did not also embrace the preliminary stage of "finished life," unborn life.

This extensive interpretation corresponds to the fundamental principle established in the adjudication of the Federal Constitutional Court, "according to which in case of doubt that interpretation is to be chosen which most vigorously develops the effective legal force of the constitutional norm." In demonstration of this the developmental history of Article 2 II 1 of the Constitution may be cited [developed in the original of the decision].

In the consultations on the 5th Law RPC there was, it should be noted, unanimity concerning the fact that unborn life is deserving of protection, although the constitutional problem was not conclusively dealt with. In the draft of laws contained in the report of the Special Commission for Reform of the Penal Code to the party caucuses (*Fraktionen*) of the Social Democratic Party (SPD) and Free Democratic Party (FDP) we read, i.a.:

"Unborn life is a legal entity that is to be considered fundamentally equivalent to born life. This conclusion is self-evident for the period during which the unborn life would be capable of life outside the mother's womb. However, it is also justified for the earlier period, beginning approximately fourteen days after conception, as Hinrichsen among others has convincingly demonstrated in the Public Hearings. . . It is the altogether overwhelming persuasion of medical,

anthropological, and theological science that the whole subsequent development presents no further distinction of comparable significance. . .

For this reason it is forbidden to negate unborn life after implantation or even merely to consider it with indifference. For this purpose it is not necessary to answer here the question whether and in the event to what extent the Constitution takes it under its protecion. At all events it corresponds to the general conception of justice, apart from the extreme views of individual groups, to evaluate unborn life as a legal entity of high degree. This understanding of justice underlies this draft."[5]

The reports of the Commission on the other drafts are approximately equivalent.

2. The duty of the state to protect every human life therefore can be directly derived from Article 2 II 1 of the Constitution. In addition, it results from the express prescription of Article 1 I 2 of the Constitution; for developing life also shares in the protection given by Article 1 I to human dignity. Where human life exists, it possesses human dignity. It is not determinative whether the bearer of this dignity is conscious of it and knows how to preserve it himself. The potential abilities placed within the human being from the beginning suffice to establish human dignity.

3. Conversely, it is not necessary to decide the question, controverted in the present action as well as in scientific writing, whether the *nasciturus* itself actively possesses constitutional rights or, because of a lack of legal and constitutional standing is "only" protected in its right to life by the objective norms of the Constitution. According to the consistent decisions of the Federal Supreme Court the norms of the Constitution contain not only subjective rights of defense for the individual against the state, but in addition incorporate an objective system of values which stands as a fundamental constitutional decision for all areas of law and gives guidelines and impulses for legislation, administration, and adjudication. Whether and in the event to what extent the state is constitutionally obligated to give the protection of law to developing life can for this reason be determined from the objective legal content of the constitutional norms.

II. 1. The duty of the state to protect is inclusive. It does not only—self-evidently—forbid direct state intrusion into developing life, but also commands the state to place itself before developing life for its protection and promotion, i.e. above all to protect it from illegal assault by other persons. The various areas of the legal order must conform to this commandment, each according to its particular assigned task. The duty of the state to protect must be taken with correspondingly greater seriousness as the rank of the legal entity in question takes on a correspondingly high rank within the value-structure of the Constitution. Human life, as it is not necessary to demonstrate further, represents a maximum value within the constitutional order; it is the vital basis of human dignity and the presupposition of all other fundamental rights.

2. The duty of the state to take developing life under its protection also exists with reference to the mother. Indubitably the natural ties between the unborn life and that of the mother creates a distinctively articulated relationship for which there is no parallel in other spheres of human life. Pregnancy is part of the woman's private sphere, the protection of which is assured by Article 2 I in connection with Article 1 I of the Constitution. If the embryo were to be seen

as only a part of the maternal organism, then the termination of pregnancy would also fall in the realm of the private expression of life, into which the legislator is forbidden to penetrate.[6] Since however, the *nasciturus* is a distinctive human being (*ein selbstständiges menschliches Wesen* may also be translated "independent human being," but the sense here would seem to stress its distinctiveness or individuality rather than its *independence,* which during pregnancy is purely conceptual, not actual.—Trans.) that stands under the protection of the Constitution, termination of pregnancy becomes a social issue, making it subject to and requiring regulation by the state. The woman's right to the free development of her personality, which has as its content the freedom to act in a comprehensive sense and thus includes the woman's personal responsibility to make a decision against parenthood and the duties it involves, can indeed also claim recognition and protection. However, this right is not accorded without limits, as it is limited by the rights of others, by constitutional order, and by the moral law. From the outset it can never include the right to intervene in the protected rights of another without justifying reason or by any means to destroy it with life itself, and least of all when according to the nature of the matter a particular responsibilty for precisely this life exists.

A compromise that preserves both the protection of life for the *nasciturus* as well as the freedom of the pregnant woman to terminate pregnancy is not possible, since termination of pregnancy always means the destruction of unborn life. In the evaluation that is therefore necessary, "both constitutional values are to be seen in their relationship to the dignity of man as the central point of the constitutional value system." In an orientation with respect to Article 1 I of the Constitution, the decision must fall in favor of the protection of the life of the fruit of the womb before the pregnant woman's right of self-determination. This right of hers may be curtailed in many possibilities of personal development by pregnancy, birth, and child-rearing. The unborn life, by contrast, is destroyed by termination of pregnancy. According to the principle of the least destructive compromise between competing legally protected positions, according to the fundamental thought of Article 19 II of the Constitution, priority must be given to the protection of the life of the *nasciturus*. This priority holds for the entire duration of pregnancy and also is not to be questioned for a particular period. The opinion expressed in the third reading of the Law for the Reform of the Penal Code in the Federal Diet, namely that it is a question of bringing out, "for a certain period, the woman's right of self-determination, derived from human dignity, above all others, including the right to life of the child" (German Federal Diet, 7th Electoral Period, 96th Session, StenBer S. 6492) is irreconcilable with the constitutional system of values.

3. From here we arrive at the fundamental attitude that the Constitution requires our legal system to adopt with respect to the termination of pregnancy: the legal system may not make the woman's right of self-determination the sole legal principle of such regulation. The state must take as its fundamental starting point the duty of carrying a pregnancy to term, and thus must fundamentally view its termination as unjust (contrary to justice). In the legal system, disapproval of the termination of pregnancy must be clearly expressed. It is necessary to avoid the false impression that the termination of pregnancy is the same sort of social action as going to a physician to be healed of a sickness or even that it is a legally indifferent alternative to contraception. The state may not evade its duty by recognizing a "space free of law" by refraining from an

evaluation and leaving the matter to the individually responsible decision of the individual.

III. How the state fulfills its obligation for the effective protection of developing life must be decided first of all by the legislator. He must determine which protective measures he holds to be useful and appropriate in order to assure an effective protection of life.

1. To this end, and with especial emphasis in the case of the protection of unborn life, the guiding thought is the priority of prevention over repression. For this reason it is the duty of the state to make use first of all of socio-political and welfare means for the protection of developing life. What can be done in this regard and how auxiliary measures are to be worked out in detail remains in large measure the province of the legislator and is in general not subject to constitutional evaluation. The principal consideration in this is to strengthen the readiness of the expectant mother to assume the personal responsibility for the pregnancy and to bring the fruit of her womb to full life. In considering the duty of the state to protect life, we must not lose sight of the fact that nature has entrusted the protection of developing life primarily to the mother. The foremost goal of the state's efforts to protect life should be to reawaken the mother's will to protect where it has been lost, and in case of necessity to strengthen it. Admittedly, the ability of the legislator to influence this is limited. The measures he may introduce frequently become effective only indirectly and with some delay, by means of a comprehensive educational program and the change of social attitudes and opinions that it achieves.

2. The question of the extent to which the state is obliged by the Constitution to make use of the means of the penal law as the sharpest weapon at its disposal for the protection of unborn life cannot be answered by the simplistic question whether the state has the obligation to punish certain actions. What is necessary is a comprehensive view, one that on the one hand considers the value of the injured legal entity and the extent of the social damage of the act of injury—including the comparison with other acts punishable by law and given the same value by social ethics—and on the other hand takes cognizance of the traditional legal regulation of this area of life as well as of the development of views concerning the role of penal law in modern society, and finally does not neglect to consider the practical effectiveness of threats of punishment and the possibility of replacing them with other legal sanctions.

As a matter of principle, the legislator is not obligated to take the same penal measures for the protection of unborn life that he thinks to be useful and appropriate for the preservation of born life. As a glance at the history of law shows, this has never been the case in the application of penal sanctions and also did not correspond to the legal situation prior to the Fifth Law RPC.

a) From earliest times, the mission of penal law has been the protection of the elemental values of community life. The fact that the life of every single human belongs among the most important legal values has been developed above. The termination of a pregnancy irrevocably destroys human life that has already come into existence. The termination of pregnancy is an act of killing; this is attested in the clearest possible fashion by the fact that the punishment attached to it—even in the Fifth Law RPC—is contained in the section "Felonies and Misdemeanors against Life" and was designated "Killing of the Fruit of the Womb" in previous criminal law. The currently customary

terminology "termination of pregnancy" cannot obscure this factual situation. No legal regulation can pass over the fact that this deed transgresses against the fundamental immunity and inviolability of human life guaranteed in Article 2 II 1 of the Constitution. From this perspective, the application of penal law against "abortive acts" is indubitably legitimate. It is valid law in most civilized states—under different formative presuppositions—and it is particularly characteristic of the German legal tradition. Likewise, from this it is evident that we cannot refrain from a clear legal designation of this procedure [abortion] as "injustice."

b) At the same time, punishment can never be an end in itself. Its application is fundamentally subject to the determination of the legislator. There is no obstacle to his also expressing the constitutionally mandated legal disapproval of the termination of pregnancy, taking into account the viewpoints given above, otherwise than by the means of threat of punishment. What is decisive is whether the totality of the measures that serves the protection of unborn life, whether they fall in the sphere of individual rights or public law, and particularly of social or penal law, actually assure a protection that corresponds to the importance of the legal entity that is to be guarded. In the most extreme case, i.e. when the protection mandated in the Constitution can be achieved in no other way, the legislator may be obliged to make use of the means of the penal law for the protection of developing life. The penal norm represents in a certain way the "ultima ratio" (last resort) in the panoply of the legislator. According to the principle of proportionality that dominates the entire public law, including constitutional law, in a society based on laws (*Rechtsstaat*) he may make use of this means only carefully and with restraint. Nevertheless, even this means must be utilized if there is no other way to attain an effective protection of life. This is demanded by the worth and significance of the legal value to be protected. We are thus not dealing with an "absolute" duty to punish, but with a "relative" duty to make use of the threat of punishment, arising out of an insight into the inadequacy of all other means.

Over against this, it is inadequate to object that a constitutional right intended to preserve freedom can never give rise to a state obligation to punish. If a constitutional norm determining value obligates the state to protect an especially important legal value effectively from assault by third parties, then it will frequently be impossible to avoid measures that affect the liberty of others possessing constitutional rights. To this extent the legal situation on the application of social or civil legislation is in principle no different from that on the imposition of a penal norm. At all events the only differences have to do with the forcefulness of the necessary intervention. Nevertheless the legislator must resolve the conflict which thus arises by evaluating the two opposing fundamental values or spheres of freedom according to the standard of the scale of values set by the Constitution and according to the principle of proportionality of a society based on law. If one were generally to deny the obligation to make use of the means of criminal law, then the protection of life to be attained would be significantly reduced. The gravity of the threatened sanction corresponds to the worth of the legal entity threatened with destruction; the criminal prosecution of the destruction of life corresponds to the fundamental value of human life.

3. An obligation of the state to protect developing life also exists—as indicated—vis-à-vis the mother. Here, however, the application of penal law cre-

ates special problems resulting from the unique situation of the pregnant woman. The deep influence of pregnancy on the woman's physical and psychological condition is immediately evident and does not require fuller presentation. Frequently they require a substantial transformation of the total pattern of life and a limitation of the possibilities of personal development. This burden is not always or fully compensated by the fact that the woman finds new fulfillment in her task as a mother and that the pregnant woman has a claim on the assistance of society (Constitution, Article 6 IV). In individual cases, difficult, even life-endangering conflict situations can arise. The right to life of the unborn child can lead to a burden on the woman that goes significantly beyond the degree normally associated with pregnancy. This leads us to the question of expectability (*Zumutbarkeit,* i.e. the degree to which something may be expected of someone), or in other words the question whether even in such cases the state may force the pregnancy to be carried to term by means of penal law. Respect for unborn life and the right of the woman not to be forced to sacrifice her own life values above and beyond any measure that could be expected of her in the interest of respecting this legal entity clash here. In such a conflict situation, which generally does not permit an unequivocal moral judgment and in which the decision to terminate a pregnancy may have the dignity of a decision of conscience deserving of respect, the legislator is obligated to exercise special restraint. If in such cases he does not regard the conduct of the pregnant woman as deserving of punishment and refrains from the use of criminal penalties, then this must be accepted from a constitutional point of view as the result of an evaluation required of the legislator. [In other words, while the right to life guaranteed by the German Constitution requires the government to make use of punishment or the threat of punishment in order to preserve that right, the law may determine not to impose punishment in certain cases without thereby transgressing against its fundamental constitutional duty to safeguard life.—Trans.]

Nevertheless, the specific content of the criteria that enable one to agree that [carrying the pregnancy to term] cannot reasonably be expected must exclude circumstances that do not excessively burden the person under obligation, because they represent the normal situation with which everyone must come to terms. On the contrary, there must be circumstances of considerable gravity, which so greatly increase the difficulty the person in question faces in carrying out his duty that it cannot reasonably be expected of him. Such criteria are present in particular when the person is plunged into severe inner conflicts by the fulfillment of his obligation. The resolution of such conflicts by the threat of punishment does not in general appear to be appropriate (cf. BVerfGe 32, 98, 109 on faith healing), because it imposes external force in a place where respect for the human personality demands complete inner freedom of decision.

It does not appear possible to expect the continuation of pregnancy in particular when it is demonstrated that termination is necessary in order to avert from the pregnant woman "a danger to her life or the danger of an extremely grievous injury to her health" (§ 218b Nr 1 of the Penal Code in the version of the Fifth Law RPC). In this case her own "right to life and bodily integrity" (Constitution, Article 2 II 1) is in jeopardy, and it is impossible to expect her to sacrifice it for the unborn life. Over and above this, it lies within the legislator's discretion to refrain from imposing a penalty for the termination of pregnancy in the case of other extraordinary burdens on the pregnant woman, of similar weight with respect to the criterion of expectability as those laid down

in § 218b Nr. 1. Among such may be counted in particular the eugenic, the ethical (criminological), and the social or extreme duress indications for the termination of pregnancy. During the sessions of the Special Commission for Penal Code Reform (7th Electoral Period, 25th Session, StenBer. pp. 147off.), the representative of the federal government set forth in detail and in convincing fashion why a continuation of pregnancy to term in these four cases is not to be expected. The decisive factor is that in all of these cases another interest, one that the Constitution also designates as worthy of safeguarding, imposes itself with such urgency that the law structure of the state may not demand that the pregnant woman yield priority under all circumstances to the right of the unborn.

Also, the indication of a general condition of necessity (social indication) may be included here, for the general social condition of the pregnant woman and her family can create conflicts of such gravity that the pregnant woman cannot be forced by criminal law to make sacrifices beyond a certain limit for the sake of the unborn life. In regulating this case the legislator must circumscribe the conditions for immunity for punishment in such a way that the gravity of the social conflict here presupposed is clearly recognizable and that the congruence of this indication with the other cases of indication, from the perspective of expectability, is preserved. If the legislator excludes genuine conflict cases of this nature from the protection afforded by the penal code, he does not fail in his duty to protect life. In such cases the state may not content itself with merely examining and where appropriate attesting that the legal requirements for termination of pregnancy without penalty have been met. On the contrary, it is much more to be expected [of the state] that it provide counseling and assistance with the intent of urging on the pregnant woman the fundamental duty of respect for the right of the unborn to life, of encouraging her to carry out the pregnancy, and—above all in cases of social necessity—to support her with measures of practical assistance.

In all other cases, the termination of pregnancy remains punishable injustice, for in such cases the destruction of a legal value of the highest degree is subject to the free choice of another party, not motivated by any necessity. If the legislator were to refrain from criminal sanctions in this case as well, this would be reconcilable with the requirement of protection of the Constitution, Article 2 II 1, only if another equally effective legal sanction were available to make the injustice of the deed (its disapproval according to the legal order) clearly recognizable and to prevent such termination of pregnancy just as effectively as a criminal penalty.

a) If we examine the controverted time-limit rule of the Fifth Law RPC according to these criteria, it is evident that this law does not adequately fulfill the obligation of the Constitution, Article 2 II 1 together with Article 1 I to protect developing life. . . .

This corresponds to the justification of the federal government for the draft law proposed in the 6th Electoral Period of the German Federal Diet (BT-Drucks VI/3434 p. 9): "The time-limit rule would lead to a disappearance of the general awareness of the fact that unborn life is worthy of protection during the first three months of pregnancy. It would give credence to the view that abortion, at least in the early period of pregnancy, is just as subject to the free determination of the pregnant woman as is the prevention of pregnancy. Such a view is irreconcilable with the scale of values of the Constitution."

b) The gross balancing of life against life, which leads to accepting the destruction of the supposedly lesser number in the interest of the preservation of the supposedly greater number, cannot be reconciled with the duty of the individual protection of each single, concrete life. . . .

c) Such a "total balance"—which is to be rejected in principle—also lacks any reliable factual basis. There are no sufficient grounds to suppose that the number of terminations of pregnancy in the future will be significantly less than under the previously valid legal regulation. The representative of the government, before the Special Commission for the Reform of the Penal Code (7th Electoral Period, 25th Session, StenBer. p. 1451), instead concluded, on the basis of very thorough evaluations and comparisons, that the introduction of the time-limit rule in the Federal Republic would lead to a 40 per cent increase in the total number of legal and illegal abortions in the Federal Republic. . . . Even if we assume that all of the peculiarities of the situation in the Federal Republic of Germany work in favor of the time-limit rule, then we must still reckon with a rise in the number of abortions, because—as already indicated—the mere existence of the criminal norm of § 218 PC has had an influence on the general public's idea of values and manner of behavior. In addition, we must understand the significance of the fact that a consequence of punishability in the past was a limitation of the possibility of obtaining an abortion at all, and certainly legally, (among other factors, financially speaking). It is at all events not evident that the time-limit rule would produce even a quantitative strengthening of the protection of life. . . .

NOTES

1. Here and elsewhere in this summary the frequent parenthetical references to the location of the texts in question in the *Grundgesetz* (Constitution), *Strafgestezbuch* (Penal Law Code), *Bundesgesetzblatt* (Federal Law Register) et al. have been omitted, as they will be of interest primarily to those who will prefer to consult the complete original text of the decision rather than this summary. —Trans.

2. The details of the provisions of §§ 218-219 which follow at this point are omitted. —Trans.

3. *Bundesverfassungsgericht* 34, 9, being *Neues Juristisches Wochenblatt* 1972, 1943f. For further references, see *NJW* 1975, 574.

4. BVerfGe 18, 112, 117 = *NJW* 1964, 1783.

5. References in *NJW* 1975, 575.

6. *Ibid.*

Special Report:

A survey of *Legalized Abortion and the Public Health*

by Harold O. J. Brown

In May of this year, The National Academy of Sciences' *Institute of Medicine issued a study on some aspects of the effect of legalized abortion on the health of the women involved. Dr. Brown here briefly reviews that report, and follows it with his translation, from the German, of the text of a study by a Polish doctor, Stanislaw Lembrych, which is cited in his review.*

In *The Brain Bank of America* (New York: McGraw-Hill, 1975), a study of the National Academy of Sciences sponsored by "consumer advocate" Ralph Nader, Philip M. Boffey charges that "the Academy is a flawed institution—capable of occasional brilliance but often mired in unexpected mediocrity or subverted by special interests."[1] Certainly the present study gives more evidence of mediocrity than of occasional brilliance. Boffey illustrates his charge that the Academy's reports and recommendations appear to be subverted by special interests with reference, among other studies, to reports on dog and cat food standards and to the support given by a group of bottlers and canners to an Academy study "finding" that public education, rather than legislation forbidding the manufacture of certain disposable containers, would be the ideal way to solve the highway litter problem.

There is nothing in the present report, *Legalized Abortion and the Public Health*, to demonstrate that it is deliberately intended to serve special interests. Nevertheless, the fact that it was funded in part by the militantly pro-abortion Population Council, and that the Council's senior consultant, Dr. Christopher Tietze, was a member of the National Academy's steering committee on legalized abortion, may explain some otherwise perplexing inadequacies and distortions in this report.

Here, as in the report of the United States Commission on Civil Rights (*Constitutional Aspects of the Right to Limit Childbearing*, April 1975), "ethical issues of abortion are not discussed . . . nor are questions concerning the fetus in abortion. The study group recognizes that this approach implies an ethical position with which some may disagree. The emphasis of the study is on the health effects of abortion, not on the alternatives to abortion."[2] (The similar remark in the report of the Civil Rights Commission is: "The Commission therefore takes no position on the moral or theological debate which presently surrounds the issue of abortion."[3]) The United States Supreme Court, having explicitly recognized the "sensitive and emotional" [not ethical or moral] nature of the abortion controversy, undertook "to resolve the issue by constitutional measurement free of emotion and of predilection."[4] It appears that only the Congress is left to address itself to the ethical and moral aspects of the issue, which the Court and the various federal agencies sedulously avoid.

Content

The first third of this 144-page report (excluding bibliography) consists of material not directly related to the issue under study, namely a resumé of the

history of abortion legislation in the United States, a description of the methods by which abortion is performed, and tables concerning the racial, age, economic, and other characteristics of women obtaining abortions in various places throughout the nation through 1973, as well as a rather superfluous summary of Roe v. Wade. Chapter 7 explores, not very thoroughly, "the possibility that women who would otherwise use contraception may begin to rely instead on abortion. . . . What evidence is available on substitution phenomena comes primarily from New York City for the period July 1970 through June, 1972."[5] Chapters 3—6, in 67 pages, address themselves to several topics: "Abortion and the Risk of Medical Complications"; "Abortion and the Risk of Death"; "The Psychological Effects of Abortion," and "Birth Defects and Selective Abortion." In general, it may be observed that—as the report itself admits—the data base is small and the period of observation too brief to allow for satisfactory conclusions. Hence it is rather astonishing that the study methodologically excludes most information from abroad: "In general, information from abroad has been used in this report only when the study group believed that the data could be compared transnationally, regardless of cultural factors."[6]

Medical Complications.

Although the report informs us that "risks of medical complications associated with legal abortions are difficult to evaluate,"[7] its general conclusion is that there is no significant evidence of such risks, except in teenagers, "but it also appears that a teenager is at risk if she carries a pregnancy to term."[8] The primary source for this chapter is the so-called JPSA (Joint Program for the Study of Abortion) Study undertaken by the Population Council in 1970-1971. The most serious defects of this study lie in the fact it covers only 73,000 legal abortions, and that the Population Council is actively engaged in the advocacy of abortion on demand. The study of J. K. Russell, "Sexual Activity and its Consequences in the Teenager"[9] is cited to support the dangers following abortion in pregnant teenagers, but modifies this finding by reporting that teenage pregnancies in general may pose problems. Indeed, Russell does point this out. However, his data—involving a small selection, only 59 patients —indicate that medical difficulties are substantially greater following abortion of such early teenage pregnancies than following normal delivery,[9] and this finding is not reflected in the Academy's report, but rather dismissed, at least by implication.

Selected foreign data are admitted, for example in the case of two studies performed in Yugoslavia (certainly not the closest European parallel to American conditions and standards!) at Ljubljana in 1971-1972 (4,700 cases) and at Kospje in 1968-1969 (948 cases, including 222 abortions and 726 normal deliveries). The Ljubljana study dealt with a very particular type of complication, ectopic pregnancies, and found no increase in women undergoing abortions. The Kospje study "did not find any evidence of greater prematurity or other reproductive problems among women who had had abortions compared with other groups of women."[11] Perplexingly, the Academy's report did not mention an address delivered in January, 1975 before the Fourth European Congress of *Perinatal Medicine* by Dr. Alfred Kotásek, head of the Gynecological and Obstetrical Clinic of Prague's famous Charles University. Based on a study of two million voluntary, legal, first-trimester abortions over a period of two decades,

he reports that "artificial termination of pregnancy greatly increases the risk of a subsequent spontaneous abortion . . . it also enhances the likelihood of premature births and ectopic pregnancies . . . abortion frequently reduces a woman's future reproductive capability and affects her emotional and sexual life . . . a great sum of serious morbidity following legal artificial termination of pregnancy has been noticed and described in many papers. . . . A very high standard of antenatal care from the end of the first trimester for all women who have had a previous artificial termination of pregnancy is advisable."[12] It is all the more remarkable that a study covering two million cases should be ignored in view of the fact that a summary report was available in the United States in February, 1975, three months before the publication of the N.A.S. study. An earlier study by Stanislaw Lembrych, M.D., published in the *Zentralblatt für Gynäkologie* in 1972, reported: "Our results and their analysis led to the conclusion that the termination of the first pregnancy has a negative influence on the course of the subsequent pregnancy and birth. The classification of our material demonstrated statistically proven, significantly frequent negative subsequent developments in women where interruption of pregnancy was performed."[13] (See the text of Dr. Lembrych's paper in English translation that follows this article.) One of the results of the type of evidence that has been accumulated in Czechoslovakia has been the change in the legal definition of "advanced age," after which abortion would be routinely granted, from 25 in Bohemia-Moravia and 29 in Slovakia (Czechoslovakia is a federal state with different laws in the two national republics, Czech and Slovak) to 35 and 40, respectively.[14]

Psychological Problems

Chapter 5, "The Psychological Effects of Abortion," notes the methodological difficulty of coming to any conclusions in this area, chiefly in consequence of the lack of appropriate data. Nevertheless, the N.A.S. report feels competent to state: "The mild depression or guilt feelings experienced by some women after an abortion appear to be only temporary, although for women with a previous psychiatric history, abortion may be more upsetting and stressful."[15] It seems odd that this type of reassurance would be given in the absence of supporting data and in view of the widespread opinion of competent authorities[16] that the psychological consequences are negative.

Conclusion

It is remarkable that a report that ignores major information relatively available in a good medical library in order to give unwarranted reassurance concerning the potential medical and psychological consequences of a widespread procedure (the second most common surgical procedure in America today, following tonsilectomy) should be published under the aegis of the National Academy of Science. This is all the more remarkable in view of the report's repeated admission that it draws upon inadequate evidence. One is led to wonder whether its publication was not rushed in order to make it available in time to influence pending legislation. In light of its apparently tendentious content, it may not be unreasonable to inquire whether the participation of the Population Council in the financing and of Dr. Christopher Tietze on the Steering Committee may have inclined the present report in the direction of advocacy rather than objectivity. In any case, it is particularly difficult to reconcile the omission of readily avail-

able, important material such as that provided by Kotásek and Lembrych, i. a., with the standard of scientific inquiry and academic integrity that one would expect from the National Academy of Sciences.

1. Cited in *The Washington Post, Potomac Magazine,* Sunday, June 22, 1975, p. 8.
2. *Legalized Abortion and the Public Health,* p. 1.
3. *Constitutional Aspects of the Right to Limit Childbearing,* p. 1.
4. Syllabus Roe v. Wade, pp. 1-2.
5. "Liberalized Abortion," p. 115.
6. *Ibid.,* p. 15.
7. *Ibid.,* p. 4.
8. *Ibid.,* p. 67.
9. J. K. Russell, "Sexual Activity and its Consequences in the Teenager," in *Clinics in Obstetrics and Gynecology,* I (December, 1974), pp. 683-698.
10. *Ibid.,* pp. 693-694.
11. *Legalized Abortion,* p. 57.
12. Reported in *Medical Tribune,* February, 1975.
13. Stanislaw Lembrych, *"Schwangerschafts-, Geburts- und Wochenbettlauf nach künstlicher Unterbrechung der ersten Gravidität,"* in *Zentralblatt für Gynäkologie,* 1972/5, pp. 164-168.
14. *Ibid.,* p. 164.
15. *Legalized Abortion,* p. 98.
16. Cf. Russell, "Sexual Activity," p. 693.

From Poland:

The Course of Pregnancy, Birth, and Lying-in after the Artificial Termination of the First Pregnancy

by Stanislaw Lembrych, M.D.

This study, which was conducted by Dr. Lembrych in Opole, Poland, was published in the East German publication Zentralblatt für Gynäkologie *(1972/5, pp. 164-168), and is here translated from the German by H. O. J. Brown, Ph.D. and reprinted with the permission of the author.*

Summary: Our results and their analysis lead to the conclusion that the termination of the first pregnancy has a negative influence on the course of the subsequent pregnancy and birth. The collation of our material demonstrated statistically proven, significantly frequent complications in women undergoing abortions:

1. Complications in the form of *abortus imminens, placenta praevia,* premature detachment of a normally affixed placenta;
2. Premature births with immature or premature offspring;
3. Early or premature rupture of the membranes;
4. Difficulties in dilatation requiring the use of oxytocic agents;
5. Complications in the post-partum period such as *placenta incompleta, placenta accreta,* atonic hemorrhaging;
6. Laceration of soft tissue, especially of the cervix, as well as
7. Increased blood loss in the course of delivery and immunization of women with negative Rh-factor.

Our research proves the damaging influence of an interrupted first pregnancy on subsequent pregnancies and birth. If we also take into consideration the early and later complications which appear much more frequently as a consequence of an interrupted first pregnancy (sterility and infertility), then we come to the conclusion that the interruption of a first pregnancy is extremely inadvisable. This places the physician under an obligation to make a very cautious determination of indications for abortion, and to be especially conscientious in explaining all of the possible negative consequences to women.

Despite the numerous reports in the literature concerning various problems of the artificial termination of pregnancy . . . we could not find a paper dealing with the influence of the interruption of the first pregnancy on the subsequent pregnancy, birth, and lying-in. In this paper, a position is taken on this subject as a result of my own investigations.

My Investigations

Our investigations deal with the medical history of all the women who gave birth for the first time in the years 1966-1968 in the Departmental Hospital at Opole. Multiple births were not considered. The cases examined have been divided into two groups:

Group I: 143 primiparae between the ages of 18 and 38 who reported a prior abortion in giving their medical history. Of these, 123 were married, 20 unmarried. The termination of pregnancy had taken place from one to eight years earlier, in the sixth to twelfth week of pregnancy. The operation was always done in a single procedure, according to the generally accepted rules of gynaecology, under scopalamine or hexobarbital anaesthesia.

Group II: Likewise 143 primiparae, aged from 17 to 36 years, of whom 131 were married, 12 unmarried. The deliveries evaluated in this group were those which came in the birth register immediately following the women belonging to Group I.

Results

1. COURSE OF PREGNANCY

The complications observed in the course of pregnancy in both groups are compared as follows:

	Group I	Group II
Hemorrhaging	19	2
Early and late gestation	19	25
Other complications	9	6

We presuppose that only complications that are designed as hemorrhaging during pregnancy (abortus imminens, placenta praevia, ablatio placentae praecox [= abruptio placentae] can be related to the procedure carried out and statistically evaluated. In Group I, they made up 13.3% of all cases, in Group II 1.4%. The difference is 11.9%, the mean variation in the difference 3.0. The result is a genuine difference in the frequency of these two groups.

In the evaluation of the duration of gestation the following results were obtained:

Length of gestation in weeks	Group I	Group II
Less than 28 weeks	5	—
28 — 31 weeks	7	3
32 — 35 weeks	7	2
36 — 37 weeks	24	11
38 — 41 weeks	97	117
42 weeks and over	3	10

The number of premature births corresponds to 30% in Group I, and to 11.2% in Group II. The difference is 18.8%, with a mean variation in the difference of 4.64%. A significance in the level of virtual certainty is evident here.

2. COURSE OF DELIVERY

Spontaneous labor was observed in Group I 131 times, in Group II 126 times. In the other cases it had to be initiated by medication or rupture of the amniotic membranes. The observed differences are not significant; they cannot be statistically assured.

The rupture of the membranes took place in both groups as follows:

Discharge of amniotic fluid	Group I	Group II
Premature	45	24
Early	34	35
Timely	54	75
Late	4	3
Other	6	6

The premature and early ruptures are represented by 57.7% in Group II, by 43% in Group II. The difference is 14.7% and the mean variation in the difference

between these two frequencies is 5.9. The difference in frequency is thus unequivocally significant.

In a number of cases there were difficulties in dilatation during delivery and consequent retardation of the progress of labor, in consequence of which oxytocic agents were administered. In Group I the number was 46, i.e. 39.2%, in Group II 18, i.e. 12.6%. In this difference of 20.3% the mean variation in the difference is 4.9. Here too the difference in frequency is statistically demonstrable.

We also investigated the duration of the various phases of labor. In Group I, it was as follows:

Dilatation and effacement 2 hrs. 15 min. — 44 hrs. 15 min. Average: 11 hrs. 45 min.
Passage 15 min. — 3 hrs. 30 min. Average: 54 min.
Birth of placenta 3 min. — 1 hr. 45 min. Average: 7 min.

In Group II the following times were observed:

Dilatation and effacement 1 hr. 45 min. — 31 hrs. Average: 9 hrs.
Passage 15 min. — 4 hrs. 5 min. Average 48 min.
Birth of placenta 3 min. — 45 min. Average: 6 min.

Statistical evaluation demonstrated a significant difference only in the dilatation phase. Here the difference of the average figures in both group is 165 minutes, with a mean variation in the difference of 46 minutes. Here, too, the difference of frequency is unequivocally significant.

The vast majority of deliveries proceeded spontaneously, while the others were assisted as follows:

	Group I	Group II
Speculum	23	20
Vacuum Extractor	12	12
Forceps	3	—
Caesarean	2	1
Manual assistance	8	—
Turning according to Braxton-Hicks	1	—

If we do not take manual assistance into account—the application of which bears no relationship to the abortion procedure—then there are no significant differences between the two groups. In amplification we should mention that speculum deliveries are usual with us in the case of premature births.

The complications occurring during the delivery of the placenta compare as follows:

	Group I	Group II
Missing Amniotic Membranes	2	1
Incomplete placenta	9	—
Placental adhesion	8	2
Atonic hemorrhaging	15	6
All complications	34 = 23.8%	9 = 6.3%

The difference in frequency among these complications is 17.5%, the mean variation in the difference 4.1. Here once again the difference in frequency is unequivocally significant.

Similarly, statistically—certain differences in frequency result from investigation of soft tissue injury, which compares as follows:

	Group I	Group II
Laceration of the perinaeum	2	4
Laceration of the vagina	4	2
Laceration of the cervix	21	10

We are of the opinion that only lacerations of the cervix are related to the previous termination of pregnancy. The statistical evaluation was made on the basis of this assumption. The percentage of cervical laceration is 14.7% in Group I, 7% in Group 2. The difference in frequency is accordingly 7.7%, with a mean variation in the difference of 3.7.

The evaluation of the loss of blood in both groups led to these results:

Loss of blood (in cc's)	Group I	Group II
0 to 150	30	42
200 to 450	94	87
500 to 1000	16	8
over 1000	1	—
Average	273 ml	234 ml

As is apparent, the difference of the two averages is 39 ml, with the average variation from the difference 18.7. Therefore there is probable certainty here too. In the judgment of cases with a loss of blood in excess of 500 *ml* we could determine a degree of certainly approaching statistical reliability.

3. LYING—IN

In the lying-in period of both groups, as well as in the condition of the newborn infants, no significant differences appeared. Those complications that did appear, other than the higher frequency of premature births in Group I, are hardly to be related to the procedure of termination of pregnancy.

Special attention should be paid to the determination of the immunization appearing in five of the 36 women with a negative Rh-factor. In two of the newborn, the Rh-factor was negative. In the three others having positive Rh, there was no clinical evidence of a serological conflict.

Discussion

As was to be expected, our material allows us to ascertain a negative influence on subsequent pregnancy and birth as a result of the termination of a first pregnancy. In view of our results, we would like to point out the fact that we could observe two sorts of injury to the cervix that occurred during dilatation. In the first, it is a question of injury to the musculature and consequent cervical insufficiency, and one consequence is premature rupture of the membranes and premature birth. The second variety involves scarring and stenoses, most probably the result of inflammatory processes. Rigidity of the neck of the cervix, prolonged labor, and frequently occurring laceration of the cervix should be noted as complications here.

Hemorrhaging during pregnancy, problems with the birth of the placenta and increased blood loss in connection with them, are to be seen as related to the curettage of the uterus and the injury to the mucous membranes it causes.

It is remarkable that the duration of the interrupted pregnancy prior to the abortion, the number of times a patient had an abortion (in thirteen cases there were double abortions), as well as the length of time between the abortion and the subsequent birth, gave results no different from those of the group as a whole.

Letter From Norway:

A Bishop Resigns in Protest

In our Spring issue (Appendix B) we published a translation of "The Bible and the Abortion Problem," by Lutheran Bishop Per Lønning of Borg, Norway. Since then, the Norwegian Storting *(parliament) has passed a new abortion law, and Bishop Lønning has resigned in protest. He explains his action in a letter to our associate, Dr. Harold O. J. Brown (#1, below), with which he enclosed a translation of his farewell pastoral letter to the churches, prefaced by a short note to American readers, which we also reprint (#2), with permission.*

* * * * *

Fredrikstad
June 19, 1975

#1.
Dear Pastor Brown:

. . . Things have developed rather dramatically here in Norway. I refer to our new abortion law, which was, to the surprise of everybody, not only bought wholesale by the parliament, but even amended in a direction contrary to the requests of the Christian churches in the country. I do not hesitate to characterize this new Norwegian law as the worst abortion law in the world. It keeps up a kind of face in letting every abortion application be channeled through a commission. This commission is, however, paralyzed through an appeal procedure which makes it possible for one doctor alone to grant an abortion license, whereas a refusal has to be given by a full commission and afterwards is appealed by the state to another commission for a second trial. In this way the state engages as partner in every abortion trial in support of the abortion request. The purpose is obvious enough: to get rid of those abortion commissions which still try to keep up some minimum ethical standard. In addition to this the conditions for an abortion are absolutely crushed, so that any abortion permit granted hereafter will be legal. Finally, the law starts by stating: "A pregnant woman has the *right* to an abortion in such and such cases." For the first time in history, a Norwegian law applies the word "right" to something which is obviously "wrong" according to the law of God. As a result of this I handed in my applications for resignation as a bishop of the official Church of Norway the same day that the law was passed. This has caused more publicity that I had anticipated, and the testimonies of support to my standpoint are overwhelming. For your information I enclose some material which I have prepared for friends in the U.S.A.

PER LØNNING

* * * * *

#2.
Dear friends:

I write in connection with the somewhat unexpected news, which may by now have reached you, of my resignation as bishop of the Church of Norway. In order to avoid all misunderstandings, I feel I should explain my motives for de-

livering my application for resignation in connection with the *Storting's* final endorsement of a new abortion law. The following English translation of my pastoral letter, which I foresee to be read from the pulpits of all churches in the diocese of Borg this Sunday, will make the situation clear:

Per Lønning, bishop of the diocese of Borg, sends his greetings to all congregations in the diocese: Grace and peace from God our Father and our Lord Jesus Christ!

Through the media, most of you will be familiar with the extraordinary step which I have found myself obliged to take this week. As a consequence of the Parliament's passing of the new abortion law, I have found it impossible to remain as bishop in a church possessing the kind of state affiliation which the church of Norway has at present. The reasons are that the new law violates the laws of life given by the Creator and attacks the very foundation of a state based on rights—the respect for human dignity—and, further, that several deeply serious requests made by the Church of Norway concerning this matter have been left completely aside by the Parliament.

1. From the very moment of conception, man is an individual with all basic characteristics determined. Therefore it is clear that the conviction of human dignity will weaken if we abolish the duty of society to protect all life, even life unborn. The Scripture says: "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." (Psalms 139:16)

2. The new law spells out, however, that "a pregnant woman has the *right* to abortion when . . ." Among the cases listed, many cannot be defended without completely denying the human value of a life unborn. Worst is probably the regulation that the life of the child can be interrupted if the later care for its upbringing can be seen as "an unreasonable load" on the mother. This is probably the first time in history that Norwegian law in plain words puts the name "right" on acts contrary to God's law. The Scripture says: "Woe to those who call evil good and good evil, who put darkness for light and light for darkness, who put bitter for sweet and sweet for bitter!" (Isaiah 5:20)

3. The new law muddles all clear principles to the effect that the private moral opinion of each individual doctor in the future will be decisive in abortion cases. The kind of discrimination which this allows will necessarily strengthen the popular demands for so-called "self-determined abortion" in the near future. When the politicians assert that the new law will promote equality, the statement has meaning only if the purpose is to put increased pressure on those abortion commissions which still try to resist the abortion boom. This pressure is considerably strengthened by the regulation that one single doctor from now on will be authorized to grant an abortion, whereas a refusal from an abortion commission automatically will be appealed to another commission for renewed trial. The pressure effect of the whole procedure is obvious.

4. The shocking increase of the abortion figures in the whole western world in recent years is a clear testimony of how the powers of death are at work in today's environment—the same powers which induce pollution of nature, waste of resources, and corruption of human life. The same forces also affect our attitude toward human life. In short-sighted egotism, we want to make ourselves masters of life and death. A law which under such circumstances will forward the will of the Creator must see it as its primary task to fight these life-wasting forces. The new Norwegian law does exactly the opposite. It violates not only Christian faith, but every somewhat reflected will to protect the dignity of man.

5. The Church of Norway has, through its bishops, made several approaches to national authorities in this matter. I refer to the document "Abortion, Legis-

lation, Human Dignity" (1971) and to the letter to the *Storting* (1973). Concerning the government bill of January of this year, where the Church was consciously omitted from the list of official consultants to be contracted by the Department for Social Affairs, the bishops also submitted a joint statement in which they unanimously and strongly warned against an adoption of the law in its presented form. Similar declarations were made by other churches and by several ecclesiastical councils and organizations. In spite of this, the Parliament altered the law in a direction *opposite* to these requests.

6. In a democratic society, no organization may demand that all its requests be granted. This applies also to the Church of Norway. Everyone, however, who on reflected premises questions a government bill and its relation to human dignity, may justly demand to be heard, to have his concern discussed, and to receive an answer which shows that his question has been paid attention to. In the matter before us, the Church of Norway and the other agencies who have championed the same cause have been totally refused such a right.

7. Considering that the Church of Norway is organized as a state church and that the state of Norway, under paragraph 2 of the National Constitution, claims "Evangelical-Lutheran Christianity" as official creed, the circumstances here referred to are still more meaningless. If the Church should accept this state of affairs without protest, it would be accepting an unworthy and completely self-contradictary role in today's society.

8. As long as the Church of Norway is bound by the present state church structure, however, it is not to be avoided that all of us who heartily wish to belong to this church and to serve this church will make ourselves guilty of some inconsistency. In delivering myself from this one inconsistency of serving as a bishop under the conditions I have mentioned, I cannot escape the consequences implicit in any realization of my deep wish to continue to serve this church, even under today's circumstances. Therefore I make no appeal to bishops, pastors, or other church workers to follow my example. On the contrary, I ask them all to remain in their service, so that an issue which more than any other in our time has united our church should not lead to any kind of internal split or weakening. As the only one to resign my office at the present time, I foresee that my testimony will have the necessary weight and that, at the same time the unity and concord within our church will remain preserved.

9. In the history of the Church, it has frequently happened that God has commanded some individual to break away from a position that is safe in human terms without demanding the same of others in order to make God's word heard and to emphasize that the testimony of the Church is worthy of belief.

10. For someone who knows that he is commanded to take such a step, the experience is, not least, a humiliating detection of his own half-heartedness and inner dependence on positions and privileges. I myself must, therefore, heed this word from the Bible, which on this occasion shall be my greeting to all of you: "Humble yourselves therefore under the mighty hand of God."

I entrust myself and my family to the intercession of the congregations—at the same time as I assure you of my prayers for the congregations in the diocese of Borg, for the Church of Norway, and for our beloved fatherland.

Truly yours,
PER LØNNING

APPENDIX A

(The following is reprinted with permission from the transcript of Wm. F. Buckley's "Firing Line" program on abortion, which was taped in New York City on March 31, 1975 and originally telecàst on the Public Broadcasting System on April 27. Only a few minor omissions [repetitions, etc.] have been made in the interview portion of the program, but, for space reasons, the entire question period has been eliminated. "Firing Line" is a production of the Southern Educational Communications Association of Columbia, South Carolina, and is produced and directed by Warren Steibel.)

Firing Line on Abortion

MR. BUCKLEY: I have a sinking feeling that this program devoted to recent developments and insights in the abortion controversy is going to prove a little unruly, not so much because we have unmanageable guests as because we depart from the usual format in order to have three guests of particular contemporary interest, each one of whom has a great deal to say.

Norman St. John-Stevas is briefly here from England, where he handles many portfolios. He is a more or less perpetual member of the House of Commons and the leader there of the opposition to the permissive abortion law. He is a scholar, educated at Cambridge, Oxford, and Yale, a lawyer, an author of a half-dozen books, a journalist, an historian who has just completed a definitive edition of the works of Walter Bagehot, a polemicist, and a radio and television commentator as well known in Britain as anyone this side of a Rolling Stone. (laughter)

The Reverend, or however one correctly addresses a Jesuit who has been discharged from his order, Joseph O'Rourke is a Catholic radical activist who engaged in acts of civil disobedience and vandalism in protest against the Vietnam war, protested his cardinal's chaplaincy of the armed services on the occasion of Father O'Rourke's ordination, and who baptized against the orders of his superior a child into the Church whose mother's views on abortion, like his own, were considered heretical, leading to his expulsion from the order.

Margot Hentoff is the author and critic, a columnist for the *Village Voice*, contributor to the *New York Review of Books*, graduate of Syracuse and the New School, who recently astonished her liberal colleagues, perhaps including even her distinguished husband, Nat Hentoff, by writing recently on abortion that, whatever one's views on the subject, it rests on what she calls an ethics of convenience and is closer to infanticide than to, say, anti-pollutionism.

I should like to ask Mr. Norman St. John-Stevas if he would briefly bring us up to date on the controversy over abortion in England since he last appeared on this program several years ago. Specifically, has there been a shift in sentiment?

MR. ST. JOHN-STEVAS: Yes, there has. A very dramatic shift in sentiment. The abortion law was changed in 1968, so we've had about seven years' experience of liberalized abortion, and, as a result, the abuses have become so sharp and there's such resentment that last month in the House of Commons a bill to tighten up the abortion law, and to change some of the features of the 1968 act, was passed by 200 votes to 88, which is about the same proportion as the original abortion act was passed by. So you can see what a dramatic change there has been.

MR. BUCKLEY: What features were those?

MR. ST. JOHN-STEVAS: Well, what has happened, really, is that although the law was intended to allow abortion for restricted reasons, for the health and welfare of the mother, in fact how it operates in practice is that provided you pay enough, you can get an abortion on any ground whatsoever. And so there have grown up literally rackets of one kind and another in which touting taxi drivers, crooked doctors,

property developers who want to make money out of abortion clinics, have got together and are running these rackets under the cover of the law, and the only post-operative action that anyone takes is to sell the fetuses to soap factories in order to make a little more money. So this has so shocked the conscience of the nation that Parliament is determined now that the law shall be tightened up.

MRS. HENTOFF: Is that really what they do—excuse me—they sell the fetuses to soap factories?

MR. ST. JOHN-STEVAS: Yes. It's quite horrible, isn't it? Quite horrible.

MR. BUCKLEY: Well, do they use some ecological argument for this?

MR. ST. JOHN-STEVAS: I'm afraid it's not an ecological argument, it's a financial argument that you make more money if you do this. Of course, it's against the law, and other people are anxious to get hold of these fetuses for experiments. This, again, is against the law. But a recent book has been published, called *Babies for Burning*, done by two journalists who started off—it was an investigative book into the situation in Britain. They were not particularly one side or the other when they started, and they were so horrified by what they discovered that they turned into raging anti-abortionists.

MR. BUCKLEY: Is it then safe to conclude that as things now stand in England abortion is not available to mothers who simply desire to have an abortion, that there has got to be some reason given, and if so, by what percentage will this likely diminish the number of abortions over the old permissive days?

MR. ST. JOHN-STEVAS: Well, you see, a large proportion of the women having abortions aren't English at all. They're coming from France and Germany; 50,000 of the 165,000 abortions that take place yearly, those are for women from abroad. So one of the proposals put forward in this bill which received this huge majority was to have a residence qualification of 20 weeks, so that would cut out a lot of those people. Then if you tightened up the actual grounds and tightened up the machinery, this would cut out a lot of the people who were just wanting an abortion for convenience.

In a recent poll, 80 percent of the men replying to the poll and 85 percent of the women said they didn't want abortion on demand. They were prepared to see it for serious reasons, and the legislative difficulty is to get a means by which the law can be enforced. What I favor myself is to have a referee system so that one of the two doctors authorizing an abortion is a doctor who has no pecuniary interest in the operation at all, and will certify that this is an abortion that is justified by the law and not something undertaken purely for grounds of convenience.

MR. BUCKLEY: Well, is a serious reason, in the bill you talk about, the reason that the mother does not desire the economic burden of the child? Is that considered a serious reason under the bill?

MR. ST. JOHN-STEVAS: I think that any reason under the way the law operates in the private sector—I'm not talking about the national health service where, of course, only a minority of the abortions are carried out, about one-third of them, where I think there is a check because this has to be certified and there are responsible people operating. It's in the private sector, and what these two journalists, who investigated the whole situation, found out was that the lady who was going round, although she'd never been pregnant in her life, all the pregnancy tests she was given she was told were positive, so she would be able to have an abortion which, of course, she didn't need. And never, at any time, when she was going round these private clinics, was she given any counseling or any advice or any indication that there was an alternative to having an abortion. So these really are rackets of the worst possible kind and this is what we want to bring an end to.

MR. BUCKLEY: Well, Mrs. Hentoff, in your analysis it's less the fact of its being a racket that offends you, as I understand it, than the vocabulary of its defense. Is that right?

MRS. HENTOFF: Well, that's part of it, yes. I am a little bit irritated that all the people who are humanists and those who see themselves as always pro-life see this actual killing of fetuses, at a point that I think is very close to infanticide, as being something that fits in with the liberal, humanist, non-violent philosophy, when, in fact, it is killing and, while I don't say one should never kill, this is what it is and I think this is a word they're avoiding. And I think the people who are most brutalized by the kind of abortions that go on right now, which are late abortions where there are recognizable fetuses, who look recognizably like babies—This is very brutalizing to the doctors and nurses who do it and to the community as a whole, because we are really moving in a backward direction, rather in a direction that we've really moved away from.

MR. BUCKLEY: You mean, back even in the direction in which infanticide was considered a legitimate means of—

MRS. HENTOFF: Of the Greeks and Romans, yes, right, in which you could expose a child after birth. And I really don't see the difference between a late abortion in which a fetus is potentially viable and infanticide, the minute the child is born. As a matter of fact, I think it's more kind, if a deformed, defective child is born, if, at that moment, it would be destroyed than to kill healthy fetuses who are of six months' fetal age. I mean, it seems rather senseless to draw a line at the point at which it's outside the mother or inside the mother.

MR. BUCKLEY: Well, you both write as though this strikes you as obvious and say it as though it strikes you as obvious, which leaves difficult to understand why the people whom you address find it so difficult to follow.

MRS. HENTOFF: I don't know, because they have an argument about when life begins—which, of course, there is no argument about when life begins. It begins at the moment of conception, clearly. Everything is potentially there that is ever going to be, and a newborn baby is no more a full-fledged human being than a fetus. I mean, it's only a human being in potential. Now, people who have thought about this seriously will talk about the quality of the life that's being saved or the sentience or the self-awareness—

FR. O'ROURKE: The personality.

MRS. HENTOFF: Right, which, of course, a newborn baby really doesn't have either. And, in fact, you would have to go quite along the way before you come into that and, at the other end of the scale, senile old people, people who are seriously ill. So you run into a whole category of killings and of things that I think we're just not coming to grips with.

MR. BUCKLEY: And why is there a resistance to thinking about it—simply because it's unpleasant?

MRS. HENTOFF: Liberals really cannot bear to think of themselves as anything less than fine (laughter) and humanistic and kind and loving and pro-life, and it's very difficult—

MR. BUCKLEY: Would you say there is a distinctively liberal position on euthanasia?

MRS. HENTOFF: I would think there is. It hasn't come up lately, but I would say that there would be. I would think—

MR. BUCKLEY: And it would be on the side of what?

MRS. HENTOFF: Killing.

MR. BUCKLEY: Yes.

MR. ST. JOHN-STEVAS: They seem to be awfully liberal at getting rid of other people's lives. (laughter)

MRS. HENTOFF: I mean, that's my guess, I don't know. It hasn't been—

MR. BUCKLEY: They believe in suicide, too. Father O'Rourke, your position, as I understand it, is at least heterodox if not heretical.

FR. O'ROURKE: I don't feel that, really. The Catholic Church's position, I believe, has changed certainly in terms of the public opinion with the Church. As you probably

know, there was a survey not long ago that showed 88 percent of Catholics believe in the choice of abortion when the health of the mother is at stake and the statistics are almost as high for rape and a deformed child and so on. And effectively I think even the hierarchy now, at this point—Cardinal Cooke was on television last night and one of the implications of his talk, I think, was that the hierarchy really believes that the Supreme Court decision is something they'll have to go with simply because the real way to stop the brutal business of killing is really to out-love it, not to outlaw it. Having legislation at this point would again reinstitutionalize the killing of mothers, and I think that that's the kind of thing that really has to be avoided and the only way to do that is through other kinds of moral persuasion and so on.

MR. BUCKLEY: Do you have figures that I'm unaware of about mothers who were killed before the Supreme Court decision?

FR. O'ROURKE: I don't have them at my fingertips, but, as you know, it's practically been stopped. I mean, effectively the mothers—The statistics in the years when abortion was illegal were enormous, of mothers that died, and now it's practically stopped.

MR. BUCKLEY: No, but as I understand it, the Supreme Court's ruling would not countenance such a law as was passed in England, and yet such a law as was passed in England is in the direction of restricting abortion to those cases in which there is an unusual argument to be made for abortion. Now, do I understand you to say that Cardinal Cooke of New York has said that resistance to the Supreme Court is going to collapse within the United States?

FR. O'ROURKE: Oh, he didn't lobby, you know, with the other four cardinals; and, you know, last night the point he made theoretically that while the Catholic Church has not changed its position on responsible parenthood and not changed its position on no abortion as an ideal, the way to approach that is through social delivery systems where poverty, malnutrition, medical ignorance, and immorality will be destroyed through forms of exercising social justice.

Take, for example, abortion is a hidden plague in the Third World, where there's practically one abortion for every birth. And that's not because women don't want to have children; it's simply because of the poverty and the malnutrition and so on. And, for example, if we were to re-orient all our Catholic relief services really to go after hunger, as he said last night, I mean, then you're really doing something about abortion because you're doing something about economic development, which, as people point out, is the way to begin to control population.

MR. BUCKLEY: I don't see how that follows, because there's not much hunger here, but there were one million three hundred thousand abortions last year.

FR. O'ROURKE: Well, but, very often, if you take a place like Wisconsin—

MR. BUCKLEY: Food is relatively plentiful in America, but abortions are, I think, about the highest rate in the world.

MR. ST. JOHN-STEVAS: Yes, exactly, you don't help the starving poor of India in Calcutta by having an abortion in Manhattan. I think there is a certain amount of cant in that approach. I hope Cardinal Cooke is sticking to his guns because I think you need two things. You certainly need the positive social action to improve social conditions, but you also need, on this issue, you really need a prophetic witness, and that is, after all, what the Catholic Church has been doing on this issue. The Catholic Church must be right about something, (laughter) and on this issue they have, in fact, given a very clear and forthright witness that's echoed right round the world. This really is the point that Mrs. Hentoff was making, that in the sort of liberal world, in the world of people who want to improve matters, there is a callousness about this subject which really is horrifying. It's as though they've got a blind spot here about this unfortunate fetus. But what it is really is another form of discrimination, and people who would never dream of discriminating on the grounds of color discriminate against the fetus on grounds of size, because what is the fetus but

something very small that cannot in fact make its voice heard; therefore, it's brushed aside as being of no importance. And it's when you have that type of callousness that you need a real prophetic condemnation. So, Cardinal Cooke, if you're looking at this program, stick to your guns, improve society, certainly, but tell people the truth about this matter.

FR. O'ROURKE: Well, I think the business of prophetic witness is actually the place of the Church on this issue and not spending millions and millions of dollars lobbying against the rights of American women, though. It's really the point to be made here that it's not a fit subject for legislation, this particular thing.

MR. ST. JOHN-STEVAS: But it's a necessary subject for legislation, because it's not the rights of women that are involved here, it's the rights of the unfortunate fetus.

MRS. HENTOFF: That's right.

MR. ST. JOHN-STEVAS: And after years of studying this subject, I've come to the conclusion that this is one area where the law really has to be stricter than morals. In most areas you say morality is more demanding than the law and the law is more minimal. Here, I think, once you start altering the law through the gap which you create for very good reasons and good moral reasons, perhaps, through that gap come a whole host of ghastly abuses. That's why I think the law really has to be strict here in order to protect this creature which is so defenseless.

MRS. HENTOFF: The problem is it's such a terribly convenient act, abortion. It solves so many problems, social problems. Nobody has to support these children that parents don't want. The mother doesn't have to go through the thing. Doctors are willing to do this. So it's really very hard to fight because it solves problems so easily. It's such an easy way out. People don't really even have to be responsible for practicing birth control. They really don't. They can just go in and get an abortion on demand.

FR. O'ROURKE: But, Margot, there's a problem there. For example, with the repressive morality in the Catholic Church and, like, in ignorance on birth control, for example, it turns out that—

MRS. HENTOFF: What do you mean ignorance on birth control? Nobody that I can think of in America today has to be ignorant of birth control.

FR. O'ROURKE: *Has* to be, but, on the other hand, you know, if you have—

MR. BUCKLEY: They can read it in *Reader's Digest.*

MRS. HENTOFF: I mean, for God's—

FR. O'ROURKE: Correct. They certainly have, you know—At this point they have gone out and educated themselves without the inspiration of the hierarchy at this point. But, for example, the statistics are beginning to prove that Catholics in the United States are the only people who have *two* abortions, you know, because they go back and don't use birth control, for example. In the past six years in Wisconsin, you know, the clergy have dealt with—

MRS. HENTOFF: But are these Catholics who are not using birth control then going and having abortions?

FR. O'ROURKE: Because of the principles of the Church, yes. It happens the second time around.

MRS. HENTOFF: If they're going to go against their beliefs that way, I should think they should practice contraception first and it would be far less harm.

FR. O'ROURKE: They should. That's the point.

MRS. HENTOFF: I think people have to start taking responsibility for themselves and, really, the society must expect a certain amount of responsibility. Suppose we allow early abortions and say that you really have three or four months in which you can get yourself together and manage to get over there and do this—although I really think it's just a question of degree, but I think most ethical decisions *are* a question of degree. It's much less brutalizing. Early abortions are less brutalizing than late abortions.

Now, I've had people run up to me at various times being absolutely furious that the New York State Senate wasn't going to allow abortions up until the end of the ninth month, as long as the baby was still within the mother. And, you know, part of this is part of this thing that I think we have in which we absolve people of responsibility for their own actions and for themselves. We say the poor don't manage to get there until they're five months pregnant. Well, why is that? I don't believe that that's necessary. I mean, we're not living in a backward—

FR. O'ROURKE: Many Catholics are, in the United States.

MRS. HENTOFF: But that's their choice, really.

FR. O'ROURKE: I think that choice should be opened up to them, to disclose that they really have made the choice not to have abortions and to use or not to use birth control.

MR. ST. JOHN-STEVAS: I think one must make very clear moral distinction, first of all, between family planning and contraception on the one hand, which is in the sphere of sexual ethics, and abortion, which is in the sphere of human rights.

MRS. HENTOFF: That's right.

MR. ST. JOHN-STEVAS: There seems to me a great gap between those two, and I believe personally that a matter of birth control is a matter for the individual to decide in the light of one's own conscience; I don't think that is the case with abortion because another set of rights are involved, and I agree with Margot, who is saying, really, that people are making moral judgments here which are in their own convenience to do. And I think one should always be extremely suspicious of the sort of moral approval which one confers upon one's action if that action is a convenient one for one to go through.

One of the great evils of abortion, I think, is it's a shortcut. It creates all sorts of other evils. It destroys life and, while I certainly think that in very extreme cases you can make a moral case for abortion, I think to make this a *normal* part of social policy is really where the social evil arises. And I think that when you talk about Catholics having more than one abortion, I wonder how meaningful that kind of statement is, unless you define what the Catholic is or who the Catholic is. Are these people who are nominally Catholic, just as many people say they're nominally Church of England? Well, that means literally nothing. Or are these people who are really believing, practicing Catholics? I would have thought that on this issue practicing Catholics did have a very clear and different view, just as many practicing Jews have a very clear ethical view about abortion.

MR. ST. JOHN-STEVAS: And many Anglicans. Well, many Protestants. The witness on this is very widespread, and also many agnostic humanists—I think of Lady Wootton in Britain, who is a very strong agnostic and is also a very strong opponent of liberalized abortion laws. So I don't think one should think this ethical problem is perceived only by Catholics, although they have done rather well on this, and all credit to them.

FR. O'ROURKE: Well, I think at least our Church has to begin to trust women to make those decisions, to take responsibility for their lives, to begin to control the reproductive system, and as I see it, from counseling and so on, that the sense, even, of a woman who has an abortion, of her own freedom, of her own power of social control is really—

MRS. HENTOFF: Over somebody else, though.

FR. O'ROURKE: Well, at least in cooperative form, you know, she begins to participate even, you know, in one or two forms of national and international life.

MRS. HENTOFF: Obviously a woman should have control over her own body and over her own life, but at what point? Suppose, I mean, if you go back to the Roman theory as part of the family she could really destroy all her children after they were born. Would you go along with that? That's taking control of your own life. You have the children and then you cut off their heads.

FR. O'ROURKE: Well, mind you, I'm not taking a stand that abortion's a marvelous thing. I mean, I think that part of the control down the road will be to do away with abortion when people get control of their own lives, because nobody even wants an operation much less an abortion, you know.

MRS. HENTOFF: Well, I don't know. A lot of people do, because I think women are always rather ambiguous about whether they want a child or not at any given point when they're pregnant. And I think when it was less easy to get an abortion, people would go through with it if they didn't really care. But I think there is always a feeling of being trapped and I think one of the things in abortion on demand is that people are much more willing just to go and do it.

MR. ST. JOHN-STEVAS: I think you've also got to see where this position leads on to, because once you decide a matter of life and death for a fetus and you say that that fetus hasn't got a right to live and the life isn't worth living, then I don't see where you draw the line about deciding for old people.

MRS. HENTOFF: I don't either.

MR. ST. JOHN-STEVAS: You say, "Oh, well, their lives, in fact, aren't worth living." This is not a qualitative value, and this really is the decision of the Supreme Court. That's the evil in the decision of the Supreme Court. It is handing over this decision over another person's life to someone else, and we found this in England. No sooner had this abortion bill gone through than the same stage army appeared of people who had been supporting the abortion bill and supported a euthanasia bill. And that was defeated in the House of Lords, where it was introduced, but only in fact narrowly. And they are now continuing their campaign for euthanasia, using all these same arguments of convenience which have been used against the fetus—

MRS. HENTOFF: Yes.

MR. ST. JOHN-STEVAS:—Only with less success because whereas the fetus can't speak up, there are a lot of people who are in danger of being euthanatized not so keen on the idea, and therefore it's a less popular cause. (laughter) They're at risk.

MRS. HENTOFF: Right. Wasn't there something in British hospitals at one time where people over 65 were not to be resuscitated if they were in a certain state and then that was changed? I remember this, some years ago.

MR. ST. JOHN-STEVAS: Yes, a notice was put up in this hospital saying that if you were over 70, I think it was, and you had a heart attack, you weren't to be resuscitated. Well, this, of course, caused a most awful row, and the thing was removed.

MRS. HENTOFF: Yes, but it's this kind of thing.

MR. ST. JOHN-STEVAS: It's the inhumanity of it that is so frightful.

MR. BUCKLEY: But, of course, on the issue of euthanasia, the opponents don't have available to them, do they, the argument of the respect for the rights of the other entity. In the case of the mother and the fetus, you can say, "Well, the law has to protect the fetus because the fetus cannot protect itself." But in the case of euthanasia, if the person is himself willing to be euthanatized—

MRS. HENTOFF: It's a different story.

MR. BUCKLEY:—you have to appeal to a different kind of moral proscription, don't you?

MR. ST. JOHN-STEVAS: Yes, I think you do. But I think that, again, I would use the same argument about opening the way to abuses because if you had a law authorizing euthanasia, then the scope for fraud would be immense, the scope for self-deception would be very great. You'd have some poor old lady whom you're supporting. She's living in a home. How easy to convince oneself that she'd be much happier out of the way and, of course, it would be much more convenient for one's self, because one wouldn't have, for example, if she is dependent, to pay the fees to keep her alive.

MR. BUCKLEY: How would you effect her consent, though?

MR. ST. JOHN-STEVAS: Well, I wouldn't want to effect her consent, but you could.

MR. BUCKLEY: How?

MR. ST. JOHN-STEVAS: You could have it in law. You could have a thing, which is being proposed here in America, of a euthanasia referee. You apply to be euthanatized and you're inspected by a doctor and a judge and then you sign and various people witness it. Well, that seems to me really to dehumanize people completely, when you in fact use this cumbersome, cold-blooded machinery. So another lot of people say, "Well, let's not have that at all. Let's just rely on the doctor." But, being a lawyer myself, I've no great respect for doctors, and if the level of incompetence in the medical profession is anything like the level of incompetence in the legal profession, I wouldn't like to trust my life to a doctor in those circumstances. They might misdiagnose one.

MRS. HENTOFF: You're quite right, but a person should have the right to take his own life if he wants to, because he's really not then stepping on anybody else's rights. And what we're talking about really with this euthanasia thing is very often when a person is in no condition to decide, if they're in a coma, if they're very sick, if they're mentally retarded, if there is all sorts of brain damage, and then somebody must decide for them, and this is really obviously—I mean, I will not speak out against *suicide*. I think it's a marvelous solution to personal problems when you've decided you've had enough.

MR. ST. JOHN-STEVAS: Well, I certainly don't intend to practice it, at any rate, at the moment.

MRS. HENTOFF: No, but I mean, I might someday, I don't know. But that's not the same as taking a child's life.

MR. ST. JOHN-STEVAS: No, no. It's a different issue, but these are connected issues. I myself feel very strongly on all these life issues. I'm against capital punishment, for example. I'm very strongly against taking lives.

MRS. HENTOFF: Well, that's also brutalizing, yes.

MR. ST. JOHN-STEVAS: But I think that all these things hang together. What is so extraordinary is the people who are so much against capital punishment, which is the normal combination, and then who want to euthanatize anyone in sight and no fetus is safe from them if they can get their hands on it.

MRS. HENTOFF: No, no, those people are also against capital punishment. It's actually the Right to Life people who are for capital punishment and for just wars and that's, you see, a thing that's confusing.

MR. BUCKLEY: You mean in preference to unjust wars?

MRS. HENTOFF: Right. Are there any?

MR. ST. JOHN-STEVAS: I can't speak for other people. I'm only endeavoring to speak, however feebly, for myself and to say, as far as I'm concerned, the right to life is indivisible.

MR. BUCKLEY: We're trying to isolate a syndrome here and we are probing the inconsistencies in fashionable philosophical arguments. And as I understand it, Mrs. Hentoff says, "Look, isn't it odd that people who believe it is wrong for the state to take someone's life under any circumstances—"

MRS. HENTOFF: Under *any* circumstances.

MR. BUCKLEY: "—are so insouciant about the state in permitting almost anybody to take the life of the fetus," and again they become a little bit inconsistent when dealing with very old people by being rather soft on euthanasia. You take a consistent argument all the way through that the state oughtn't to be permitted to take the life or permit others to take a life under practically any circumstances.

MR. ST. JOHN-STEVAS: Well, when I get to war I think I run into difficulty, but I'm not very keen on war and, at the same time, I don't think I can take the full pacifist position because there are some evils that are worse than war. One thinks of the Nazi regime. Should one resist a regime of that nature that is perpetrating the most terrible crime, the murder of the Jews, *et cetera*? Well, I would rather, I think, fight against such a regime than stick to a pacifist principle. But I would require a very high

burden of proof to show that a war was justified, particularly in modern conditions.
FR. O'ROURKE: There are other methods of changing those kinds of situations. The difficulty we have with euthanasia and abortion in this country is if they were outlawed, as, well, for example, euthanasia is now, it goes on anyway. I mean at Bellevue every day, if you talk to any doctor, it just happens. You know, it happens without social control, without moral argument, without any sense of the larger claims of community on these lives.
MRS. HENTOFF: Yes, but at least the state isn't saying it's okay. And somehow, in some ways, it's better when the state doesn't say it's okay.
FR. O'ROURKE: It'd be kind of good if the state didn't say anything in regard to abortion, right?
MRS. HENTOFF: Well, you know, you always had massacres, but what happened in Germany, what was so dreadful about it and what was so different from the experience in other places, was that this was so much state-directed. And I'm always afraid when there are laws on the books that—
FR. O'ROURKE: Well, comparisons to other societies, though, are really deficient at this point in time, I think, in both our liberal law and other societies, because I think certainly the church is a force and one of the things that's happening around this free choice argument within the Catholic Church is that it's revivifying the sense of religious liberty through the writings of John Courtney Murray, I guess a friend of Norman's, and civil liberty, and we're beginning to see that liberty is the basis of justice as justice is the basis of peace, and beginning to engage in the reform of social structures so that they really do meet people's needs and are in their control so that we don't need wars nor violent solutions to any kind of problems.
MR. ST. JOHN-STEVAS: Well, I'm sure there's a great deal in that, but to go back to your point about euthanasia in hospitals, and in our societies, there surely is a very clear moral distinction between a statute authorizing the killing of a person, because that is what euthanasia is even if it *is* with consent, and allowing a person to die in peace and not for the sake of a few extra months of life keeping them alive at the most enormous expense, *et cetera.* Now, how do you regulate that? All we have, and it may be a poor thing—
FR. O'ROURKE: Those are not the only cases.
MR. ST. JOHN-STEVAS: —are the ethics of the medical profession. You have to rely on that, therefore I think that professional training, ethics within the profession, are extremely important. It's not a perfect solution. But I agree with Margot, it's better to have that kind of solution rather than bringing the state into it as an authorizing factor.
MR. BUCKLEY: And it's even worse, I take it you both agree, to be less than superdiligent in monitoring the practices of doctors who occasionally transgress the law by failing to administer heroic therapy and allowing somebody to die whose life might actually have been prolonged for a week or two, right? That is to say, you—
MRS. HENTOFF: I don't know. I really don't know.
MR. BUCKLEY: Are you enthusiastic about prosecuting those doctors who in fact permit to die of neglect people in that kind of situation?
MRS. HENTOFF: You mean, if somebody is dying of a dreadful disease, is in agony, and the doctor does not—
MR. BUCKLEY: Yes, give him that incremental—
MRS. HENTOFF: No, I wouldn't dream of trying to prosecute the doctor.
MR. BUCKLEY: But you want it continued to be illegal?
MRS. HENTOFF: I would prefer it to be.
MR. BUCKLEY: Yes.
MRS. HENTOFF: I would prefer there to be no law at all about it. I mean, if it were possible in this less than ideal society, if there was such a thing, I wish nobody paid any attention to it.

MR. ST. JOHN-STEVAS: Yes, but if you had no law at all that would mean you would have a law which would authorize people—
MRS. HENTOFF: Yes, I know, you've got masochistic—
MR. BUCKLEY: No, no, no. If you had no law at all, it would be the same as murder.
MR. ST. JOHN-STEVAS: Yes, exactly.
MR. BUCKLEY: So, therefore, it would be—
MRS. HENTOFF: I suppose I would like the law and nobody to pay any attention to it, (laughter) unless they found a case of murder.
MR. ST. JOHN-STEVAS: Well, you obviously don't want—
MR. BUCKLEY: Like marijuana laws?
MRS. HENTOFF: I suppose, yes.
MR. ST. JOHN-STEVAS: Well, I don't agree as far as that. I think you've left me somewhere along the line. But I think there are cases and it's a question of very fine judgment where you bring a case for prosecution and where you don't. Where there's a real abuse then I think you have got to invoke the law.
FR. O'ROURKE: Except that every one in the states at present looks like a repressive prosecution of a man who's obeying the law and, you know, is exercising himself in a responsible medical practice, and that's what our present difficulty is, why we have to stand against legislation and for the Supreme Court decision.
MRS. HENTOFF: But, you see, this is very different from the abortion issue because what I'm saying is it really is very humane in a sense if someone is suffering terribly and there's no hope for a doctor to allow this person to die. It really is a humane act. It is not a humane act to a fetus to kill it: There is no way this is a humane act. It is agreeable for the mother who does not want to bear a child, but in a truly just society—I think, after all, I was projecting into the future where they're going to be able to take fetuses at 12, 14 weeks and bring them to full development outside the uterus. Then, what are they going to do with them? This is the point. If there's a possibility of doing this, then you really are killing fetuses that the mother doesn't want just as surplus property and human waste.
MR. ST. JOHN-STEVAS: But your argument against abortion on the grounds of shortcut —it does apply equally strongly to euthanasia, because when people are dying, and I know this from conversations I've had with people who have spent their lives caring for the dying, what people who are dying need is loving and devoted and tactful care.
MRS. HENTOFF: That's absolutely true.
MR. ST. JOHN-STEVAS: They don't want to be written off as though they were already dead, even if they have a terminal illness.
MRS. HENTOFF: I suppose I feel as if I would want to die if I were terminally ill, and I'm reacting very personally to this.
MR. ST. JOHN-STEVAS: Well, people are very different in this. But really what people want in that situation is to be loved, to be cared for, to be treated as a member of the human race and not just disposed of as though they were just an inconvenience and got out of the way. It's a most difficult problem and I've come across it myself so I'm not speaking entirely out of the top of my head. But I think by and large when people are in this situation what they need is that loving care and not instantaneous dispatch.
MRS. HENTOFF: Oh, I think, of course, nobody would disagree with you.
FR. O'ROURKE: This is the argument, that many Catholics are coming to about abortion, that that is a way to solve the problem. I mean, I saw an abortion a week ago. I mean, there just was no, in terms of human feelings—the care for this woman, the competing claims on community, if you like, between the freedom, just beginning to be disclosed, of this woman and this undeveloped fetus, you know, just seemed to me totally clear, you know, that I would never want to put that woman in a situation where solid medical care and moral counseling even were not available to her, which would happen if we legislated abortion out of hospitals.

MR. ST. JOHN-STEVAS: But what are any of us, but fellow fetuses?
MRS. HENTOFF: Yes.
MR. ST. JOHN-STEVAS: That's all we are. All any of us are are fetuses in differing stages of development.
MRS. HENTOFF: What is your position on a kind of infanticide when a child is born defective? Would you agree that a doctor should dispose of it at the time of its birth rather than putting its parents through—
FR. O'ROURKE: Well, the first thing I wouldn't see that child as an isolated, independent right, as often people argue from, but that he comes into a community, that then, you know, if it's a life for a life, if it's, you know, destroying some other life in that community, for example, or taking away food from somebody else, yes, I would go with you on infanticide. But that's where the moral decision would be made and should be made in that community by the people who control their community's life.
MR. BUCKLEY: I don't see how you can ever build a laboratory that would give you an answer so exquisitely precise.
FR. O'ROURKE: I don't either. This is one of the reasons why it has to be left to the people.
MR. BUCKLEY: You don't have a situation in which, by feeding this invalid child you know that some other child somewhere—
MRS. HENTOFF: Will starve.
MR. BUCKLEY: —is not going to be fed.
FR. O'ROURKE: Well, you do know it in some societies. For example, the classic case of the Eskimo grandmother, you know, which is a euthanasia question, where a woman is given a piece of blubber and put on an ice floe and sent away because she is a food consumer and when a child—
MRS. HENTOFF: Yes, but we've spent all these years moving away from that position.
MR. ST. JOHN-STEVAS: Yes, I don't think we should—
MRS. HENTOFF:—and we're moving upward . . .
FR. O'ROURKE: But there are survival situations in our society, in the ghetto and so forth.
MR. ST. JOHN-STEVAS: Exactly. I quite agree. Why should we take an Eskimo grandmother as the paradigm of civilization to which we're all in fact moving toward. I think the difficulty about your argument about a defective child is that surely it cannot be morally right to make a judgment about another person that if that person isn't perfect that person's life isn't worth living. Life can be—
FR. O'ROURKE: No, I said no such thing.
MR. ST. JOHN-STEVAS: I said "you" in the general way because I've forgotten who actually made the point, perhaps nobody did. But this is a point that *is* made—
MR. BUCKLEY: But Mrs. Hentoff planted the question.
MR. ST. JOHN-STEVAS: She did.
MR. BUCKLEY: Yes.
MR. ST. JOHN-STEVAS: Well, she did it so successfully that I overlooked who did it.
MRS. HENTOFF: What he in effect was saying was that it would be a life for a life, which it isn't, certainly not in America—
FR. O'ROURKE: Well, there are cases like that.
MR. ST. JOHN-STEVAS: Well, the principles—
MRS. HENTOFF: There really isn't.
FR. O'ROURKE: It's one of the difficulties with—
MRS. HENTOFF: It's just not a life for a life. It's a life versus an inconvenient life or an inconvenience for the state.
FR. O'ROURKE: It's not a theoretical problem. We have to have, you know, a real situation. That's why—
MRS. HENTOFF: A mongoloid child is born. The whole family would perhaps be better off, they would think, and certainly—
FR. O'ROURKE: Oh, no, not necessarily so. I mean, I know many families with

mongoloid children that are very much more loving in general because of the care and sharing with this child that they've had to develop.

MR. ST. JOHN-STEVAS: Yes, I agree with that, but I think here is where you really need positive help on behalf of the community—

FR. O'ROURKE: Social support systems.

MR. ST. JOHN-STEVAS: —so that the particular burden which that family is carrying is made possible to bear. That's terribly important. But in my experience, in my own constituency dealing with people who have mongoloid children and other handicapped children or they've got people in the family they have to care for, there is no feeling there that they would want to get rid of that child. Their only concern is how can that child be cared for, and particularly what will happen when they die; but they love that child and it's a love situation. And it's a very remarkable thing to see the way children in that situation are cared for by the parents without any complaint.

MRS. HENTOFF: Well, of course, I think this is the way parents would feel about fetuses if they could see them. The thing about abortion is that, especially in late abortions, the people who are brutalized by it or the person who is brutalized is not the mother, who is unconscious during this process, but the doctors and the nurses who are removing this developed, highly developed fetus and seeing what in effect is a miniature baby that they're killing. But I think if a parent were to see this, parents would not be so cavalier about the process, that's all.

MR. ST. JOHN-STEVAS: I quite agree. They don't see it.

MRS. HENTOFF: And certainly there's more potential in a healthy fetus, and more reason for it to live, than there is in a defective newborn, which at the beginning. . .

FR. O'ROURKE: That's odd. Do they give general anesthesia for abortion? The one I saw—

MRS. HENTOFF: The late abortions—the one that Dr. Edelin did, the one I'm talking about, the kind where you do the hysterotomies. I'm not talking about early procedures in which you don't see anything.

FR. O'ROURKE: Oh, the late ones, right. But I don't think they would keep you from seeing it either, the products of conception there.

MR. BUCKLEY: You might elect *not* to see it.

FR. O'ROURKE: Yes, you might elect not to see it.

MRS. HENTOFF: I'm sure they would—

MR. ST. JOHN-STEVAS: I'm sure people would, but we certainly have had a number of cases in England recently, and these two journalists in this book, *Babies for Burning*, interviewed a doctor and they were using a tape recorder, hidden tape recorder, and he was telling them that the previous week he had had four live fetuses who were crying their heads off and his difficulty was how to dispose of them. So there is a real horror here, not just horror stories, but a real horror which people don't want to see because if they saw the actual mechanics, as Margot says, they would take a very different view.

MR. BUCKLEY: From that which is convenient.

MR. ST. JOHN-STEVAS: They would find it difficult to sustain the argument of convenience when they saw the real horror that's happening, not made-up stories.

MRS. HENTOFF: I mean, you have these death rattles and—

MR. BUCKLEY: It's like not wanting to see your lungs blacken everytime you inhale a cigarette.

MRS. HENTOFF: Yes.

MR. ST. JOHN-STEVAS: Yes, I quite agree, but I don't smoke.

APPENDIX B

(In the "Firing Line" transcript immediately preceding, Fr. Joseph O'Rourke makes several assertions about New York's Terence Cardinal Cooke in particular, and Catholics in general. The editors believed that, in fairness, the Cardinal's office should be shown the text of O'Rourke's remarks and given the opportunity to reply. Monsignor Eugene V. Clark, director of communications for the New York Archdiocese, submitted a statement, which, slightly abridged, we print below.)

In a television interview, a participant's credentials are usually not quite as important to viewers as the quality of what he says. But, when an audience believes that a man is an expert, they do give a special credence to the accuracy of what he says. In the case at hand the audience presumed surely that a man who is a Catholic priest enjoys a reasonable background in Catholic theology, an intellectual involvement in Catholic questions, and a binding concern to represent the Catholic Church's views exactly.

These assumptions are all in doubt in Father O'Rourke's case. He has said on another occasion that he successfully avoided much, if not most, of the theological education and personal training traditionally prescribed for Jesuits; at present, knowing as he does that the crime of abortion is cause for excommunication, he is a director of "Catholics for a Free Choice," making him an advocate of abortion; he has repeatedly obscured particular doctrines of the Catholic Church by substituting for them his own prophetic concepts. Lest anyone think this substitution is only academic, Father O'Rourke on February 22, 1975 in a Catholic rite witnessed the marriage of two divorced Catholic persons in the United Nations Chapel. He did that of course without the faculties (permission) of the local Catholic Bishop and simulated a sacrament (performing a sacramentally meaningless act), incurring, in the interpretation of many canon lawyers, liability to priestly suspension.

This last violation of Church law took place after his expulsion from the Jesuits—confirmed by the Vatican—for disobeying his superiors by baptizing the child of a public advocate of abortion on August 24, 1974.

Father O'Rourke's commentary on the teaching or spirit of Catholicism is, therefore, at least suspect, and his introduction as a Catholic priest, while technically correct, is by popular standards misleading. On *Firing Line* he was clearly identified as a man discharged from the Jesuits. But the distinction is not easy to make publicly and clearly, and I think the points above are also relevant.

A problem of Father O'Rourke's rhetoric clouds any reaction to his comments. He doesn't often address himself to facts or even to reliable estimates of other men's sentiments. Like many other professional dissenters, he repeats prophetic declamations of what should be, and why everyone is being forced to agree with him. A major emphasis of his prophecy is to tell people that the Catholic community is about to reverse its position on marriage, abortion authority, etc., etc. Thus Father O'Rourke's words are often related only to his prophetic spirit and not to any kind of ordinary quotation, information or fact.

Father O'Rourke's statement about Cardinal Cooke belongs to the world of impressionistic nonsense. Cardinal Cooke, the presiding Archbishop of New York State, publicly and forcefully opposed the abortion-on-demand bill in New York State, repeatedly warned the Catholic Community of the moral horror of abortion, publicly attacked Governor Rockefeller for vetoing a majority decision of both New York State Houses to ban abortion, and strongly attacked the Supreme Court decision on the subject for the partisan opinion it delivered. The Cardinal has a book full of talks that he has given in the last few years, expressing his continuing principled opposition to abortion-on-demand.

After all this, Father O'Rourke stunned the listening audience by saying that

APPENDIX

Cardinal Cooke had just announced a change in his position which he (O'Rourke), and no one else in the whole national press corps, had discovered. Cardinal Cooke, who with the whole Catholic Hierarchy of the United States has publicly called for a constitutional amendment to outlaw abortion-on-demand, is alleged by Father O'Rourke to have decided with the Hierarchy that "the Supreme Court decision is something they'll have to go with simply because the real way to stop the brutal business of killing is really to out-love it, not to outlaw it." This is a bizarre and dangerous babbling—and an offense to the quality of the invitation he received to appear on *Firing Line*. His suggestions about Cardinal Cooke are ridiculous on the surface and, after investigation, wholly imaginary and untrue.

After pondering carefully how even an activist like Father O'Rourke could have come to such a conclusion, and presuming he believes it himself, I can only guess that he had twisted out of recognition a sentiment the Cardinal has often expressed these last two years. Since so many religious people have fought against legislative and judicial endorsement of abortion and have taken strong democratic measures to undo that lethal machinery, the Cardinal has urged them not to forget their personal moral opposition to abortion as a grave sin—an opposition that is even more important than their *political* opposition. Moreover, to people who may confuse what is legal with what is moral, the Cardinal has often made the same distinction, calling for a final line of defense against abortion in personal, moral abhorrence of abortion. Only a confused or partisan person could draw from those distinctions and exhortations the thought that political and public opposition to abortion-on-demand was a waste of time. But this is what Father O'Rourke said. His comment was a hopeless misrepresentation of the position of the Cardinal, the Hierarchy, and the Catholic community.

Recently the American Bishops elected Cardinal Cooke as chairman of their Ad Hoc Committee for Pro-Life Activities, the agency which coordinates the educational and information work of the bishops in their desire to drive abortion from American life. His election was surely a tribute to his known opposition to abortion and his feeling for a pro-life constitutional amendment.

Moreover, the statistics quoted by Father O'Rourke were inaccurate. He said that 88 per cent of all Catholics questioned in a recent poll (probably De Vries) said that they would condone an abortion performed when a mother's health was endangered —an inaccuracy amounting to the difference between what is moral and what is immoral. (Interestingly, very few speakers bother referring any more to the "double-effect" concept which alone, in Catholic theology, allows an abortion when a mother's life is endangered.)

He descended further on the scale of imaginary statistics with this preposterous statement: ". . . the statistics are beginning (sic) to prove that Catholics in the United States are the only people who have two abortions, you know, because they go back and don't use birth control, for example. In the past six years in Wisconsin, you know, the clergy have dealt with . . . [broken off]".

This is just schoolgirl scuttlebutt, the sort of sick observation that the cash-on-the-barrelhead abortionists and case workers use to coax young girls into abortions. There are no such statistics, and careful research can discover no related experience in Wisconsin. Talk like this on television debases the medium.

Fortunately, Mr. St. John-Stevas and the other guests responded very well to most of Father O'Rourke's commentary. Mr. St. John-Stevas said: "So, Cardinal Cooke, if you're looking at this program, stick to your guns, improve society, certainly, but tell people the truth about this matter [abortion]."

Have no fear, he is and will. And so will the whole Catholic Hierarchy and clergy, with the rarest exceptions.

Eugene V. Clark

APPENDIX C

(The following is the text of the statement made by Senator Thomas F. Eagleton of Missouri before the U.S. Senate Judiciary Subcommittee on Constitutional Amendments, July 8, 1975.)

Our Constitution has been amended only 26 times in the 186 years since its adoption. This is fitting for, in my view, we should not casually or capriciously tinker with the Constitution. Rather, we should amend it only where there is a clear need either to provide a necessary governmental procedure or to protect a vital substantive right. By definition, the protection of human life is a vital matter and it is to that subject that I address myself today.

On January 22, 1973, the Supreme Court handed down its decision in the case of *Roe v. Wade*. In the majority opinion for the court, Justice Blackmun wrote that the state did not have a compelling right to intervene on behalf of an unborn child until it reached "viability," the point at which it could sustain "meaningful life" outside the mother's womb—at about the beginning of the seventh month of pregnancy. Then, in a sweeping order, the court struck down various anti-abortion laws adopted by the states.

Perhaps the most disturbing aspect of the Blackmun opinion was the historical premise on which he based his case. In an analysis of historical attitudes on abortion, Justice Blackmun observed that strict anti-abortion laws generally did not appear in the western world until the nineteenth century. He then concluded that the weight of history was on the side of allowing abortion. To my mind, Justice Blackmun's argument in fact leads to the exact opposite conclusion—that the appearance in the nineteenth century of laws preventing abortion was a clear indication that, as western civilization progressed, respect for the dignity of life in all forms increased.

The majority opinion blandly sidestepped the key question—the humanity of the unborn. Since they found no clear medical, theological, or philosophical consensus on the subject, the majority concluded that the judiciary was in no position to "resolve the difficult question of when life begins." And therefore, Justice Blackmun wrote, the Court saw no need to resolve the question.

I cannot comprehend how our nation's highest court could find that it was necessary to consider the humanity of the unborn. Their humanity is the entire question.

I do not profess to be an expert on the physiology of reproduction, nor do I think that one must be an expert to reach a conclusion on this question. In this, as in most difficult issues, there are experts on both sides, equally credentialed and equally convincing. Their contributions may prove useful but, ultimately, each individual's decision on the humanity of the unborn is a product of that individual's own experiences and values.

It is my profound moral conviction, Mr. Chairman, that life is a continuum, from first beginnings in the womb to the final gasp of the dying, and that the first function of society, the primary responsibility of government, is to protect life and to create conditions which permit each person to flourish and to reach his or her fullest potential.

Given my position on this subject, I cannot simply say that I disagree with the decision of the Supreme Court in *Roe v. Wade* and let the matter rest there, as I might do in any other case where my opinion and that of a majority of the Court do not coincide. The result reached by the majority's opinion is so inimical to my view of the nature of life and of the fundamental role of government that I am compelled by logic—not theology—to speak out in favor of an amendment to the Constitution.

But as we stand in defense of the unborn, we cannot allow ourselves to ignore the dehumanization of American society in other areas. We must realistically face

the discomforting truth that, as a society, we have lost our respect for life in a variety of ways. We too easily accept the relegation of the poor, the handicapped, and the elderly to the junkyard of society. We too easily accept the inconsistency implicit in asking our government to protect the life of the fetus while also urging it to use death as a means of punishment.

Therefore, Mr. Chairman, I propose that this Subcommittee consider amending the Constitution in the broadest possible terms to protect the sanctity of life throughout its full spectrum from womb to tomb. I would provide substantive constitutional guarantees against abortion, infanticide, euthanasia, and the imposition of death as punishment.

Where there is a question concerning human life, I believe that society, by its basic governmental charter, must come down on the side of life.

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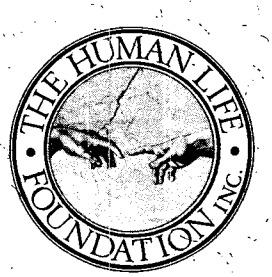
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