the HUMAN LIFE REVIEW

FALL 1977

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. . . about THE HUMAN LIFE REVIEW

With this issue, we complete three full years of publishing. We started out more on faith than substance; we believed that there was in fact a place (even a need) for a journal such as this one, and — violating all sensible rules of publishing — we decided to produce our Review first, and let it go out to find not only its audience but also writers willing to appear in these pages. There were some who warned that, given the subjects we were determined to deal with here, we might well find few of either. Not so, we are happy to report. Based on the usual readership standards, we have reason to assume that some 25,000 people now read our journal; perhaps more important, we think the readers will agree that we have had no trouble whatever attracting as impressive a listing of contributors as one could want — certainly far more impressive than we had a right to expect, e.g., Mr. Malcolm Muggeridge, in a personal covering note that accompanied the lead article in this issue, writes us: "I think the *Review* gets better and better, and I rejoice that it exists." *Amen.*

Speaking of that famous man, we mention in this issue his book about Mother Teresa *(Something Beautiful for God,* published by Harper & Row, New York); we hope the interested reader will obtain a copy not only of this fine book, but will also want to know that Harper & Row has published several more of his books. *Anything* by Mr. Muggeridge is well worth reading, and, if your bookstore doesn't have them you might write direct to the publisher (10 East 53 St., New York City 10022).

We are also happy to announce that, thanks to the generous help of a friend, we are now preparing indices (something we sadly lacked until now), and by about November 1 of this year, not only will our Bound Volumes be fully indexed (see inside back page for information on how to order) but separate indices for all three ('75, '76, and '77) volumes to date will be available (free to libraries) at $.50 each. Again, see the back page for details.

RIP

"Do not hesitate to write or call if I can be more helpful. . ." We quote from the closing sentence of a letter from Professor David W. Louisell, written us shortly before he died suddenly (in late August). We were privileged to publish several of his articles, most especially (we think) his moving and eloquent plea for Congressional action to protect the unborn (see A Life-Support Amendment, *HLR, Fall '75). A distinguished legal scholar of high competence (especially in such difficult fields as Procedure and Medical Malpractice), author of numerous books and articles, and devoted to what he would have described as "hard evidence" both in legal matters and in his unflinching pursuit of truth, he played a major part in the anti-abortion movement (including his vital role as the* sole *"pro-life" member of the National Committee for the Protection of Human Subjects of Biomedical and Behavioral Research — see again HLR, Fall '75) that was largely unknown due to his extreme and unjustified modesty. Beyond all that, those who knew and worked with Dave Louisell have lost an irreplaceable friend — the prototype of what was once called a gentleman.*

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INTRODUCTION

"I FEEL CERTAIN — and I think everybody should get ready for it — that before long euthanasia will be legalized like abortion, like Family Planning, because all these things are closely related. They're all a slippery slope, one leading inexorably to the other."

Few writers today would put the case quite like that, but Mr. Malcolm Muggeridge does so, in our lead article, with his accustomed power, and without hint of apology: to him, the truth of the matter is as plain as the fact that most people want to avoid facing it ("A favorite theory of mine," Muggeridge has said elsewhere, "is that in every dying civilization, you have a death wish. You see people doing all they can to bring it about."). In our opinion, *anything* Muggeridge says is hard to gainsay (he says it all so *well*!). We think this is one of his finest pieces; certainly it is one of the best articles we have had the opportunity to publish here. As the reader will note, it is an edited (by the author) version of an address to the *Festival for Life* in Ottawa earlier this year; it retains the flavor of the spoken word, as well as some topical references, well-known to his audience, but perhaps not familiar to our readers; e.g., Dr. Morgentaler is Canada's most famous abortionist, who was tried several times on a charge of performing illegal abortions (his case ended in landmark decisions that, according to the New York *Times,* "involved not only the abortion issue but the Canadian legal system as well."). *Re* the Beethoven story, the "family history" described is in fact true. As for Mother Teresa of Calcutta, those readers who require an introduction will be happy to know that Mr. Muggeridge has written a book *(Something Beautiful for God)* which not only provides the best-available account of this remarkable woman and her work, but also contains more of Muggeridge's inimitable judgments, such as *(apropos* the above): "What, I wonder, will posterity — assuming they are at all interested in us and our doings — make of a generation of men, who, having developed technological skills capable of producing virtually unlimited quantities of whatever they might need or desire, as well as enabling them to explore and perhaps colonize the universe, were possessed by a panic fear that soon there would not be enough food for them to eat or room for them to live? It will seem, surely, one of the most derisory, ignominious and despicable attitudes ever to be entertained in the whole of human history; though containing its own corrective. In seeking to avert an imagined calamity, the promoters and practitioners of birth-control automatically abolish themselves, leaving the future to the procreative. An interesting case of self-genocide."

Strong stuff. And, in this issue, there is a great deal more of it in what follows. Muggeridge having set the compass — i.e., that what was once thought to be simply "the abortion issue" has become a kind of trial of the *Zeitgeist,* before a still-expanding jury — we proceed, *via* contributors both familiar and new, to extend the evidence in a dozen directions.

Professor John T. Noonan, Jr. gives us his analysis of the U.S. Supreme Court's (June 20th) decisions which, he argues, signal a retreat from "the logic and language" of the original 1973 *Abortion Cases,* which, while "not overturned, . . . are significantly dented . . ." Professor Robert M. Byrn (like Mr. Noonan, a frequent contributor to this journal) also discusses the recent High Court decisions, but in the broader context of what, in his judgment, is the problem of an "imperial judiciary." Both articles are timely, yet both raise questions of fundamental and lasting importance. So does Professor Francis Canavan (another frequent contributor and a Fordham colleague of Mr. Byrn's), who expands the discussion of the Court's abortion rulings to include the ever-present charge that abortion is, somehow, a "Catholic" issue. While agreeing that "Framing laws for a pluralistic and democratic society is a difficult task," Professor Canavan argues that the prime motivation of the "Separationists" is "that what they really want to separate is law and traditional Judeo-Christian morality." Taken together (as we hope you will read them), these three articles comprise an impressive and broad commentary on the current legal status of the abortion question in the U.S. (For the *public* status of the controversy, see the *Appendix,* which contains some notable examples of the commentary provoked by the Court's June 20 decisions.)

Professor Ian Hunter (who, as it happens, is currently at work on a book about Mr. Muggeridge) shifts the *locus* to Canada. The reader will see that, while many of the facts differ, the issues and the arguments are much the same there. Mr. Hunter, too, slides (along the slippery slope) over into the euthanasia issue: "Even as I write these words, an ominous reminder of the distance we have gone on the road to Buchenwald comes from an unexpected quarter — a report to the Anglican Church of Canada from its Task Force on Human Life. . . recommends that severely retarded infants . . . be killed after birth."

Mr. James F. Csank, Esq. (who first appeared in this journal with his memorable comparison of *Roe* and *Doe* with *Dred Scott,* in our *Spring*'77 issue) also deals with abortion, from a viewpoint melancholy or hopeful, depending on one's point of view ("What Lincoln taught us about the right to freedom is equally applicable to the right to life: we cannot claim it for ourselves while denying it to others."). He also punctuates our series of professors; Professor Raymond J. Adamek (of the nowadays well-known Kent State University) resumes it with yet another article on the seemingly-inevitable comparison of our own actions and the Nazi experience — a theme that sounds over and over again not only in these pages but also in almost every extended discussion of the abortion-euthanasia controversy. The conclusions Mr. Adamek comes to are, to say the least, disturbing — chilling. (A valued friend and editorial advisor insists that *any* relation of abortion to Hitler's crimes "hurts the case"; if so, alas, it is an admonition impossible to follow, for not only Professor Adamek but also Mr. Muggeridge *et al* seem unable to avoid it!)

The following article by Miss Sondra Diamond seems to us as unusual as

its author. As she herself describes it, "severe brain damage" at birth left her unable to do a great many things (". . . dress myself . . . or write;"), but did not prevent her from some redoubtable accomplishments (she is now in private practice as a counseling psychologist, etc.), among which we would include this article (adapted from a speech she delivered to the Chicago *National Right to Life* convention in June). Today, people seem to hunger for a "different view" of things. Miss Diamond gives you precisely that. It is a moving performance by an agile mind, unaffected and undaunted by handicaps that now cause doctors — as she says — to tell parents of children with "birth defects" (in many cases far less severe than Miss Diamond's) that the "humane" thing to do is let them die (because they have "Little or no hope of achieving meaningful 'humanhood' ").

There follows another abrupt change of subject. Miss Ellen Wilson wrote us, a year or so back, about matters totally unrelated to her present concerns: it was not what she wrote, but the way she wrote it. In due course she presented us with the dividend we print in this issue, just as she wrote it (born writers should not suffer superfluous editing), except for a comma or two, gracefully deleted. She describes a situation peculiar to Bryn Mawr, but in terms that illuminate the more general *malaise* now so prominently featured in the press.

Up to now, we have avoided the subject of homosexuality. But Miss Wilson having joined it quite convincingly to our usual concerns, we decided to ask our resident Expert to join in the joining. Right on schedule (i.e., a week late), Mr. Sobran delivered his own treatise on the subject. We have reason to suspect he thinks that his own views on a given subject are definitive; our regular readers have reason to suspect that we agree (never more so than in this case!). Without doubt he seems able to put almost any case well enough to incite envy from its adherents.

We conclude with another article that you should not fail to devour, by Mr. Erik von Kuehnelt-Leddihn, who, like Mr. Sobran, sees just about everything from what appears to be a totally unusual angle. In fact, he presents here views that, while they may well infuriate the more strident of "feminists," might also convince many that the "traditionalist" image of women is remarkably fresh — even welcome, given the present competition. In any case, Herr Kuehnelt writes with impressive (i.e., his *own*) authority, tempered only by his unfailing charity. Who else have you read lately who would leave you with the thought that "Neither should we forget that love between the sexes frequently constitutes the breakthrough to the love for God and thus has — implicitly or explicitly — a metaphysical dimension"? Think about it, while we think hard about how to produce future issues as lushly varied as we think this one is.

J. P. McFADDEN
Editor

Abortion to Euthanasia: A Slippery Slope

Malcolm Muggeridge

WE HAVE NOW had legalized abortion in England for some three years, and it is a terrible thought that during those three years more than one million babies have been murdered. In other words, there have been more deaths, as a result of our Abortion Act, than in the First World War. I was brought up to believe that one of the great troubles of the Western World was that in the First World War we lost the flower of our population. Well, now we have destroyed an equivalent number of lives, in the name of humane principles, before they were even born. I'm not going to go over the arguments in this controversy — they have been endlessly repeated, and you all know them, at least as well as I do. I'm not going to rake over all that because I don't think it will serve any useful purpose in an assembly of this kind. But what I do want to say to you is this: that though in worldly terms the battle has been lost, and abortion is now legalized throughout Europe, and in the Western Hemisphere, it still remains the most important issue confronting us, and that nothing can take away from the importance of that issue. The fact is that government after government has surrendered on it, not, notice, in response to pressure from public opinion, but out of a weird kind of inertia or fatalism which seems to be inculcated by the media, as though somehow or other this is an inevitable step. Though that's happened, and though all over the Western World this dreadful slaughter of the innocents is taking place, and though, speaking for England and I imagine other countries, gynecologists cannot in fact become consultants unless they are prepared to perform abortions — despite all that, the issue remains a *live* issue, and it is of *highest* importance that gatherings like this should take place and that protests such as we propose to make, *should* be made. Also, that the *contrary* proposition of the *sacredness* of the process whereby new beings come into this world, should constantly and by every possible means find expression. It's interesting in this connection, and something that I find rather wonderful and hopeful, that, strangely enough in India, a country which we refer to as "underdeveloped" or "backward," and talk a lot of nonsense about a population explosion there — that in India even the ramshackle machinery of Parlia-

Malcolm Muggeridge is an author, critic, TV personality (and much more) of international renown. This article is adapted from his address to the *Festival for Life* held in Ottawa, Canada, in May.

mentary democracy operated in *defense* of the right of people not to be sterilized — which was happening to them, and happening, sometimes, by force. Yes, the Indian people, in our terms an illiterate people, rose up and voted, and the issue on which they voted was this very one — that God has given us the stupendous gift of *creativity,* which we must reverence and cherish. When you are as old as I am, the most beautiful thing in the world is your grandchildren. As your life comes to an end, so you see new lives beginning. And those new lives bear in their faces, in their words, in their bearing, hints of the beginning of it all, which was your marriage, your children. This is the most beautiful thing that life has; this is the most *solacing* thing that life has, when you get to the end of your days, as I'm getting to the end of my days. All the rest seems a lot of worthless rubbish. But *that* is a real thing, as these Indian women who had been *pressurized* by every sort of means, including physical force, recognised in the way they cast their votes. Why, at one point they were actually offered in return for agreeing to be sterilized — what? — a transistor set! Imagine, an allegedly advanced civilization reaches the point of sending out to an ancient one transistor sets to be the reward for giving up the most vital and beautiful creativity that's in us. That's black humour for you, and I can't help envying the future Gibbon who will have the great satisfaction of describing it. Well, I won't go on about all that. But I would say that, looking round the world today, it saddens me beyond words to note in countries like Italy, where Catholicism has been such a strong force, that now there is legalized abortion; that in France, where the medical profession, especially the Catholic doctors, put up such a magnificent fight against it — that there, too, there is legalized abortion. However, every cloud has a silver lining; I heard the other day that on the present basis of population and abortion and contraception, Sweden, in 100 years' time, will have no population. There will just be nobody there at all. That prospect at least is a tiny compensation for what we all have had to endure.

I have spoken and written about the work of Mother Teresa, which of course is something that I hold very dear, and which has, through my first accidental acquaintance with it, and with her, so enormously enriched my own life. She, as it seems to me, though a simple nun with her sisters, represents most magnificently the mighty *contrary* force to what is going on in these so-called civilized Western countries. Those of you who saw the TV program called "Something Beautiful for God" — which is Mother Teresa's description of what she is seeking to do — will remember, I'm sure, a shot of her holding a baby girl so tiny, that it seemed extraordinary

that she could go on living at all. And I say to Mother Teresa in the film: "Are you *sure,* Mother, that the tremendous efforts you and the sisters make in this economically-desolate country, to keep these little creatures alive are really worth while?" Some of them brought in, as this baby was, from dustbins. For answer she holds up the baby — such a tiny little creature — and says: "Look, there's *life* in her!" Now *that* to me is the picture we should all keep in our minds when we are deluged with statistics and arguments and propositions about this question — the picture of Mother Teresa holding up a tiny little creature that had been thrown away into a dustbin, and saying with such exultation: "Look, there's *life* in her!" When I contrast that with, as I gather has happened, some sort of humanist presentation to Dr. Morgentaler of an award as the humanitarian of the year, I feel delighted beyond words, unspeakably joyful and grateful to be on Mother Teresa's side.

Of course, it would be quite wrong to think that the offensive which is being mounted on our Christian way of life will stop at abortion, and already there are the rumblings of a new, strong push in the direction of euthanasia. I have absolutely no doubt that this will be the next great controversy that will arise. The fact is that because it's so costly in money and personnel to keep alive people about whom the medical opinion is that their lives are worthless, the temptation to get rid of the burden by killing them off will be even greater. And thus disposing of them will of course be dressed up in humanitarian terms as an act of humanity and compassion. Almost all the evil things that have been done in the world in the last decades have been done in the name of justice, equality, compassion, etc. There's a wonderful saying of Dr. Johnson — that wise and good man — that I like very much: "Why," he asks, "Is it that we hear the loudest yelps for liberty among the drivers of slaves?" And this is of course true: it is in the name of humanitarianism that these terrible proposals are made. There would, I feel sure, have been an intensive pressure for euthanasia before now had it not been for one circumstance — that the only government so far in the history of the *world* to put a euthanasia law into effect is the government of the Nazis. *No* other government in the *whole* of recorded history has ever actually *enacted* a euthanasia law. But the Nazis did. And to a considerable extent the German medical profession cooperated with them. The law, I should add, was widely applied throughout the Reich. I happened a few years ago to be visiting a Lutheran settlement for sick and deranged people at Bethel near Bielefeld in West Germany. And there they told me all about how this monstrous piece of legislation had been enforced. They, in

common with all such institutions, were asked to produce particulars of the patients that they had in their care. And they refused to do this, because they knew quite well that it would be a prelude to getting rid of a lot of them. So, in due course they were visited by an official who wanted to know why they hadn't sent the required particulars, explaining to them that the definition of a person whose life was useless was an inability to communicate. In that case, they said, there was no one in their institution who was in that category. And they proved it, demonstrating that, because their institution was run on the basis of Christian love, *all* the patients in response to love answered with love, and so were able to communicate. Anyway, the long and short of it was, that almost alone in the whole of Germany, their institution escaped the application of the Nazi euthanasia law.

But we shall not be so fortunate when the agitation for legalized euthanasia really gets going in our part of the world. In the first place, it will be argued — which is, alas, true — that in many hospitals in the Western world the lives of patients considered unfit to live are already *being* terminated by the administration of excessive sedation. So, the contention will be that there's no point in retaining a legal prohibition which is already being disregarded. Secondly, the argument will be used that the resources needed for disabled people — not just the old and the senile, but also the Mongols and others who are badly disabled and not fully conscious — can be better employed in other ways. The quality of life, it will be argued, requires that the drastically handicapped should be got rid of. We shall of course resist this, we should all — every single Christian — find such a proposal utterly abhorrent. But I feel certain — and I think everybody should get ready for it — that before long euthanasia will be legalized like abortion, like Family Planning, because all these things are closely related. They're all a slippery slope, one leading inexorably to the other.

I wanted to tell you about a little playlet that some friends of mine devised, because I think it illustrates what I'm talking about better than any kind of argument. The scene is a doctor's consulting-room in Vienna round about 1770. A peasant woman comes in and tells the doctor that she is in her second month of pregnancy, that her husband is an alcoholic and has a syphilitic infection; that one of her children is mentally incapacitated, and that there is a family history of deafness. The doctor listens, and finally agrees that there is a case for her to have her present pregnancy terminated. And so he has to fill in a form. Filling in the form he asks her name, but he can't quite hear when she tells him, so he says: "Please spell it out."

And she spells out: "B-E-E-T-H-O-V-E-N." And then the Sixth Symphony strikes up. Now I think that little drama tells what we're concerned with. *How* can we ever know that such a life shouldn't be born? Or, that such a life should be terminated? On what *conceivable* basis can we in our arrogance make such decisions as that? It is out of all relation to the great Christian traditions in which our society was born, and on the basis of which it has grown up, becoming a great civilization. We have a duty, in all circumstances, to say that men are not bodies; men have souls. That our narrow, self-interested human values cannot be applied to decide the fitness, or otherwise, of a God-created human being to go on living. That in the womb, when this marvellous process of gestation takes place, a life comes into existence that, like all other lives, is an infinitesimal particle of God's creation. And that that particle of creation contains within itself all the potentialities that exist in every other God-created life. If we *ever* depart from seeing it so, then it is *not just* that we've abandoned our religious faith and that we can no longer participate in the great drama of the Incarnation from which our whole way of life is derived, but we have ceased to deserve to be known as civilized men and women. That is the issue. The attack has been made in terms of this terrible legalized abortion which is upon us. It *will* be followed up, in terms of legalized euthanasia. First, of getting rid of the old and senile, and then of deciding that such and such and such persons don't rate being allowed to go on living. Out of the Christian notion of a human family has come all that is most precious to us. We have to guard it. We have to treasure it. We have to stand up for it, whatever may happen governmentally and administratively. That is our essential duty and our privilege.

I am an old man, and I shall soon be dead. Old men have a strange thing that happens to them. They often wake up in the middle of the night, at two or three o'clock, and they can see between the sheets the battered old carcass that they will soon be leaving, and it seems like a toss-up whether you go back to it to live through another day, or whether you make off. It's a moment, dear friends, of very good perceptiveness, this moment when in a weird sort of way you stand between life here and life in eternity, and you see in the distance, like you see when you're driving, the glow of a city. You see the lights of St. Augustine's City of God. And in that situation, you have some very sharp convictions. One of them is of the sheer beauty of our earth — the beauty of its shapes and its foliage and its animals and its trees and its rocks — *everything,* the incredible beauty of it. Also, of the great beauty of human relationships: between parents and children, between husband and wife, between friends, between

sweethearts — all these beautiful human relationships. Of the wonder of human work and human creativity. Of all that human beings have been able to achieve. *But you also see* that all this wonder derives not from *men,* but from the participation of men in a creation which has been provided for them by a Creator. And that therefore, in existing even at the fag-end of a life, existing as this tiny, tiny part of God's creation, you are a participant in God's purposes. And that these purposes are creative, and not destructive. These purposes are loving, and not hating. These purposes are universal and not particular. *Above all* — and this relates so closely to what's drawn us here together today — *above all,* they relate to a *surrender,* an abandonment to God's purpose for men, so that on *that* relationship reposes all that is wonderful in our life. And that whenever we arrogantly, or seemingly with good intentions but still with the dreadful conceit of scientists, think to intervene *ourselves,* shape our genes, rearrange our genes as we want them, make sure that all the creatures that come into the world are beauty queens and Mensa I.Q.'s; when we seek to do all those things, to eliminate from the world whatever seems to *our* eyes imperfect or askew, that *then* we shut ourselves off from that wonderful light that awaits us. Then we shall relinquish our citizenship of the City of God, which is our precious, unique birthright. That's what I have to say to you, and God bless you all.

A Half-Step Forward:
The Justices Retreat on Abortion

John T. Noonan, Jr.

FOUR AND ONE HALF years after the most radical decisions ever made by the Supreme Court in interpreting the Constitution of the United States, a majority of the justices have retreated from the logic and language of *The Abortion Cases* and in a batch of cases decided this June have held the constitutional right to an abortion to be not quite as unqualified as it has looked since January 22, 1973. *Roe* and *Doe,* the *Abortion Cases* themselves, are not overruled, but they are significantly dented, and the judges who were their most avid supporters appear to be in a state of disarray, if not panic. The same is true in an even more intense way in the cadres of Planned Parenthood and the American Civil Liberties Union and the powerful pro-abortion journals like the New York *Times* and the Washington *Post.* The battle for the life of the unborn child has entered a new phase.

What the Court Did Not Reverse

The Court explicitly affirmed its earlier decisions reading abortion into the Constitution as a right. The Court explicitly called the type of criminal statute, standard in the United States before January 22, 1973, "a stark example of impermissible interference" by the state. The Court explicitly reaffirmed *Planned Parenthood v. Danforth,* which struck down recognition of a father's interest in the destruction of his child. The Court even declared in so many words that its new ruling "signals no retreat from *Roe* or the cases applying it." But if there was no retreat why were the dissenting justices enraged, the lower federal court judges amazed, and the pro-abortionist press in arms? Something had happened.

What the Court Did

At issue in each of the cases decided in June was the freedom of the citizens to withhold funding from elective, optional abortion. Was the newly-recognized right to an abortion of such overriding weight that if a unit of government provided any medical services at all, it must provide or pay for any abortion a woman and her

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doctor wanted? Was the right to an abortion so fundamental in our constitutional democracy that, like the right to a lawyer in a trial for felony, it had a claim on the citizenry which must be met in every case? Reading *Roe* and *Doe,* the federal circuit and district judges had answered these questions affirmatively.

It is worth pausing a moment to consider why these issues were raised at all as to abortion. Consider this analogy: A free press, one has always supposed, is fundamental to the existence of a democracy. Freedom of the press is in fact one of the liberties expressly guaranteed by the Bill of Rights. Has anyone ever imagined that, because this freedom is fundamental, the *government* must pay a person who wants to produce a newspaper? Has any judge ever held that in a one-newspaper town where, for true freedom of the press, two papers are a necessity, the American Civil Liberties Union has the right to make the government subsidize a second paper? Yet on the issue of abortion some of the justices seem to have supposed that abortion was not only a liberty, but that due process required that it be funded.

Other judges thought the matter was one of equal protection of the law, as though it were argued in the newspaper case: "The government subsidizes public broadcasting. A newspaper is an alternative form of public communication. Therefore, it is a denial of equal protection of the laws if the government does not offer an equivalent subsidy to a would-be newspaper publisher." This argument looks ridiculous, and it is. But it has been made with great seriousness as to abortion.

Why has this happened? Because the Supreme Court in *Roe* and *Doe* and their sequelae up to this June laid such great stress on the sacred character of the new-found liberty to abort that the lower federal courts believed they were doing the Court's bidding in mandating the provision of abortion. Typical was the opinion of Jon O. Newman, the federal district judge in Hartford: "The view that abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy may be gleaned," he wrote, "from the various opinions in *Roe* and *Doe.*" Of course this view may be gleaned from *Roe* and *Doe,* although it is a bit like saying "stock fraud and speculation in stocks, when stripped of the sensitive moral arguments surrounding them, are simply two alternative financial methods of dealing in the stock market." When moral sensitivities are eliminated, how do you distinguish good procedures from bad? Jon O. Newman, at any rate, did not see how you could, and, albeit with some of the missionary zeal appropriate

for a federal satrap enforcing his masters' will on the disenfranchised local population, Newman and his colleagues held that Connecticut had a constitutional obligation to fund any abortion a woman could not afford.

Daniel J. Snyder, Jr. and his colleagues in Pittsburgh held that Pennsylvania had a similar obligation to fund abortions as a part of Medicaid. Donald R. Ross in Omaha and his associates ordered St. Louis to make abortion available in its municipal hospital. Similar results occurred by the edict of federal judges in New York, South Dakota, and Utah. The temper of these federal judges ordering public officials to do what it is now found they have no obligation to do is captured by Donald Ross's opinion. This judge of a circuit court described St. Louis and its officials as "wanton," "callous," and finally as "obdurate and obstinate." What a stream of epithets to fling at persons doing their conscientious duty and exercising *their* constitutional rights!

Poor Jon O. Newman, poor irate Donald Ross and their distinguished colleagues! They had gone out on a limb which the Supreme Court, while "signalling no retreat from *Roe* or the cases applying it," sawed off. The district and circuit judges had misconceived its mind, the Court now said. Abortion was not such a fundamental right that the citizenry could be coerced against its will to pay for every abortion. Connecticut could deny funding for elective abortions. St. Louis need not use its municipal hospital for the performance of elective abortions. The Social Security Act was not to be read as mandating abortion with Medicaid. Congress had the power to decide not to fund nontherapeutic abortion.

What The Court Implied

Here one enters a treacherous area of intention and intimations, where any interpretation may be stultified by a switch in the political current and a corresponding shift in a justice's mind. But a fair present reading of the majority opinions would yield two results: First, the justices have abandoned the definition of "health" espoused by the Court in *Roe* and *Doe* which identified "health" with "the psychological needs" and "the emotional well-being" of the abortionee. The reason for this inference is that the majority now distinguishes between "therapeutic" and "nontherapeutic" abortions. Under the previous definition, *every* abortion was therapeutic, for every abortion is for the "emotional well-being" of the abortionee; every abortion is a response to psychological needs. If a distinction in types of abortion exists, "health" must have a more limited, traditional meaning.

Second, it is likely that some at least of the present majority believe that the state must provide or pay for all therapeutic abortions. The inference is drawn from the stress in the opinions on the adjective "nontherapeutic" qualifying the abortions for which the state need not pay. The suggestion is almost irresistible that, if the abortions had been "therapeutic," some of the justices would have made the state pay. But whether "therapeutic" abortions would be only those to save a mother's life or whether they include those to save her health is not clear.

What the Court Missed

The majority said nothing about the main conscience issue in the cases — that is, whether a citizen should be compelled to pay for an action that he or she believes is the destruction of a member of the human species. Yet surely if minorities have a right to conscientious objection, so do majorities. There is nothing more odious than the judiciary forcing persons to disobey their conscience and kill or pay for killing. Jon O. Newman and his colleagues were perfectly willing to dismiss the conscience issue as "the state's unarticulated position on the morality of abortion"; but why did the majority of the Supreme Court, overruling Newman, not articulate it? Inferably, the majority feared that even a word on the true basis of the moral objection to abortion — that is, that it is always the taking of human life — would open the really fundamental question, "Were *Roe* and *Doe* rightly decided?"

The majority's studious silence on the rights of a citizen's conscience is matched by its reticence on the rights of the unborn child. It speaks first of the State's interest "in encouraging childbirth" and ultimately of "the State's strong interest in protecting the potential life of the fetus." The first way of putting it, focused on "childbirth," seems to ignore the citizen's interest in protecting the actual unborn life now in existence. The second way of putting it, "potential life of the fetus," seems at first curiously contradictory. Does it mean that the fetus is not actually but only potentially alive? Surely not. Apparently, the Court is again saying only that it is childbirth, and beyond, which the state may protect. But why cannot the state protect the unborn for themselves, just as it can constitutionally protect dolphins and whales? No answer is given by the Court.

Declining to look at the unborn as actually there, turning away from the issue of conscience, the majority lets the minority have the rhetorical and emotional field. What a field day of rhetoric and emotion the minority has!

The Dissents

Of the three dissenters, Thurgood Marshall is the most excited. The opponents of abortion, he announces, "have attempted every imaginable means to circumvent the commands of the Constitution and impose their moral choices upon the rest of society." The phrase "circumvent the commands of the Constitution" is wonderfully alliterative and must have flowed easily from the pen of the justice; but what does it refer to? It refers to the right to an abortion invented in 1973 by seven members of the Supreme Court. Any attempt to narrow, palliate, or treat as less than absolute that right is what Justice Marshall views as "circumventing the commands of the Constitution."

In this spirit he continues: "The present cases involve the most vicious attacks yet devised." Elective abortion had been criminal everywhere in the United States until January 22, 1973. No state or municipality had ever authorized such a practice, much less paid for it. But when a state or city has failed to do a flipflop and treat as desirable what yesterday was criminal, it has engaged in "the most vicious attacks yet devised." The intemperateness of Justice Marshall could scarcely be excelled.

But he does excel himself. Among the evils he pictures as flowing from the denial of free abortions is the birth of poor children who "will sadly attend second-rate segregated schools." His implied suggestion for this misfortune is a unique, novel, and terrible contribution to the law on school desegregation. Dare one follow his logic and put it in words? He says, No free abortion, then segregated, second-rate schools. He implies, Free abortions, then no segregated, second-rate schools. And why would there be no such schools? Because their potential pupils would be dead. Can Thurgood Marshall really be saying or implying this? I would rather believe that it is some untried graduate of a law school, serving as his clerk, who has put this extraordinary argument in the Justice's mouth. I cannot believe that the real Thurgood Marshall believes that you end school segregation by aborting the students.

The impassioned and naive tone of Marshall's dissent continues to its very end, where it indulges in fantasy as to the forces the Judge is opposing. Public officials, he declares, are under pressure by "well financed and carefully orchestrated lobbying campaigns" to restrict abortion further. (Has Justice Marshall ever attended a Right to Life Convention? If he had, he would find his metaphor of "orchestration" as appropriate a description for the anti-abortionists' efforts as for the movement of travellers in Grand Central Station.) As for the anti-abortionists being "well financed"!

The very suggestion is enough to draw a smile. If they have 1/20 of the resources of Planned Parenthood of America, or of the American Civil Liberties Union, or of the New York *Times,* it would be a great surprise to those associated with the effort to eliminate *Roe* and *Doe* as the law of the land.

Justice Marshall concludes with a reference to elected leaders who "cower before public pressures." He is referring to Connecticut where Governor Ella Grasso ran on a platform favoring a constitutional amendment eliminating *Roe* and *Doe* and to St. Louis where Mayor Poelker was elected on a pledge to stop optional abortion in the municipal hospital. Ella Grasso and John Poelker are the first officials to be described as "cowering" because they lived up to their campaign promises. Would that every politician "cowered" by doing what he said he would do before his election.

William Brennan, also dissenting, is only a modicum more restrained than his brother Marshall. He cites as controlling precedent a case that addressed merely the procedural question of the plaintiff's standing to complain — a gross confusion of procedural and substantive law for which he is duly taken to task by Justice Powell writing for the majority. He cites as sound law Jon O. Newman's amoral posing of the nature of abortion and adds to it: "Pregnancy is unquestionably a condition requiring medical services [citing cases]. Treatment for the condition may involve medical procedures for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth." Is this so far from writing, "Life is unquestionably a condition requiring medical services ... Treatment for the condition may involve medical procedures for its termination or its continued support"? Certainly the bland equation of life or death as two alternative and acceptable outcomes is shocking to the least tender conscience.

But what is most disturbing about this dissent is its apparently deliberate ignoring of the rationale of the majority's opinion justifying a state's preference for encouraging childbirth. Why has a state an interest in not funding abortions? Justice Brennan asks. Is it to save money? No, because if an abortion is not had, it will cause an "increased welfare bill incurred to support the mother and child." Is it the mother's health? Justice Brennan answers negatively here, too. But he never mentions the reason Justice Powell has given — "the potential life of the fetus." The life of the unborn child, which is at least potential life to Justice Powell, has become literally invisible to Justice Brennan.

The shortest and comparatively most restrained dissent is that of the author of *Roe* and *Doe,* Justice Blackmun. In his view, the

Court is letting the states accomplish indirectly what he had said they could not do directly, that is, restrict the right to an abortion. He exaggerates, of course; but his sense that the old pro-abortion majority has crumbled is clear and understandable enough. He lets fly a little invective at the Court: what it has accomplished is "punitive and tragic." But his strongest words are reserved for those who are not before him, but who have plainly struck a raw nerve: he sneers at public officials bowing to "the demonstrated wrath and noise of the abortion opponents." These are strong words for a judge of the Supreme Court, entering the political lists and taunting those who have challenged his imaginative interpretation of the Constitution. He makes no acknowledgment of the fact that public officials, like judges, occasionally act from reason and conscience.

Unlike Justice Marshall, however, Justice Blackmun not only imagines political leaders cowering, but he takes offense at their running for office on anti-abortion programs. Mayor Poelker is "one whom the record shows campaigned on the issue of closing public hospitals to nontherapeutic abortions." The majority of voters who elected him is described, strangely, as a "presumed majority." The majority is declared to have acted "punitively." "This," Justice Blackmun says with the hauteur of Queen Victoria, "is not the kind of thing for which our Constitution stands."

Our Constitution, according to this judge, does not stand for a majority following its conscience. Our Constitution does not stand for a majority deciding on the taxation of themselves to fund optional operations. Our Constitution apparently *does* stand for seven males telling all the rest of the people that they cannot prevent abortion. Our Constitution has conferred on these special individuals unique insight and wisdom which ennobles them to tell the rest of us when we are "punitive" or "vicious" or lacking in reason. Our Constitution apparently does stand for seven or five justices taxing us to pay for measures we as a people have judged unconscionable.

The Logic of the Decisions

Let us turn from the dismayed cries of the dissenters and look again at the majority opinions. In a remarkable footnote 15 to *Beal v. Doe,* Justice Powell states: "The issues present policy decisions of the widest concern. They should be resolved by the representatives of the people, not by this Court." Again, in *Maher v. Roe,* he declares, "Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy

is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' "

There, it has been said, and by the justice speaking for the Court — on questions of policy such as these the people have a right to decide. But why does this recognition of the democratic process not apply with equal force where the issue is abortion itself? What gift do justices of the Supreme Court possess that enables them more than other men and women to decide that, contrary to fifty state legislatures, abortion must be permitted? If the majority of the Court accepts the democratic process on the funding of abortion, why not on the restriction of abortion?

It will be necessary for three justices to follow the logic of the decisions and join Justices White and Rehnquist, the original dissenters in *Doe* and *Roe,* before these blots on our jurisprudence are erased. Chief Justice Burger has never seemed happy with them. Justice Stevens, arriving after they were decided, has no special reason to be committed to them. Justice Powell has now articulated the best reason for abandoning them. Is there the making of a majority for overruling *Roe* and *Doe*? It is too soon to say. Meanwhile, until that happy day arrives, it is necessary for their opponents to use the great democratic forms open to them — to undertake that favoring of childbirth now permitted by the Court and to secure in permanent form the liberty of the unborn child by an amendment to the Constitution.

Which Way for Judicial Imperialism?

Robert M. Byrn

THE UNITED STATES Supreme Court was once known as "the least dangerous branch" of our government. So it may have been. But with the advent of an era of elitist egomoralism in the federal judiciary, the situation has changed dramatically. Our fundamental law is in a parlous state — brought there ultimately by the Supreme Court. "Judicial Activism" inadequately characterizes the crisis. *Judicial imperialism* says it better. With the focus thus sharpened, I shall here contrast imperialism with activism (I), demonstrating imperialism in action, *via* the "right of privacy" and the pre-1977 Supreme Court abortion decision (II), and reaching some tentative conclusions about the future course of judicial imperialism based on the Court's 1977 decisions upholding the constitutionality of governmental refusals to fund or facilitate elective abortion (III).

I. Judicial Imperialism vs. Judicial Activism

Francis Bacon, the seventeenth century jurist and jurisprudent, was less than fond of activist judges. "Judges ought to remember," he wrote, "that their office is *jus dicere,* and not *jus dare:* To interpret the law, and not to make law." That sounds straightforward enough: Judge, restrain thyself! Thou shalt not be an activist! But it is not all that simple. The judge who interprets the law in novel circumstances actually makes law. So too does the judge who changes the law because the conditions which originally gave rise to it no longer exist. The line is not easy to draw.

Nor are things the same in America today as they were in England when Bacon propounded his maxim. Law and society are a great deal more complex. The same person, be he "conservative" or "liberal," may hold seemingly contradictory views on the merits of an activist judiciary. He may celebrate (or condemn) activism when a federal judge limits the power of Congress, and condemn (or celebrate) it when the federal judiciary intrudes upon the sovereignty of the states. Even so "conservative" a Supreme Court Justice as Felix Frankfurter could write: "In our scheme of government, readjustment to great social changes means juristic readjustment."[1] There are no neat categories.

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Fortunately, problems of judicial "legislation," the role of the judiciary in social reform, the status of our federal system, and other anomalies and nuances of the intricacy which is judicial activism are beyond the scope of this paper. We need not take sides on any of them because we do not here face the question of how the judiciary may better function — with activism or restraint — to protect the enduring values of the American commitment to liberty. Rather we confront the recent reality of a phalanxed federal judicial attack upon the very values themselves, a half-accomplished subversion of the American commitment. This elitist exercise of raw judicial power, *this judicial imperialism,* is generically different from judicial activism.

It is of the very fabric of American constitutional jurisprudence that there are certain *human* rights, rights reflective of value judgments on the worth of human beings, which must ever remain beyond the absolute control of both state and majority lest we become a despotism in the guise of a democracy.[2] The judge, more so than others, must consciously subordinate his own predilections to these moral imperatives of liberty. This is what I take the role of law to mean.

It was not always so in the jurisprudence of our legal forebears. Bacon thought that the Throne was the law and the judge was the lion *under the Throne.* Today's judicial imperialist make the law the lion *under the Bench.* Justice Frankfurter once reminded his brethren: "As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that this is 'a constitution we are expounding,' so that it should not be imprisoned in . . . the Eighteenth Century." But, he went on, "the judicial judgement . . . must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment."[3] In the context of Justice Frankfurter's admonition, both judicial restraint and judicial activism may be consistent with the rule of law so long as deference is given to the essential values of the American Commitment. Judicial imperialism expunges these values. The idiosyncratic morality of the judge becomes law; the judge becomes the law; the rule of law gives way to the rule of man.

As we contemplate the peril of imperialism let us not be seduced by the sweet smell of social concern that sometimes surrounds it.[4] That judicial fiat may seem the shortest route to a cure for a social ill does not justify hacking a destructive path through essential values. Of this the Supreme Court itself has said:

> [O]ne might fairly say of the Bill of Rights in general, and the Due Process

> Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy . . . [5]

These days one of the more fragile values of a vulnerable citizenry is the value of innocent and helpless, albeit burdensome (to others), human life. On March 10, 1975, before a Committee of the United States Senate, holding hearings on various proposals for a constitutional amendment to protect the lives of the unborn, Harriet Pilpel, a lawyer and a Vice-Chairman of the American Civil Liberties Union, urged in opposition to an amendment: "Nowhere in our Constitution or in any amendment adopted to date is there any reference to, or guarantee of a 'right to life' for anyone. . . . Neither [the Fifth nor the Fourteenth] Amendment confers any 'right to life.'"[6]

It is a bit shocking to learn that one has no constitutionally protected right to live. And did we ever expect to hear a ranking civil libertarian urge that the Constitution imperiously confers, rather than dutifully advocates, those fundamental rights which are, in the words of the Supreme Court, "of the very essence of a scheme of ordered liberty?" All this is the more startling when we stop to consider that the vehicle for depriving unborn children of life — the "right to privacy" — is nowhere to be found in the Constitution. Indeed, it is the evolution of the right of privacy and its anti-life usages which provide the prime example of judicial imperialism.

II. Privacy and Abortion: Imperialism in Action

The Constitution, it has been said, incorporates the basic values of the Declaration of Independence.[7] The principal constitutional guarantee of our fundamental rights against impermissible state invasion is the Fourteenth Amendment which commands, ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In the 1937 case of *Palko v. Connecticut,* the Supreme Court identified the rights protected by the Due Process Clause as those which are ". . . implicit in the concept of ordered liberty . . . principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . [so that] neither liberty nor justice would exist if they were sacrified."[8]

These generalities, you will observe, are really guideposts of the rights *cum* values which are the American commitment. These, in turn, are nowhere comprehensively catalogued. Some are familiar

to us. "One's right to life . . . to free speech, a free press, freedom of worship and assembly" were listed, among others, in a 1943 Supreme Court decision.[9] But they cannot be finally defined, lest we imprudently confine our liberty and devalue ourselves as human beings.

With his eyes fixed on the guideposts, a judge may discover a violation of a fundamental right in a situation where it was never thought of before. Experience may have taught that the moral imperatives of liberty require it. This is the burden of Justice Frankfurter's admonition which I quoted earlier. And it is what Justice Frankfurter did in the 1952 decision of *Rochin v. California,* a case which may only be on the periphery of privacy, but is helpful to our understanding of what was to come after.

Police entered the home of a narcotics suspect, forced their way into his room, seized him, took him to a hospital, had his stomach pumped, recovered morphine capsules, and charged him with illegal possession of morphine. The capsules were put in evidence at trial, and he was convicted. Resorting to the *Palko* explication of Due Process, Justice Frankfurter found that ". . . this is conduct that shocks the conscience . . . They are methods too close to the rack and the screw . . ."[10] and reversed the conviction. Other methods of obtaining evidence might be consistent with rights implicit in the concept of ordered liberty; this was not.

Palko v. Connecticut and *Rochin v. California* are the touchstones for the 1965 decision in *Griswold v. Connecticut,* the first successful "privacy" case in the Supreme Court. In striking down a state statute which forbade the use of contraceptives in the marital relationship, the Court applied the *Palko* concept of fundamental values and the *Rochin* implementation of the concept, even though the Court relied on other judicial precedents and different constitutional provisions.[11]

The Court held: "the present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees . . . and it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand . . ."[12]

The restricted aegis of this zone of privacy is apparent in the limitation of the holding to laws forbidding the conjugal use of contraceptives, as distinct from those regulating manufacture and sale. In language reminiscent of that used by Justice Frankfurter in *Rochin* the Court asked: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of

contraceptives? The very idea is repulsive to the notions of privacy surrounding the marital relationship."[13]

The *Griswold* Court did not proclaim a generalized right of privacy; it posited a discrete "zone of privacy." And it did so to protect against a particular, threatened, "bedroom" intrusion into the uniquely intimate sexual relationship of husband and wife — an intrusion as repulsive, in the eyes of the Court, as the stomach-pumping in *Rochin* and equally as inconsistent with the notion of fundamental rights advanced in *Palko.* So viewed, the *Griswold* decision is within the framework of a concept of enduring rights *cum* values and consistent with the American commitment to liberty. One might label it as activist; one might disagree with the outcome. But is is not judicial imperialism.

The first step on the road to judicial imperialism is judicial arbitrariness. A revolutionary rule of law is announced without any truly justifying rationale — sometimes in the most off-hand way, as though it were *a priori.* In this manner, the Supreme Court in 1972 gratuitously created an amorphous and, as it turns out, law-less "right of privacy." *Eisenstadt v. Baird* struck down a Massachusetts law which, among other provisions, forbade the distribution of contraceptives to unmarried persons. The case was decided on technical Equal Protection grounds. But during the course of the opinion the Court, in a statement which is not part of the rationale of the case (*obiter dictum* in lawyers' terminology), declared: "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[14] In support, the Court cited only *Griswold.*

But notice how the discrete marital zone of privacy in *Griswold* has become a catholic individual "right of privacy" in *Eisenstadt;* notice that the right is uncontoured ("If the right of privacy means anything . . .)"[15]; notice that it encompasses "the decision whether to bear or beget a child." Do "bear" and "beget" have different meanings? Does one refer to abortion and the other to contraception? Is abortion being made a constitutional right by fiat in a contraception case in which the question was never argued? Is abortion to be the *individual* right of the woman, exclusive of the consent of her husband, the father of their unborn child? All these questions were to be answered in the affirmative by the Court in later decisions. The first step toward judicial imperialism was taken in *Eisenstadt.* The Court arbitrarily, and for its own purposes,

created a right so vague that its content depends on the idiosyncratic predilections of judges.

Lest you conclude that I am opposed to notions of privacy on a constitutional plane, let me acknowledge parenthetically that the concept of liberty spawns intuitions of decency which rebel against invasions like the actual stomach-pumping in *Rochin* and the apprehended bedroom intrusion in *Griswold.* There is about liberty a bit of the *laissez faire,* an aura of being "let alone" by government to the maximum degree consonant with ordered liberty.[16] Then too a fundamental right unearthed by a court in one case may, by logic, analogy and the mandates of liberty, be found applicable in a later case involving entirely different facts. All this is admitted. What I object to is the unstudied creation of an abstract new right, without reference to the facts and circumstances of the case before the Court, and possibly reaching into situations where the exercise of the right may destroy fundamental values of first priority in the scheme of ordered liberty. Essential rights are then at the absolute disposal of judicial socio-moral biases. Justice Black warned, "'Privacy' is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things . . ."[17]

Justice Black was proved both sage and seer in 1973 when, in *Roe v. Wade,* the Supreme Court interpreted privacy as a constitutional ban against protection of the lives of unborn children. The trappings of judicial imperialism were on blatant display. The Court turned its face against the facts, the law, and the fundamental values implicit in the American commitment.

The first task of a Court is to resolve the disputed issues of fact in the case before it. Fact-finding is really truth-finding, and a lawyer must never become so zealous an advocate that he abandons the quest for truth. In *Wade,* the Supreme Court did not seek the truth. The Court agreed that if the Fourteenth Amendment personhood of the unborn child were established, "the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment."[18] Hence, the approach of the Court ought to have been to decide: (a) whether the unborn child, as a matter of fact, is a live human being; (b) whether all live human beings are "persons" within the Fourteenth Amendment; and (c) whether, in the light of the answers to (a) and (b), the state has a compelling interest in the protection of the unborn child, or to put it another way, whether there are any other interests of the state which would justify denying to the unborn child the law's protection of his life. Instead, the Court reversed the inquiry, deciding first that

the right of privacy includes a right to abort, then that the unborn child is not a person within the meaning of the Fourteenth Amendment, and finally, refusing, or purportedly refusing, to resolve the factual question of whether an abortion kills a live human being. In effect, the Court raised a presumption against the constitutional personality of unborn children and then made it irrebuttable by refusing to decide the basic factual issue of prenatal humanbeingness.

In an attempt to vindicate its default, the Court observed that ". . . [w]hen 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." The Court then concluded that ". . . we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."[19] But what was at stake for the unborn child was not a "theory" of life; it was the fact of life. The lack of consensus, to which the Court referred, is not a lack of consensus on the fact of existence of human life at all stages of gestation — that is established beyond cavil by medical science — but on conflicting theories of the value of a human life already in existence. That value judgment was made over one hundred years ago, on a constitutional level and as a matter of binding law, by the framers of the Fourteenth Amendment. Indeed, eighteen months after *Wade,* in an *obiter dictum* directly on the mark of the Fourteenth Amendment jurisprudence of fundamental rights, the Supreme Court would extol "our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty," and one which requires ". . . recognition by this Court [of protection of life] as a basic of our constitutional system."[20]

If the Court refused to seek out the facts in *Wade,* it most certainly did go on an Alice-in-Wonderland quest for a right to abort. Citing a number of prior decisions, none of which, except for *Eisenstadt,* has expounded a universal right of privacy, the Court decreed such a right, which by nonsequiturial ukase, was ordained to include a right to abort. Indeed, the absence of precedent forced the *Wade* Court into some inexcusable bootstrapping. Justice Blackmun maintained that the Court had "inferentially" held that unborn children are not Fourteenth Amendment persons in *United States v. Vuitch,* decided two years before *Wade.* In *Vuitch,* the Court had found that the District of Columbia abortion statute (which permitted abortion only to preserve the life or health of the mother) was not unconstitutionally vague, particularly noting that ". . . vagueness . . . is the only issue we reach here."[21] How could the Court in

Vuitch have decided "inferentially" an issue — the Fourteenth Amendment personhood of the unborn — which it never reached? Or if we accept decision-by-inference, must we not conclude that *Vuitch* by upholding the constitutionality of a facially restrictive abortion law, inferently established that there is no broad "right of privacy" to abort (even though the issue was not reached)? Or do we finally admit that this is all getting absurd? That no inference, one way or the other may be drawn from *Vuitch vis a vis* the issues in *Wade*? The answer seems obvious. As Justice Brennan wrote in another life-or-death context, ". . .[t]he constitutionality of death itself . . . is before this Court for the first time; we cannot avoid the question by recalling past cases, that never directly considered it."[22]

The death knell of the unborn rang in a new jurisprudence, a jurisprudence of "privacy" where the "capability of meaningful life outside the mother's womb," the establishment of some sort of an elitist "consensus" on which among us are "human," and a consistency with "the demands of the profound problems of the present day"[23] determine whether the law will protect the lives of a class whose continued existence may mean "a distressful life and future"[24] for others. The same judge who opined in *Wade* that "the fetus at most represents only the potentiality of life"[25] had a year earlier lamented, in the "environmental context" of the destruction of trees and animals, "any man's death diminishes me, because I am involved in Mankinde."[26] In the new jurisprudence logging is a sin; abortion is a solution.

Consider too how the jurisprudence of privacy becomes putty in the judge's hands. Professor Paul Bender of the University of Pennsylvania, a defender of the new right of privacy, admits that the privacy cases ". . . are indeed remarkably free of any generally valid rationalizing principle . . . [the Court's] reasons will often be glaringly inadequate, even contradictory. Many are, in truth, after-the-fact justifications." As he admits that the Court does "stumble about," so he leaves us with cold comfort when he tells us; "the Court can, I suspect, do better in the long run than merely to reflect the values of the justices on an ad hoc basis."[27]

What Professor Bender advocates, whether he realizes it or not, is an egomoralistic, elitist, imperial federal judiciary, unencumbered by notions of rights essential to liberty and at war with the rule of law.

The Supreme Court carried the war to the family in 1976 in *Planned Parenthood v. Danforth* when it struck down a Missouri statute which required spousal consent (in the case of a married

woman) and parental consent (in the case of an unmarried minor) for abortions not necessary to preserve the life of the mother.

Consider now the ways of judicial imperialism:

First: The *Danforth* Court observed that in *Wade,* ". . . we specifically reserve decision on the question whether a requirement for consent by the father of the fetus or by the parents, or a parent of an unmarried minor, may be constitutionally imposed." The *Danforth* Court continued: "Clearly, since the state cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision [*i.e.,* the holding in *Wade*], The State cannot delegate authority to any particular person, even the spouse, to prevent abortion during the same period."[28] The Court tells us, in effect, that the question it had specifically reserved in *Wade* for future decision, and which was not at issue in *Wade,* was "clearly" decided in *Wade.* Bootstrap reasoning makes bad law.

Second: You will recall the gratutious *obiter dictum* in the *Eisenstadt* contraception case to the effect that the right of privacy encompasses "the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." The *Danforth* Court cited this judicial superfluity for the proposition that a married woman has the individual right, exclusive of her husband's wishes, to abort their child. The vague, casual, unsupported, irrelevant throw-in in *Eisenstadt re* contraception was seized upon in *Danforth* as an *a priori* principle *re* abortion. More bootstrapping!

Third: Griswold was one of the cases relied upon in *Wade* to create a right of privacy to abort. In *Griswold,* the Court had recognized a zone of marital privacy "older than the Bill of Rights — older than our political parties, older than our school system." Marriage, the court instructed, ". . . is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commerical or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."[29] Quite clearly it was the transcendence of this intimate, bilateral unity and loyalty between husband and wife which persuaded the court to erect a barrier of privacy. The rights protected by the barrier are older than our constitution. The constitution does not confer them; it protects them as pre-existing essentials of liberty.

But in *Danforth* we are told by the Court that the state does not have the constitutional authority ". . . to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right."[30] Rights attendant upon the marital relationship are no longer older than the constitution; they are "given" by the State — or, more accurately, by the imperial judiciary. The unity and bilateral loyalty of marriage is made over into an adversary relationship, more martial than marital. "Justice Blackmun and the majority," in the words of Francis Canavan, the political scientist, "ignored the family as a natural community and the basic unit of society."[31] Another fundamental value destroyed!

Fourth: The *Danforth* Court did no better when it came to the parental consent question. In a 1924 decision, *Pierce v. Society of Sisters,* the Supreme Court had extrolled ". . . the liberty of parents and guardians to direct the upbringing and education of children under their control" as a concomitant of Fourteenth Amendment liberty. "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[32] *Pierce* was another case relied on in *Wade* to create a right of privacy to abort. Yet in *Danforth,* the Court abrogated the right of parents by making the child a creature of the state. The entire discussion is in terms of whether there is "any significant state interest" in conditioning an abortion on the consent of the parent (the Court could find none). The parents' right to direct the upbringing and destiny of the child was swept out of the Constitution: "Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision [to abort]."[33] Again, a fundamental value, older than the Constitution, has been transformed into a governmental gift.

Griswold and *Pierce* were useful to the Supreme Court in striking down the anti-abortion statute in *Wade.* They were inhibitions to striking down the pro-life, pro-family abortion statute in *Danforth.* Raw judicial power worries not about such things. As Professor Bender has told us, "the values of the justices" have been the ultimate device for decision in the privacy cases. *Griswold* and *Pierce,* the underpinnings of *Wade,* were given a passing nod and then tossed on the garbage heap. *Wade,* of course, remained on a pedestal.

Such have been the overbearing, anti-life, anti-family ways of judicial imperialism. They are not the ways of the true liberal. The "privacy" of *Wade* and *Danforth* is not a shield for values essential

to ordered liberty. It is a sword in the hands of the Court — a two-edged sword which is wielded now in the service of abortion, but which may well become the mortal enemy of childbirth.

Wade, let us recall, was not the *ad hoc* creation of a private right of choice in intimate circumstances (as erroneous as that would have been); it was the aggressive application of a proselytizing jurisprudence of quality-of-life-at-all-costs, a jurisprudence which teaches that the Constitution creates and confers fundamental rights — rather than codifying and advocating values which are of the essence of liberty — all according to judicial interpretations rooted in the idosyncratic morality of individual Supreme Court justices. Building on *Wade, Danforth* canonized abortion as a succor of the commonweal and dispensed it from the usual legal restrictions such as parental consent. Further, in the companion case to *Danforth, Bellotti v. Baird,*[34] the Court suggested that it would be constitutional for a judge to make the final determination in the event that the parents of an immature minor were to object to the abortion decision. The state (the judge) may make the decision; the parents may not. The family is suspect. The child becomes the creature of the state which, in turn, is governed by the court. And burdensome babies are anathema in the quality-of-life ethic. "Unwanted" pregnancy has become, in the words of Dr. Willard Cates of H.E.W., the ". . . number two sexually transmitted condition . . . a 'venereal disease.' "[35] It may not only be unwanted pregnancy that is to be regarded as a social disease. There were thinly veiled intimations in *Wade* that the state's "compelling interest" in preventing the proliferation of defectives may permit coerced amniocentesis followed by compulsory abortion for the unfortunates who fail the test.[36] Others see abortion as a solution to overpopulation.[37] The choice to abort is protected by the right of privacy. The same may not assuredly be said of the choice to give birth.[38]

III. The 1977 Abortion Decisions: Which Way for Judicial Imperialism?

It was against this background that the Supreme Court undertook to decide the related issues of whether elective abortion may constitutionally be excluded from public general hospitals and from the pregnancy benefits in public medical assistance programs.[39]

Despite a number of unfavorable lower court decisions on point, the better arguments were on the side of the constitutionality of exclusion. It is one thing to hold that "privacy" bars a state from proscribing, or erecting barriers against, conduct which the state considers to be homicide for convenience. It is quite another to hold

that "privacy" requires the state to finance and facilitate the killing. If the former required the latter, then the existence of the right to possess pornography in the privacy of one's home, free from government interference, would mandate pornography in public libaries. And of course it does not.[40] What is more, the exclusion of pregnancy from an employer's disability insurance plan and unborn children from Aid to Families with Dependent Children had previously been held not to be invidiously discriminatory.[41] It seemed to follow that the Constitution did not mandate abortion in Medicaid or abortionists in public hospitals.

Nevertheless, there was pessimism. Judicial imperialism and its offspring, an emerging anti-child—pro-abortion public policy, might prove too much for law and logic.

Then came the bombshell. By a six to three vote, the Court decided the cases against the claim of a constitutional mandate to fund and facilitate abortion.

In *Maher v. Roe,* a Medicaid funding case, the Court perceived the issue as "whether the Constitution requires a participating state to pay for non-therapeutic abortions when it pays for childbirth."[42] Essentially, the plaintiff's claim was a denial of the equal protection of the laws. The Court held:

First: Connecticut's restriction of Medicaid funds to "medically necessary" abortions does not impinge upon any fundamental right. There is no fundamental right to public assistance. As to the right of privacy, *Wade, Danforth,* and other abortion cases are distinguishable because the statutes involved affirmatively placed obstacles in the way of the decision to abort. But these cases ". . . did not declare an unqualified 'constitutional right to abort.' . . . The Connecticut regulation . . . has imposed no restriction [upon the indigent] on access to abortion that was not already there."[43] In short, while a state, absent some compelling reason, may not interfere with the exercise of a fundamental right, neither is a state required to fund the exercise of the right.

Second: Since the restriction does not impinge on a fundamental right, the state need not show a "compelling interest" to be served by the regulation; rather the test is whether "the distinction drawn between childbirth and nontherapeutic abortion [is] 'rationally related' to a 'constitutionally permissible' purpose."[44]

Third: The constitutionally permissible purpose may be found in ". . . the state's strong interest in protecting the potential life of the fetus . . . an interest honored over the centuries. Nor can there be any question that the Connecticut regulation rationally furthers that interest." Further, "In addition to the direct interest in pro-

tecting the fetus, a state may have legitimate demographic concerns about its rate of population growth."[45]

Fourth: Since the regulation is rationally related to constitutionally permissible purposes it does not deny the equal protection of the laws to indigent women seeking nontherapeutic abortions.

Several observations are in order. The Court maintained: "Our conclusion signals no retreat from [*Wade*] or the cases applying it."[46] As a matter of law, and in the light of the way in which the Court distinguished *Wade,* this is quite true. *Wade's* awful curse is still upon us. But *Maher* does signal a change in attitude on the Court's part. No longer will abortion cases be decided by bootstrap reasoning; each claim of right will be carefully parsed.[47] At least one of the tools of judicial imperialism is no longer operative.

Maher did not hold that, as a matter of constitutional mandate, the state must provide Medicaid funds for therapeutic abortion if funds are provided for childbirth. It held that the state was not required to fund nontherapeutic abortions under any circumstances. We do know, however, that psychiatric abortions may constitutionally be excluded from both Medicaid funding and public hospitals. This is apparent in the companion case to *Maher, Poelker v. Doe,* wherein the Court upheld the constitutionality of a directive by the Mayor Poelker of St. Louis prohibiting the performance of abortions in city hospitals except "when there was a threat of grave physiological injury or death to the mother." The directive obviously excludes psychiatric harm. The Supreme Court found: "For the reasons set forth in [*Maher*], we find no constitutional violation by the City of St. Louis in electing, as a policy choice, to provide publicly financed hospital services without providing corresponding services for nontherapeutic abortions."[48]

If "therapeutic" abortion may constitutionally be defined to exclude the mother's psychiatric health, may her physical health (short of death) also be constitutionally excluded? Quite possibly. As previously noted, in *United States v. Vuitch,* it was held that the Washington, D.C. abortion statute, which permitted abortion only when "necessary for the preservation of the mother's life or health," was not unconstitutionally vague. Observing that "health" in the statute had already been interpreted to include mental health, the Supreme Court said, "We see no reason why this interpretation of the statute should not be followed. Certainly this construction accords with the general usage and modern understanding of the word 'health,' which includes psychological as well as physical well-being."[49] If one component of health (psychological) may constitutionally be excluded from "therapeutic" why not the other

(physical)? It is an intriguing speculation — which leads us to ponder whether, as a matter of constitutional mandate, Medicaid or public hospitals need underwrite *any* abortions. Only another Supreme Court decision will give us the answer.

That decision will also tell us something about the future of judicial imperialism. Assume, hypothetically, that a particular public hospital bars all except maternal lifesaving abortions while providing the full range of medical services for childbirth. The regulation is supported by a statement of policy expressing respect for the right to life of the unborn child as a live human being whose life may not be taken except for an equivalent value — the mother's life — and even then, only as a last resort. In turn, the policy statement is reflective of a resolution by the state legislature (in one form or another) supporting a constitutional amendment to protect the unborn. The hospital regulation is challenged as an unconstitutional denial of the equal protection of the laws because a threat to the mother's physical health is not a ground for abortion. A lower court must now decide whether the regulation is rationally related to the admittedly permissible purpose of "protecting the fetus."

Unless the *Maher/Poelker* rule is read to restrict "therapeutic" abortions to maternal lifesaving procedures, the court will have to inquire into the nature and quality of the state's "strong interest" in the "fetus." This means that the court, with due regard to the expressed policy underlying the regulation, will not be able to avoid making the factual determination of who and what it is that an abortion kills. Or, to put it another way: whether the "fetus," as a matter of fact, is a live human being.

Wade will be of no assistance to the court because, aside from the Supreme Court's erroneous failure to resolve that issue of fact, *Wade's* holding that "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake" obviously restricts a state from making a finding that the unborn is a live human being *only* when the rights of the pregnant woman, *i.e.*, rights of privacy, are thereby impinged upon. But the *Maher/Poelker* precedent establishes that impingement occurs only when barriers to effectuation of the abortion decision are affirmatively erected; something more than a bare refusal to fund or facilitate abortion is required. (It is obvious, from the reasoning and the language, that this portion of the *Maher* opinion necessarily applies to all abortions, not merely the nontherapeutic.) Therefore, whatever *Wade* had to say about the humanity of the

unborn will be irrelevant to the determination of that issue in our hypothetical case.

Since the issue is one of fact, the trial court will receive expert testimony on the facts of life before birth. Thus when the case reaches the Supreme Court, it will be accompanied by a factual record on that issue.

If there has truly been a change in attitude on the court, if the majority has really stepped back from judicial imperialism, if it is now willing to examine closely the facts in each abortion case as it comes before it, if it is ready to return to essential values as a basis for constitutional adjudication, then the Court will be required to answer two questions:

> 1. On the factual record before it and in the light of the well-known and undisputed facts of life before birth, is the unborn child a live human being?
>
> 2. Is the regulation rationally related to the state's interest in protecting the lives of the human beings within its borders?

It is difficult to perceive how the Supreme Court could avoid answering these questions in a decision on our hypothetical case — except only if the Court is willing to embark on a new and more blatant course of judicial imperialism. It is equally difficult to perceive how the Court could avoid speaking directly in the context of the moral imperatives of liberty, first among which is the right of the innocent to protection from aggression against their lives. Those on the Court whose concern for the poor and for disadvantaged minorities have lead them to fulminate against proponents of this right for the burdensome unborn might well consider this language from an 1820 opinion of a slave-state court:

> The taking away the life of a reasonable creature, under the King's peace, with malice aforethought, express or implied, is murder at common law. Is not the slave a reasonable creature, is he not a human being, and the meaning of this phrase reasonable creature is a human being, *for the killing a lunatic, an idiot, or even a child unborn, is murder,* as much as the killing a philosopher, and has not the slave as much reason as a lunatic, an idiot, or an *unborn child*? . . . The term, "King's peace" means the place where the crime is committed, the actual venue, and not a particular class of human beings.[50]

Which way for judicial imperialism? Time will tell.

NOTES

1. Felix Frankfurter, *Law And Politics,* 48 (1939).
2. I have discussed the rights and values of the American commitment in more detail in "Objections to an Amendment," *The Human Life Review,* vol. II, no. 4 (Fall 1976), 119.
3. *Adamson v. California,* 332 U.S. 46, 66, 68 (1974) (Frankfurter, J. concurring).

4. *E.g.*, "I am appalled at the ethical bankruptcy of those who preach a 'right to life' that means, under present social policies, a bare existence in utter misery for so many poor woman and their children."

Marshall, J. dissenting in *Beal v. Doe, Maher v. Roe, Poelker v. Doe,* 45 L.W. at 4785 (1977). "And so the cancer of poverty will continue to grow. This this a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us." Blackmun, J. dissenting in *id.,* 45 L.W. at 4787. Of course "the poorest among us" are the unborn who have hardly been treated with evenhanded justice by the court. I leave it to others to assess the moral solvency of an ethic which would war on poverty by warring on the unborn children of the poor. I would only note the obvious: The right to life is not reserved to the comfortably situated. *Vita* is *vita* even when it is not *la dolce vita.*

5. *Stanley v. Illinois,* 405 U.S. 645, 656 (1972).

6. *Abortion — Part IV,* Hearing Before the Subcommittee On Constitutional Amendments Of The Committee On The Judiciary, U.S. Senate, at 224-25 (Government Printing Office, 1976).

7. *Gulf, Colo. & S. Fe Ry. v. Ellis,* 165 U.S. 150, 160 (1897); *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 324 (1893).

8. *Palko v. Connecticut,* 302 U.S. 319, 325-28 (1937).

9. *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 638 (1943).

10. *Rochin v. California,* 342 U.S. 165, 172 (1952).

11. *Griswold* was not the first constitutional test of the Connecticut statute. A similar challenge was mounted in *Poe v. Ullman,* 367 U.S. 497 (1961), but it failed on procedural grounds. Justice Harlan, in dissent, argued for a finding of unconstitutionality and cited *Palko* and *Rochin, Id.* at 542, 544.

12. *Griswold v. Connecticut,* 381 U.S. 479, 485 (1965).

13. *Id.* at 486-87.

14. *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972).

15. Recently Justice Brennan, who wrote the *Eisenstadt* opinion, observed that "the outer limits of this aspect of privacy have not been marked by the court," *Carey v. Population Services, et. al.,* 45 L.W. 4601, 4602 (1977). Privacy has been asserted in support of such diverse claims as a right of a relative to cause removal of life support systems from a patient diagnosed as irreversibly comatose, *In re Quinlan,* 70 N.J. 10 (1976) (successful); a right of a policeman to wear long hair, *Kelley v. Johnson,* 96 S. Ct. 1440 (1976) (unsuccessful); and the right of consenting adults to engage in private homosexual acts, *Doe v. Commonwealth's Attorney,* 403 F.Supp. 1199 (E.D. Va. 1975), affirmed, 96 S. Ct. 1498 (1976) (unsuccessful). "The scope of such a right [of privacy] remains ill-defined." *Scott v. Plante,* 532 F.2d 939 (3d Cir. 1976).

16. "[A]s against Government, the right to be let alone [is] the most comprehensive of rights . . ." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). "This 'liberty' . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman,* 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

17. *Griswold v. Connecticut, supra* note 12 at 509 (Black, J. dissenting).

18. *Roe v. Wade,* 93 S. Ct. 705, 728 (1973).

19. *Id.* at 730, 731.

20. *Gertz v. Robert Welsh, Inc.,* 418 U.S. 323, 341 (1974). On the intent of the Framers of the Fourteenth Amendment, see Byrn, *supra* note 2.

21. *U.S. v. Vuitch,* 402 U.S. 62, 73 (1971).

22. *Furman v. Georgia,* 408 U.S. 238, 285 (1972) (Brennan, J., concurring). This was a death penalty case.

23. 93 S. Ct. at 732, 730, 733.

24. *Id.* at 727.

25. *Id.* at 731.

26. *Sierra Club v. Morton,* 405 U.S. 727, 760 n.2 (1972) (Blackmun, J., dissenting).

27. Paul Bender, "The Privacies of Life," *Harper's,* April, 1974 at 36.

28. *Planned Parenthood v. Danforth,* 96 S. Ct. 2831, 2841 (1976).

29. 381 U.S. at 486.

30. 96 S. Ct. at 2841.

31. Francis Canavan, "The Theory of the Danforth Case," *The Human Life Review,* vol. II, no. 4 (Fall 1976), p. 14.

32. *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925).

33. 96 S. Ct. at 2843. It has, of course, always been admitted that parental authority does not include the right to deny medical treatment to a child in circumstances of impending death or serious injury.

For instance, courts have ordered blood transfusions of unwilling pregnant women, contrary to their religious beliefs, in order to save the lives of their unborn children. See, *e.g.*, "Estate of Warner," No. 71 P. 3681 (Cir. Ct. Cook County, Ill., May 5, 1971); *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964). Aside from such extreme cases and a few statutory exceptions, the decision on medical treatment for a child has been the exclusive province of the child's parents. See generally "Report on The Medical Treatment of Minors Under New York Law," 31 The Record 694 (1976).

34. 96 S. Ct. 2857 (1976).

35. Letter, January 4, 1977, from Dr. Cates to John Mackey, Esq., The Ad Hoc Committee in Defense of Life, Inc.

36. I have examined this aspect of *Wade* in detail in "An American Tragedy: The Supreme Court on Abortion," 41 *Fordham L. Rev.* 807 (1973).

37. See the Discussion in Kayden & Karpf, "Introduction to a Symposium on Law and Population," 6 *Colum. Human Rights L. Rev.*. 272 (1974-75).

38. But *cf. Cleveland Bd of Ed. v. LaFleur*, 414 U.S. 632 (1973), holding mandatory pregnancy leaves for public school teachers unconstitutional.

39. A large majority of lower court cases had held the exclusions unconditional. A campaign had also been mounted against private hospitals, even those with religious or other moral scruples against abortion, (see *e.g.*, the articles in 2 *Family Planning/Population Reporter* 146 [1973]; 4 *Family Planning/Population Reporter* 50 [1975]) but without notable success, until *Bridgeton Hosp. Assoc. v. Doe*, 71 N.J. 478 (1976) in which the Supreme Court of New Jersey held that nonsectarian private general hospitals may not bar elective abortion.

40. This argument was advanced in the *Amicus Curiae* Brief of the Americans United For Life in *Poelker v. Doe, infra* note 42.

41. *General Elec. Co. v. Gilbert*, 97 S. Ct. 401 (1976); *Alcala v. Burns*, 545 F.2d 1101 (8th Cir. 1976).

42. *Maher v. Roe*, 45 L.W. 4787, 4789 (1977). *Beale v. Doe*, 45 L.W. 4781 (1977), a companion case, was decided on statutory grounds. It is obviously significant but since this article is concerned primarily with constitutional issues, neither *Beale* nor the provisions of the Social Security Act will be discussed.

43. 45 L.W. at 4790.

44. *Id.* at 4791.

45. *Id.* at 4791, 4791 n.11.

46. *Id.* at 4790.

47. The *Maher* majority specifically rejected Justice Brennan's attempt to use broad language in a contraceptive decision and a hypothetical conclusion in a prior Medicaid case (decided on procedural grounds and possibly concurred in by only four justices) as controlling principles of law. See *Id.* at 4791, n.10.

48. *Poelker v. Doe*, 45 L.W. 4794, 4795 (1977). The facts, as elaborated by the Court of Appeals, clearly indicate that the Mayor's directive was understood to apply only to grave physical conditions. See *Doe v. Poelker*, 515 F.2d 541, 543 (8th Cir. 1975). Since *Maher* controls *Poelker* and since psychiatric abortions were constitutionally excluded from the St. Louis hospital, it is not significant, from the point of view of what the constitution requires, that psychiatric abortions were included in the Connecticut Medicaid regulation.

49. *United States v. Vuitch*, 402 U.S. 62, 72 (1971).

50. *State v. Jones*, 2 Miss. 39, 40 (Walker 83, 85) (1820) (Emphasis added).

Simple-Minded Separationism

Francis Canavan

Neither the Catholics, nor the members of any other denomination, have a right to impose their theology upon a free people through amendment of the supreme law of the land. The Constitution flatly forbids any religious test as a qualification for public office; it flatly forbids any law respecting an establishment of religion. To write the "Catholic position against abortion" into the Constitution would be profoundly wrong.

JAMES JACKSON KILPATRICK wrote those words in a column issued by the Washington Star Syndicate on September 18, 1976. The column was reprinted in the Winter 1977 number of this *Review,* along with several criticisms of it. It is not my intention to engage in further criticism of Mr. Kilpatrick. I only want to use his words as a typical statement of a position that seems to me to be almost perversely simple-minded.

I will take Mr. Kilpatrick's words as an expression of what we may call the "separationist" position. At first glance it appears that the separationists are concerned only to separate Church and State. But if one reflects on the matter, it becomes apparent that they want to separate religion and politics. On still further reflection, one sees that what they really want to separate is law and traditional Judeo-Christian morality.

That neither Catholics nor the members of any other denomination have a right to impose their theology upon a free people is an appealing proposition. Few Americans, including Catholics, would disagree with it. Yet everything depends on what we include in the term "theology." If we mean, for example, the doctrine of the Trinity, I am not aware that anyone in this country expects Congress to establish that as the official belief of the United States. But one might ask what is the status of the belief that there is one God who created the world and gave man his basic human rights. Is that, too, to be rejected as "theology"?

After all, the United States first asserted its existence as an independent nation in a document that stated as a self-evident truth that all men are created equal and are endowed by the Creator with certain inalienable rights. It is true that Thomas Jefferson, who wrote those words, was an eighteenth-century Deist who did not believe in revealed religion. But he did believe in what his age called

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"natural religion," i.e., certain fundamental truths about God and man which were supposed to be attainable through the exercise of natural reason alone. That is to say, he held a natural theology and he wrote it into the Declaration of Independence because it was, as he later explained, one of "the harmonizing sentiments of the day." Do we still accept that belief because it is "natural" or do we reject it because it is none the less "theology"?

At this point the sophisticated reader may point out that we have come a long way since Jefferson's day. Now that the U.S. Supreme Court has had time to reflect on the meaning of the First Amendment — adopted subsequently to the Declaration — we see that the United States is committed to no theology, natural or revealed. We are an officially agnostic nation, neither for God nor against Him. We leave all beliefs about the Deity, the origin of the world and the source of human rights to the private judgment of individual citizens. The nation, as a nation, believes in nothing.

But to say that, of course, is to go too far. We have not completely abandoned Jefferson. As the Carter Administration so often reminds us, we believe in human rights and intend to promote them, not only at home, but throughout the world. It follows that we have some conception of the rights that belong to human beings simply because they are human. We cannot be talking only about the rights guaranteed by the U.S. Constitution, because it has no legal force outside our domain and is not binding on foreign governments. We must refer to rights that belong to man as man. That is to say, we hold a belief or a doctrine about the nature and content of human rights. We recognize some claims of men on their fellow men as valid and we declare that some things that men in fact do to their fellow men are violations of their human rights. But such a doctrine falls within the scope of what is commonly called morality. We have, at least insofar as human rights are concerned, a national moral philosophy.

As between, let us say, the beliefs of the late Martin Luther King and those of the late Adolf Hitler, we are not officially agnostic. It is only when it comes to asserting some intelligible foundation for our moral convictions that we feel constrained to say nothing, because anything we might say would be "theology."

Yet we do have beliefs about human rights, and not merely because Jimmy Carter tells us so. Long before he became President or was even heard of outside of the State of Georgia, we were busily enacting those beliefs into State legislation, Acts of Congress and decisions of the Supreme Court. But where did we get those beliefs? No doubt from the harmonizing sentiments of our day — from those

ideas whose time had come — from the propositions about human rights on which secularists and "religionists" of all varieties (or at least the more enlightened among them) could agree. Clergymen, it was understood, were not imposing their theology on a free people when they marched at Selma.

There will, in fact, be little talk about "imposing" theology as long as there is consensus among those whose opinions are judged to matter on the immediate objectives of public policy. It is only when there is disagreement among the secularists and the religionists (or some of them) that we hear it proclaimed that no one has the right to impose his theology on those who do not share it. Such is currently the case in regard to abortion. It is clearly a human-rights issue. At any rate, that is how both sides see it, since they assert either that a woman has a *right* to have an abortion or that an unborn child has a *right* to life. But now those who assert the child's right to life are charged with being out of order because they base their belief in that right on a theological foundation. Their belief in the child's right is in fact a moral judgment, neither more nor less so than the belief in a woman's right to an abortion. But it is said to be contaminated by its association with theology.

But if we rule out of the public forum those moral beliefs that have a theological foundation, clearly we cannot confine our objection to the abortion issue. That is why the question of the relationship between law and morality cannot be reduced to one of separating Church and State. Separation of Church and State is a handy stick with which to beat one's opponents when the moral beliefs of Catholics are involved. Whatever people may think of the Catholic Church, they do not doubt that it is a church. Indeed, they often believe that it is the Church above all others from which the First Amendment separates the State. Yet even the most individualistic of Protestants, who belongs to no church and takes his moral beliefs from the Bible as understood by his private judgment alone, holds them as theological beliefs. But if the First Amendment rules Catholic moral beliefs out of politics, on the ground that they are theological, it must rule out all moral beliefs that are grounded in a theology.

For all practical purposes, in the United States that means the entire set of moral principles handed down to us by the Judeo-Christian tradition. The only religions whose members are present in this country in significant numbers are all based, in one way or another, on the Bible. However much Protestants, Catholics and Jews differ with each other or within the same denomination, it remains a safe general statement that all the major religions of this

country accept the Bible as God's revealed word and the Ten Commandments as His revealed law. If the belief that abortion is morally wrong cannot be made the basis of public law and policy because it is a theological belief, the same has to be said of the belief in the immorality of murder, theft, adultery, slander and every other practice described by the Bible as sinful. For those who accept a biblical religion, they are all theological beliefs. It is difficult — I would say impossible — for a man who believes in a personal God to separate his moral principles from his beliefs about God: they form a single, coherent whole.

Believers in God may believe that murder is wrong because God says: "Thou shalt not kill." Or they may believe, in the tradition of natural moral law, that God forbids murder because it is wrong in itself. But to hold the latter view is only to maintain that God, by His act of creation, so made human beings that murder is against the law of their nature, which is of course His law, since He made them. Either way, these believers do not have a morality that is independent of or detachable from what they believe about God.

This is so even if we admit, as I for one would do, that mankind can learn moral lessons from experience and can make progress in the understanding of moral principles. The long and very slow growth of moral revulsion against slavery is one example. But when the conclusion is finally arrived at that slavery or some other practice is morally wrong, those who believe in God incorporate the conclusion, so to speak, into their religion. They see the practice not merely as immoral but as contrary to the will of God. In a theistic view of the world, there are no moral judgments that are simply unrelated to God's will for men.

This fact, it seems to me, poses something of a dilemma for the separationists. If, in their zeal to separate Church and State, they insist on separating religiously-held beliefs from politics, they inevitably end by separating the moral convictions of a large number of citizens from any influence on the laws of the land. From their point of view, atheists, agnostics or any other persons who frame a morality on a strictly non-theistic basis may enact into law their judgments about the moral permissibility or nonpermissibility of not only abortion but murder, theft, rape and a host of other actions. But those whose morality has a theistic basis are not allowed to do this. As private persons, of course, they may believe whatever they wish. But as citizens taking part in the political process, they must set aside their moral beliefs because these are rooted in and inseparable from their theological beliefs. If they cannot set them aside, they must shut up and let the secularists make the laws.

Some separationists, no doubt, would welcome this conclusion. But those among them who are not also crusading secularists ought to find it embarrassing to admit that what they really want is to disenfranchise a multitude of their fellow citizens. That would be tantamount to saying that the First Amendment, in disestablishing religion, established atheism as the official belief of the United States.

One way out of this dilemma would be to deny that there is any relation between law and any morality at all, whether theistic or non-theistic. No one, on whatever ground he bases his moral convictions, should seek to inject them into the civil or the criminal law. Law, it would be explained, does not enact moral judgments of any kind. It merely lays down those rules of conduct that experience has shown us to be necessary or useful for human beings to live together in the same society. The law will forbid murder, theft, libel, nonperformance of contracts and whatever else it prohibits, but not because these actions are morally wrong; it is only because they are incompatible with social life. Private persons and private associations such as churches may form their own moral judgments on these actions. But they may not strive to give those judgments the force of law.

But this position seems to eliminate any distinction between just and unjust laws. If there is no standard of justice antecedent to and superior to the laws made by the state, then all laws are just by the mere fact that the state has made them. If this conclusion is unacceptable, then we must consider the alternatives to it. One is that justice is an objectively valid moral principle, superior to any human will, even to that of the state. But, if it is a moral principle, it follows that we cannot appeal to a standard of justice superior to law without demanding that law be based on morality. Another possibility is that justice is indeed a standard superior to any particular law made by the state, but it is not a moral principle. It is only a dictate of enlightened self-interest which tells us that in the long run we cannot hope to secure legal rights for ourselves without guaranteeing them for all human beings.

I touch here on one of the oldest issues in Western legal and political theory, one that has been argued at least since Plato's *Republic:* What is justice? Is it derived from an objective moral order? Or is it at bottom only a convention among human beings, an agreement of convenience by which I promise you and all other persons that I will not do to you what I don't want you to do to me, provided that you will reciprocate? I cannot hope to resolve here an issue that has engaged the attention of our greatest philosophers

but on which they have not arrived at anything like unanimous agreement. But I can make a few remarks about it.

First, those who choose to take the stance of holding justice to be merely conventional should at least maintain that stance consistently. They should not sneak in through the back door the conception of justice as a moral principle that they threw out through the front door. They should never use language that smacks of morality or allow themselves an appeal to men's moral sense of justice. If justice means nothing more than enlightened self-interest, then let them make it constantly clear that that is all they are talking about.

Secondly, enlightened self-interest did not prevent the Supreme Court from undefining the unborn child as a person and a subject of the right to life. There is little ground for presuming that enlightened self-interest will suffice to keep a future generation, or even this generation, from undefining the humanity of the senile, the terminally ill, the criminally insane or other kinds of socially useless and burdensome people. More generally, it seems overly optimistic to expect Americans to respect each other's life, liberty and property for motives of self-interest alone. It has been liberalism's classical faith that rational enlightenment would be enough to show men their true interests and thus to persuade them to live by the conventions of impartial justice. But the evidence before our eyes justifies a certain skepticism about that faith.

Furthermore, even the liberals themselves do not consistently hold to their faith in the power of self-interest. If one attends to the terms in which issues involving real or alleged human rights are argued, one notices that all parties to the controversy debate them as moral issues. Secular liberals in particular regularly denounce what they regard as injustices in accents of moral indignation that suggest that they see something more at stake than self-interest, however enlightened. Even those who tell us that we must not impose our morality on others insist on adding that we have no right to do so.

Listen, for example, to the lady who tells us that we may not legislate about abortion on the basis of moral or religious beliefs. She also tells us, in the same breath, that to do so would violate a woman's right to control her own body. But what is the nature of that right? Is it a merely legal right that the Constitution or statute law happens to protect? Or is it a right that the Constitution and the law *ought* to protect because it is a valid moral claim of every woman on society? The lady's tone of voice clearly implies the latter. She cannot help being moralistic while denouncing the injection of morality into law.

The same lapse into moral argument also appears, to take another example, in an editorial in the New York *Times* for June 13, 1977. The editorial castigates the Carter Administration because "it has included language in an appropriation bill for the Departments of Labor and Health, Education and Welfare that would prohibit the use of any of that money for abortions." The *Times* adds: "The principal effect would be to ban Medicaid abortions for the poor."

The *Times'* first objection to the ban is that it is probably unconstitutional. Here the *Times* adopts and makes its own the reasoning of a Federal district court judge who found a similar provision unconstitutional a year earlier, on two grounds. One was that the provision made "an irrational distinction between groups of pregnant women; Medicaid could pay for pre-natal care and births, but not for abortions."

Now, to many minds the distinction between giving birth to a child and aborting it does not seem at all irrational as a basis for public law. We must therefore ask on what ground the judge and the *Times* find it irrational. They must mean that giving birth and aborting are and ought to be legally equivalent. Yet actions which result, in the one instance, in the birth of a live baby and, in the other, in the death of an aborted one are not the same in their physical effects. The meaning, then, must be that the law ought to be indifferent to the life or death of the child because the controlling value, in the eyes of the law, has to be the mother's freedom to decide whether she wants the child. But to say that is to assert the superiority of one human value (the mother's freedom) over another (the child's life). But merely to make that assertion requires an act of moral judgment. The *Times,* in short, is proposing its own morality as the basis of public law and policy.

There is, however, a possible answer to this criticism. It is implicit in the *Times'* explanation of the judge's second reason for finding the ban on public spending for abortions unconstitutional. This is that "he perceived an attempt to enact one view in the continuing debate about when life actually begins, in apparent violation of the First Amendment." Lest there be any doubt about what that means, the *Times* explains: "The legislative history makes clear that the prohibition is based upon the Roman Catholic view that life begins at the moment of conception." Hence the answer to the criticism, if made explicit, would run that the *Times* is not proposing its own morality as the basis of public policy. It is only asking that the government be neutral as between competing views of morality.

But this is sophistry. First, it is confusing the issue to make it a question of "when life begins." Life begins at the beginning and that

is, if not the moment of conception, then at the latest the moment of implantation of a fertilized ovum in the womb. From that moment on there is a steady, unbroken process of growth and development. But this process is precisely what distinguishes living from non-living beings. It is also, of course, precisely the reason for abortion: something is alive in the womb; left to itself it will grow into a child if it is not one already; and so it is necessary to get rid of it in time.

Secondly, it is a further piece of obfuscation to turn a view on when life begins into a theological dogma by identifying it as Roman Catholic. That Roman Catholics hold that view is irrelevant. When life begins is in itself a pre-theological and pre-moral question which can only have a pre-theological and pre-moral answer, whether it be a scientific or merely a common-sense answer. Given the pre-moral answer to the question when life begins, a church or, for that matter, any individual can go on to draw the moral conclusion that it ought to be protected. But the determination that life has begun is not a moral judgment, still less a theological one, and does not become one by the mere fact that it furnishes the premise of a moral conclusion. The same distinction must be made in regard to the end of life in death. That it is permissible to remove vital organs from a human body immediately after death, but not before, for purposes of transplantation is a moral judgment. But the moment when death occurs is the object of a medical judgment about a matter of fact. Similarly, to hold that the deliberate and unprovoked killing of an adult human being is murder and is morally wrong is a moral judgment. But the judgment that the one who is killed is in fact a human being is a pre-moral judgment. (To avoid confusion, let me explain: that we ordinarily have no trouble in recognizing the victim of a murder as a human being does not mean that we make no judgment about that fact, but only that we make it spontaneously.)

Perhaps, then, we should refine the question. It is not really when life begins, but when *human* life begins. But even this is the wrong way of stating the question. An embryo that has a human father and is growing in the womb of a human mother is clearly within the human species and no other species. At no stage is it an acorn on the way to becoming an oak or an unborn kitten striving to become a cat. The life we are dealing with is a human life at an early stage of its development. The real question, then, is at what stage does this living and growing embryo become a human being in the full sense, i.e., a person and the subject of rights. It is the answer to this question that unavoidably involves moral judgments, whichever way one answers it.

To say that an embryonic human life, even if it is not yet a person,

is still a value that the law can and should protect is a moral judgment. To say the opposite and hold that human life at the pre-person stage is of so little worth that it may be destroyed at the mother's discretion is also a moral judgment. To hold that, if there is doubt about whether an embryo is a person, the doubt must be resolved in favor of the living being in the womb who may be a person, is a moral judgment. To hold the opposite and conclude, as the U.S. Supreme Court did in *Roe v. Wade,* that the doubt must be resolved against the living being in the womb because it may not be a person, is also a moral judgment. On whichever side one comes down, one is making moral judgments.

There is no avoiding a judgment about the morality of taking what is certainly a life, certainly a human life and at least possibly the life of a person. Both sides agree on the underlying moral premise that, if it is a person, its life must be protected. That is why pro-abortionists think it so important to undefine the embryo, or fetus, or unborn child — call it what you will — as a person. The immediate point, however, is that both sides in the controversy are necessarily involved in making moral judgments, because they do not want to proclaim themselves as baldly and consistently amoral.

The *Times* itself gives evidence of this by saying: "So the real question is whether poor women will obtain safe abortions or whether they will be forced to choose between back alley butchers and the birth of children they do not want or cannot afford." In so stating the question the *Times* is clearly defining what it regards as a moral issue. It is not enough to reply that to force women to this choice would be unconstitutional, because then we could ask: Why not change the Constitution by amendment? The words of the *Times* quoted above indicate what the answer would be: Because it would be immoral and even cruel to do so.

As a matter of fact, one week after the *Times* published the editorial that we are discussing here, the U.S. Supreme Court ruled that neither the Constitution nor Federal law required States to spend Medicaid funds for elective abortions. Two days later, on June 22, the *Times* characterized opposition to public funding of abortions as "immoral gibberish" and pronounced that the right of a woman who can afford it to have an abortion "belongs — in true conscience — to every woman, and especially to the poor."

The moral philosophy in the light of which poor women's right to safe abortions is judged to be a higher value than saving unborn lives is well known and has a name: utilitarianism. The *Times*, in effect, proposes that its secular utilitarianism should be accepted over competing moral philosophies as the only legitimate basis of law.

It is not my purpose here to refute utilitarianism, still less to question the *Times'* right to advocate it. I only want to point out that a legal and political issue such as abortion — or any other issue involving basic human values — is also and inescapably a moral issue, and in fact is at least implicitly recognized as such by all parties to the controversy over it. It is disingenuous for some of them to argue, for reasons of tactical advantage, that only their opponents are injecting a moral belief into the controversy. Would we, for example, accept from either side in the debate over capital punishment the argument that it is not a moral issue at all and that the people on the other side, whether they be defenders or opponents of capital punishment, are trying to "impose their morality"? I think not, because we recognize that capital punishment, the taking of a human life, requires moral justification, and that therefore we are forced to ask whether such justification is available. But this is to recognize that nations, like individuals, sometimes face genuine moral issues and must give what they regard as moral answers to them.

We may, and we do, dispute among ourselves about what the right moral answers are. But that only points up the need for serious moral debate; it does not obviate it. We cannot escape the necessity of making public moral choices. Nor can we always refuse to make them because they inevitably impose the moral beliefs of some people on others. Our legal ban on polygamy, to cite but one example, does just that. But we are not about to repeal it for that reason — and any proposal to do so would run head-on into the opposition of the women's liberation movement. A woman's freedom of choice would turn out to have limits, even for the daughters of liberty.

In conclusion, since it is very easy to be misunderstood, I must make an effort to state more exactly what I mean and what I do not mean. I do *not* mean any of the following: 1) That law is identical with morality; 2) that legal and political questions can be totally reduced to moral questions; 3) That every moral norm can or ought to be made a legal norm enforced by legal sanctions; 4) That every group in the country that has a conception of morality — and that all have one, including emphatically the American Civil Liberties Union — should strive to have it translated in its entirety into law; 5) That the Ten Commandments should be enacted into law for the reason that God has revealed them in the Bible or that a church teaches them. The relationship between law and morality is too complicated for any of the above propositions to be acceptable.

But I do mean the following: 1) That the most important legal questions — and, in some ultimate sense, probably all legal questions

— have a moral dimension and involve moral issues; 2) That therefore moral views on what the law ought to be cannot be excluded from public debate merely because they are moral views; 3) That no moral view can be excluded from public debate merely and solely because it is held as a theological conviction or because it is taught by a church.

Framing laws for a pluralistic and democratic society is a difficult task. Determining the relationship between law and morality in such a society is one of the more difficult parts of the task. But we shall have made at least a beginning if we drop the simple-minded pretense that the First Amendment and the separation of Church and State have already done that part of the job for us. We have to do it ourselves as moral agents who are responsible for the moral quality of our laws.

Abortion: Reflections on a Protracted Debate

Ian A. Hunter

ALLOW ME TO nail my colours to the mast. I am not a Roman Catholic. I can envisage circumstances in which abortion seems to me a preferable, if tragic, alternative to continuing a pregnancy. I am not a member of Alliance for Life or its allied groups, although we share a substantial concurrence of views. I occasionally detect in such groups a strident arrogance, a belief that truth, right and justice fall neatly into place on one side, and that side theirs. Moreover, I deplore the "gory pictures" approach to anti-abortion advocacy no less on tactical than aesthetic grounds, since it implies that we sail on the winds of emotion because our ship is bereft of logical ballast. In reality, it is the diamond-hard logic and cold rationality of the anti-abortion position which both attracts and concerns me (is logic alone a sufficient basis for laws governing illogical beings?).

Yes, as a man I do feel reluctant to declaim upon the morality or legality of a choice which biology precludes me from having to face. Yet I realize that our law-making tradition rejects the narrow view that only those directly affected are entitled to be heard and participate in the legislative process. Were it otherwise only land owners could be heard on an Expropriation Act, only addicts on a Narcotics Act, and only juveniles on a Juvenile Delinquents Act. In any event, since men and women make an equally vital and unique contribution to the creation of that which is to be aborted, by what logic does its subsequent destruction become the exclusive prerogative of one of the parties?

I must confess that I believe, and have done for a long time, that abortion on demand is inevitable in Canada, as ineluctable as night follows day and, just as certainly, portending darkness. I'm convinced that no amount of emotional tub-thumping, reasoned debate or academic scholarship can accomplish much more than perhaps delay the inevitable, as a lingering sunset may protract dusk. Why, then, bother?

For me, the answer is simple: since I expect to be required to account before God for my activities, I do not want the indictment

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to read that I stood idly by while the most innocent and defenceless of His creation, my brothers and my sisters, were sacrificed for the 20th century's chief idolatry: personal convenience. In a decadent society which is resolutely pursuing a death wish, good causes are, of necessity, lost causes. Abortion is, to me, a lost cause but a good cause, and misgivings, qualifications, and provisos aside, the barricades are up, and all must choose sides.

For some years now, I've read and thought about, discussed, debated, and generally struggled with abortion. Over that time, some convictions have deepened, others diminished; some principles have seemed to bear up better than others; the law's treatment of unborn children has become anomalous, and budding illogicalities in pro-abortion advocacy have blossomed into full-blown absurdities. No issue of our time is more important, and none requires greater clarity and sensitivity for its resolution; yet few issues have spawned such dishonesty, doubletalk, and legislative hypocrisy. I cannot claim that these random, primarily legal, reflections on a protracted debate are either original or correct; but they are points that have preoccupied me and may have vexed others, and there is at least a therapeutic (to use a word much abused in the abortion context) value in setting them down on paper.

Criminal Law

The antiquity of legal prohibitions on abortion reflects societal attitudes throughout the centuries. As far back as the Sumerian Code (2000 B.C.) and consistently through such pre-Christian legal codes as the Hammurabic (1300 B.C.), Assyrian (1500 B.C.), Hittite (1300 B.C.), and Persian (600 B.C.), abortion was considered criminal conduct. These codes were not uniform; some prohibited only procurement of abortion by others, while tolerating self-abortion. Some prohibited all abortions; for example, the Assyrian Code provided the severe punishment of impalement upon a stake for self-abortion.[1]

Early common-law commentaries on abortion tend to appear to us imprecise because of their emphasis upon "animation" (or ensoulment) and "quickening" (when the mother first detects foetal movement). Henry de Bracton (1216-1272), generally considered to be the father of the common law, wrote that a person who caused an abortion by striking a pregnant woman or giving her an abortifacient at a time when the child was animated committed homicide.[2] Bracton's implicit assumption, common in his time, was that animation was the beginning of spiritual life and followed conception by some indeterminate time. Later writers tended to put animation

at the time of quickening, roughly the fourth or fifth month of pregnancy.

Writing four centuries later, Sir Edward Coke took a different view: causing death of a child after a live birth was murder; causing death in the womb of a quickened child (so that the child was still-born) was "a great misprision"; causing death of a child prior to quickening was not a crime.[3]

A century later, Blackstone's Commentaries on the Laws of England essentially restated Coke's position, thus influencing subsequent development of English common law.[4]

By the 19th century, it was clear that a) abortion prior to quickening was not generally thought criminal; b) abortion after quickening was criminal, although not tantamount to homicide, and c) the common law made no distinction between procured abortion and self-abortion.

The importance of quickening was confirmed in the first English abortion statute which provided lesser penalties for abortions prior to quickening.[5] Since medical understanding of pre-natal growth and development was rudimentary, it was natural to rely on the mother's first sensation of foetal movement. But to hear contemporary advocates of abortion — usually people who pride themselves on having shrugged off primitive religious superstitions in favour of scientific rationalism — claim that a two- or three-month-old foetus is something less than human because neither seen nor felt is a bizarre reassertion of the 19th-century notion of quickening.

By 1861, English law had abandoned quickening as having any significance; the punishment for abortion became uniform whatever the stage of foetal development.[6]

Self-defence has traditionally been a common-law defence to a criminal charge. Thus, if a woman procured an abortion, or aborted herself, to save her life, she would not be convicted of an offence. In 1929, the common-law defence was codified in the *Infant Life (Preservation) Act* which confirmed that abortion was a crime unless ". . . done in good faith for the purpose of preserving the life of the mother."[7]

The landmark case of *R. v. Bourne* in 1938 turned on the breadth of the self-defence exception. A fourteen-year-old girl became pregnant after being raped by several soldiers. With her parents' consent, Dr. Bourne aborted the girl, accepted no fee for his services, and notified police. He was tried and acquitted. The significance of the case was Judge MacNaughten's instruction to the jury that ". . .

preserving the life of the Mother" could be extended to a grave threat to the "health" of the Mother.[8]

In Canada, criminal proscriptions on abortion predate Confederation.[9] Yet when, in 1969, Parliament chose to relax prohibitions on abortion, it was the *Bourne* decision which provided the formula. The prohibition section, making abortion an indictable offence punishable by life imprisonment, was left intact;[10] however, an exception for what were misleadingly called "therapeutic"[11] abortions was introduced in case of a threat to the woman's life or health. Several safeguards were included to ensure that the exception did not become the rule: 1) abortions could only be performed "by a qualified medical practitioner"; 2) in an "accredited or approved hospital"; 3) following written certification by a hospital therapeutic abortion committee composed of not less than three doctors that ". . . in its opinion, the continuation of the pregnancy of such female person would or would be likely to endanger her life or health."[12]

This 1969 amendment, part of an omnibus criminal code amending bill, was the brainchild of former Justice Minister (now Prime Minister) Pierre Elliott Trudeau.[13] The task of piloting the amendments through Parliament fell to his successor, Justice Minister John Turner. During debate, M.P.'s of all parties pointed out the vagueness inherent in the word "health" and urged that a statutory definition be included. At least one government member moved a specific amendment "to establish that a clear and direct serious threat to the Mother's health must be present."[14] While Justice Minister Turner admitted that "'health' is incapable of definition," he opposed any such amendment, arguing that the gravity and immediacy of any threat to "health" should be ". . . left to the good professional judgment of medical practitioners to decide."[15] Still he left no doubt that the government envisaged the exception being strictly and sparingly invoked:

> The Bill has rejected the eugenic, sociological or criminal offence reasons. The Bill limits the possibility of therapeutic abortion to these circumstances: it is to be performed by a medical practitioner who is supported by a therapeutic abortion committee of medical practitioners in a certified or approved hospital, and the abortion is to be performed only where the health or life of the Mother is in danger. The word endanger imports or connotes the elements of hazard, peril or risk . . .[16]

In 1970, the first year of the new legislation, the life or health of pregnant women was apparently endangered in more than 11,000 cases. By 1975, the last complete year for which accurate statistics are available, this figure had risen to just under 50,000.[17] Despite

modern medical advances, abortions have more than quadrupled in five years. One must conclude either that there exists a reverse correlation between medical advances in obstetrics and maternal risks in pregnancy, or that the law is being disregarded. The reality is that abortion on demand is available today in most metropolitan Canadian hospitals, and the ostensible restrictions are no more than legislative hypocrisy.

How did this come about? How is it that these legislative amendments ardently sought and exhaustively debated, whose proponents claimed to be motivated by compassion, became an open door to abortion on demand?

Essentially, a poisoned seed bore poisoned fruit. The seed of the 1969 abortion amendments was compromise — a futile attempt to temporize a compromise solution to an issue which defied compromise. As relativists, liberals assume that there are no absolutes, no good and evil, no right and wrong, no black and white on any issue. The Liberal government of the day sought to mediate between what they regarded as "extremists" on both sides of the abortion debate, to find a solution without confronting the two crucial questions: Does abortion involve taking life? and, if so, in what circumstances is this morally justifiable? (The U.S. Supreme Court did much the same thing in *Roe v. Wade.*[18]) For political motives[19] the Liberal government sought to quietly shunt these questions off to local abortion committees, where doctors could decide who shall live and who shall die, and why, in comfortable anonymity behind closed doors, away from public scrutiny. True, the legislation included another paper safeguard to offset concern: the provincial Minister of Health may order any therapeutic-abortion committee to provide information in order to satisfy him that the circumstances warranted an abortion. However, despite the tens of thousands of abortions annually, I have been unable to find a single recorded instance in which this power of ministerial review was exercised.

Then there is the therapeutic-abortion committee itself. Some hospitals chose not to establish committees. The Badgely Committee, appointed in 1976 to investigate the operation of the abortion laws, discovered that nearly 40 per cent of Canadian hospitals did not establish committees because of ethical objections from their medical and nursing staff.[20] Denominational hospitals (primarily Roman Catholic) almost invariably declined to establish committees.

In those hospitals which did establish committees, the committees effectively transformed what its draughtsmen insisted was restrictive legislation into broadly-permissive legislation. Given a) the inclination of those willing to sit on abortion committees, and

b) that the word "health" was deliberately left undefined, this is not surprising. Nor is it surprising that most committees chose to apply the World Health Organization definition of "health": "a state of complete, physical, mental, emotional and social well-being" — a definition of such limitless flexibility and absurdity that its literal application would exclude from "health" every human being since time began.

Standard practice simply requires a letter from a physician to the committee indicating that continuation of the pregnancy would affect his patients' "mental health." Even physicians actually engaged in this charade make little effort to pretend that the Criminal Code is observed. The Badgely Committee quoted physicians who ". . . openly acknowledged that their diagnoses for mental health were given for purposes of expediency and could not be considered as a valid assessment of an abortion patient's state of mental health."[21]

Thus, after years of lobbying, impassioned advocacy on all sides, and sober legislative consideration, Canada finished up with legislated hypocrisy: an ostensibly restrictive law, openly flouted, through whose single exception are annually channelled thousands of what are clearly illegal abortions. Formally, the Criminal Code echoes the common law — taking life, even nascent life, is permissible only in self-defence. The actual practice resembles a charnel house — *pro forma* applications, rubber-stamped approvals, and then saline, scalpel or vacuum skilfully wielded by a member of a profession which still pays lip service to the Hippocratic tradition. And the whole performance paid for by a beneficent State in the name of health insurance.

The sorry state of our criminal law becomes even more apparent when contrasted with developments in property and tort law.

Property Law

For centuries both civil and common law have recognized the inheritance rights of an unborn child (child *en ventre sa mere*). By a legal fiction, the child *en ventre sa mere* was judicially considered to be born for all purposes to its benefit.[22]

As far back as 1798, a Chancery judge disdainfully dismissed the argument that a devise to an unborn child was void because he was not yet a human being. Buller J. reviewed the status of the unborn child as follows:[23]

> Such a child has been considered as a nonentity. Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer even in value. He may be an executor. He may

> take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.

The anomaly of property law affirming the legal status and inheritance rights of an unborn child who may then be eliminated as a rival beneficiary by its mother, with criminal immunity by a legal abortion, scarcely requires further elaboration.

Tort Law

Recognition of legal status of the unborn child has been a relatively recent development in tort law. Difficulties of proof, and a ubiquitous but unfounded judicial fear of opening the floodgates to specious claims, motivated 19th century courts to refuse recovery for negligently inflicted pre-natal injuries.[24] Accordingly, the unborn child was not recognized as a legal person separate from its mother.

Until recently in Canada the legal status of a foetus to recover after birth for injuries negligently inflicted while *in utero* was judicially undetermined. In 1922, Riddell J. of the Ontario Supreme Court observed *obiter* that he saw ". . . no reason in reason or in law" why a child, born alive, should not be able to recover damages for injuries negligently caused to him before birth.[25] The Supreme Court of Canada agreed with this view when, in 1933, they awarded damages to an infant plaintiff born with club feet as a result of injuries sustained while a foetus.[26] Lamont J. held that to deny recovery would not only be inconsistent with judicial recognition of the unborn child's legal status in property and criminal law,[27] but would deny justice to one ". . . compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a heavy burden of infirmity and inconvenience without any compensation therefore."[28] But since this appeal was from Quebec, unique among Canada's provinces in its civil law system, the issue remained unresolved in the other nine common-law provinces until the 1972 decision of the Ontario High Court in *Duval v. Seguin.*[29]

At the time of a motor car collision involving her mother, the plaintiff Ann Duval was a 31-week-old foetus. As a direct result of the accident, Ann was born six weeks prematurely and weighed less than 3 pounds at birth. Although she was able to leave the hospital after six weeks, Ann was physically and mentally impaired for life. She might be able to walk, but always awkwardly and with difficulty; her I.Q. was estimated at 60-70.

Since the evidence established that Ann's physical and mental disabilities were the direct result of the defendant's negligent conduct, the issue was clear: does the common law recognize a right to recover

for prenatal injuries? Fraser J. held that it did: "To refuse to recognize such a right would be manifestly unjust and unreasonable."

Taking as his starting point Lord Atkin's famous "neighbour" test in *Donoghue v. Stevenson,*[30] Fraser J. held that in our mobile, automotive society ". . . an unborn child is within the foreseeable risk incurred by a negligent motorist." Modern medical and scientific developments allowed accurate determination of the causal connection between negligent conduct and resultant injuries and problems of proof are no longer insurmountable. "In any event," said Fraser "courts have to consider many similar problems and plaintiffs should not be denied relief in proper cases because of possible difficulties of proof."

Thus, in Canada, we know that a foetus has a legal status such that it may recover post-natally for pre-natal injuries. It is a short step from unintentional tort (i.e., negligence) as in *Duval v. Seguin* to intentional tort (i.e., assault). What about a case in which an infant plaintiff sues for damages for injuries deliberately inflicted pre-natally — e.g., in an unsuccessful attempt to induce a miscarriage? Surely the reasoning in *Duval v. Seguin* would apply with even greater force since neither causality nor foreseeability (the two thorniest evidentiary issues in a negligence action) could be seriously in dispute. Recovery must be allowed.

Assault is both tort and a crime; the civil remedy is designed to compensate the victim, criminal prosecution to vindicate the State's interest in public safety and order. The prospect of two assault actions, based on identical facts arising from a botched abortion, leading to criminal acquittal and civil liability strains even the common law's generous tolerance of inconsistency. As Lord Devlin once said: "The common law is tolerant of much illogicality especially on the surface; but no system of law can be workable if it has not got logic at the root of it."[31]

In *Watt v. Rama*[32] the Supreme Court of Victoria held that a negligent driver owed a duty of care to an unborn child who suffered brain damage and epilepsy. In this case the foetus was barely two months old at the time of the accident. After reviewing the common-law treatment of the unborn child in criminal, property and tort law, Gillard J. stated:[33]

> It is obvious that 'the person' who is conceived and develops in the Mother's body is biologically the same 'person' who survives birth, lives, and finally dies.

If this quotation seems a ponderous elaboration of the obvious, it attests the remarkable extent to which pro-abortion obfuscation

of when human life begins (neither a difficult nor controversial question as a glance at any reputable anatomy or embryology textbook will show) has intimidated otherwise candid and forthright people. Judges, lawyers, doctors, theologians and ethicists quail at having to confront the savage reality of what abortion is, and so take refuge behind vague generalities and euphemistic expressions. Nowhere is this linguistic deception more transparent than in the euphemisms served up for abortion itself: "fertility control"; "pregnancy interruption"; "post-coital birth planning," etc.[34] It is not surprising that those capable of such debasement of language are quick to debase life.

"Potential life" is another misused phrase in the abortion debate. The majority decision of the U.S. Supreme Court in *Roe v. Wade* describes the foetus as potential life. This phrase is both fatuous and malicious; fatuous, because that which is alive, not dead, cannot by definition be *potential* life — and even the U.S. Supreme Court possesses sufficient acumen to distinguish a live foetus from a dead one. Malicious, because it is by such verbal sleight-of-hand that people are kept distracted and bemused while the merchants of death make their rounds. George Grant has pointed out that "beings with only 'potential life' do not suck their thumbs in the womb in preparation for the breast. It makes perfect sense to say that we are all potentially dead, but it does not make sense to say that the foetus is 'potential life.' "[35]

International Law

The right of the unborn to be born has received at least implicit recognition in the United Nations Declaration of the Rights of the Child.[36] Unanimously adopted by the General Assembly on November 20, 1959, the Preamble reads: "Whereas the child by reason of his physical and mental immaturity needs special safeguards and care, included appropriate legal protection, *before* as well as *after* birth . . ." (Emphasis added).

A proposed amendment which would have defined child "from the moment of his conception" was defeated apparently because of potential embarrassment to those countries permitting widespread abortion. Nevertheless, the explicit reference to the ". . . child . . . *before* birth . . ." requiring ". . . appropriate legal protection . . ." is significant.

Incidentally, Principle 5 of the Universal Declaration states: "The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition." "Care" not abortion; "treatment" not ex-

termination. So much for the claim to abortion of the retarded and handicapped based on foetal indications.

Human Rights Law

Every province in Canada has a human rights code; most have based their legislation on the pioneering Ontario model,[37] and have reiterated its application ". . . to all members of the human family."[38] However one might prefer to describe the foetus, no honest person would contend that it is other than a member of the "human" family. What a dog begets is of the canine family; what man begets is of the human family.

Human rights legislation prohibits discrimination in obtaining basic necessities of life (housing, a job, access to public places, etc.) because of race, religion, colour, age, sex, etc. It is, in short, equal opportunity legislation. But of what use are such rights if the law does not also protect the fundamental right on which all others are contingent, the right to be born?

All statutory rights, whether enumerated in constitutions, bills of rights, or human rights codes are *secondary* rights; they are assertable by all only if the *primary* right, the right to be born, is protected. If the right to be born is not indefeasible, all other rights are a mockery. When exceptions are made to the sanctity of life the whole edifice of human rights, eloquently proclaimed by legislators, nurtured by the democratic process, protected by vigilant courts, is undermined. What a travesty it was in A.D. 1973 for the U.S. Supreme Court to "discover" a right to privacy lurking in the "penumbra" of the American Bill of Rights and then to proclaim that this chimeric right overrode the right to life itself.[39]

Even this cursory review of criminal law, property law, tort law, international law and human rights law reveals that the rights of the unborn child have been recognized and protected in varying degrees. Tort law differs from criminal law, it is true, but true also that the drift in all areas, except abortion, has been to expand not constrict those who may claim equal protection of law.

In its infamous *Dred Scott* decision in 1857,[40] the U.S. Supreme Court held that the black man was not a person entitled to equal protection of law. In Canada, in 1929, it required litigation to the Privy Council to determine that a woman was a legal "person" and, therefore, eligible for appointment to the Senate.[41] If, today, one substitutes the word "unborn" for the word "Negro" in *Dred Scott,* and "woman" in *Edwards,* one has precisely the claim of pro-abortionists.[42] How ironic that this claim should frequently be advanced as "progressive" and by organizations, such as the

American Civil Liberties Union, ostensibly committed to expanding human rights.[43]

Here it is important to note another example of linguistic duplicity: advocates of abortion on demand often proclaim to seek "liberalization" of the law. This is untrue. They seek abolition of abortion laws, the removal of all legal restrictions. *Abolition* not *liberalization.* Thus, the battle lines are drawn between those who refuse to extend any legal recognition and protection to the unborn child, and those who argue that the criminal law, no less than property, tort, international and human rights law, must recognize as a legitimate, protectable legal interest the claim of the unborn child to grow, develop and mature unmolested until birth. Our law's present schizophrenia — the civil law protecting the unborn for all purposes for his benefit; the criminal law winking at his killing for convenience — if persisted in must surely lead to nervous breakdown. The choice is clear: we may abandon the civil rights of the unborn child judicially developed over centuries; or we must extend his civil rights to include the right not to be killed.

The Efficacy of Criminal Law

What about the pragmatic objection: women have always had abortions and always will, whatever the law. It is said that the deterrent effect of criminal prohibitions is practically nil. All that criminalizing abortion does is drive women to unsafe, unhygienic and unethical back street abortionists. Also, since a black market has been created, abortions become costly and the law unjustly discriminates between rich and poor women. What is to be said to this objection?

First, there is a measure of truth in it. Criminal prohibitions do tend to be difficult to enforce, sometimes ineffective, costly and arbitrary; this is a failing of criminal law generally, not peculiar to abortion laws. Some sections of the Criminal Code are nearly impossible to enforce (e.g. perjury, obscene phone calls, child abuse, etc.) yet are necessary. Criminal law sets out the consequences of engaging in prohibited behaviour; it cannot prevent that behaviour. If it could, robbery, rape and murder would simply be legislated away.

However, the underlying premise — that criminal prohibitions will not deter — is belied by pro-abortion advocacy itself. If the same number of women will have an abortion whether legal or illegal, why agitate for abortion *on demand?* Implicit in such advocacy is the assumption that criminal prohibitions do in fact make unavailable to deserving women a procedure to which it is felt they are entitled.

Of course, any person engaged in illegal behaviour will be required to pay a black market tariff to compensate for the intrinsic risk of detection and prosecution. But it is the obtaining of that which is illegal, not the restrictive law, which differentially affects the poor. It is undoubtedly more difficult for a poor person to bribe a public official, or to "fix" a sporting event, than it is for a rich person, but this makes a poor case for legalizing bribery or fixing sports.

I consider that criminal prohibitions on abortions are desirable for both functional and symbolic reasons. Functional, because criminal prohibitions will reduce, although not eliminate, abortions. Since I believe foetal life to be deserving of legal protection, it follows that this is a net social benefit. Just as I support the diminution in drivers' freedoms attendant on compulsory seat belt legislation because it reduces highway morbidity, so I support abortion laws which reduce foetal morbidity even though such laws diminish a pregnant woman's alternatives.

The symbolic function of the criminal law is no less important. The criminal law is society's fundamental statement of public policy. It is the instrument by which the community draws the line between tolerable and intolerable, between civilized conduct and barbarism. It defines those whose interests society deems worthy of respect and protection, and that should include all members of the human family. Ultimately, the criminal law is a mirror of what we are; it reflects our commitment, or lack of it, to human dignity and equality. So long as abortion flourishes, the image reflected is fragmentary and soiled.

The "Presumptive Right" Argument

In recent years the law has been required to accommodate increasing claims to personal freedom, in terms of artistic expression, sexual behaviour, work norms and so on. It is up to the individual, not the law, to determine one's "lifestyle." The old social ethic, subordination to authority, has been replaced by the ethic of personal liberation, the colloquial expression of which is "Do your own thing." Abortion advocates contend that women must be allowed to decide for themselves whether or not to have children. From this reasonable proposition, they slide into the assertion of a presumptive "right" of a woman to control her own body, and deduce therefrom her right to terminate embryonic or foetal life within her body.

But the assertion of a right is not conclusive. A right implies its jural opposite, a duty. If I have a right to walk across your land, you have a corresponding duty to let me pass. If I have a right to

be secure in my person or property, you have a duty not to trespass or molest. If you breach your duty, the State has an obligation to punish you and to deter others; otherwise my right becomes ephemeral. If a woman has a "right" to control her own body, and if this necessarily entails a right to an abortion, someone must be under a legal duty to perform it. Who? No doctor is under any obligation, legal or moral, to perform an abortion. Nor would any court with even a vestigial respect for freedom of conscience countenance a law which purported to impose such an obligation.

The plain fact is that the phrase "A woman's right to control her own body" is meaningless. "Jane has a right to control the body of Jane" is neither a true assertion, nor necessarily a false assertion, but only a meaningless tautology. The phrase also attests the alienation of those who use it; for people to conceive of their own bodies as objects to be "controlled" is a tragically atomized view of one's relation to self and others.

In some circumstances women have rights with respect to their own bodies: they have the right to clothe them as they please, but not, for example, to display them unfettered by clothing in a public place. People have rights with respect to their voices, but not the right to speak seditiously, or slanderously, or to so employ them as to disrupt the public peace. Women do not have the right to indecently expose their bodies nor to sell them for sexual purposes. Why? Because all these activities are regarded as socially deleterious, partly because they affect other people as well, and are therefore properly subject to criminal proscription. From the fact that women undeniably enjoy some rights in respect of their own bodies, one must not assume that the right to terminate a live and growing child within their bodies is or ought to be among these rights.

But the presumptive right argument is not only meaningless and tautological — it is also disingenuous. More than the woman's body is involved. Without entering on a detailed delineation of the attributes of foetal life, it is undeniable that it is alive, not inanimate, human (of the genus *Homo*), and that it possesses potential for becoming an absolutely unique human being, however defined. This alone is sufficient to refute the exclusivity of the woman's claim to arbitrarily determine its fate.

No one would argue that the foetus is a fully developed human being, but then neither is a newborn child. However, the foetus is not so radically different from a fully developed human being that it should be deprived of all legal protection. The criminal law prohibits infanticide because the killing of an infant deprives it of the opportunity to grow, develop and mature into a full human being.

Feticide, which is a legalistic but accurate synonym for abortion, denies precisely the same opportunity. I would not contend that the foetal interest in the abortion decision is greater than, or even equal to, the pregnant woman's interest; nor do I argue that the foetal interest should necessarily prevail. But I do contend that it has a legitimate interest, deserving of social consideration and legal protection, and that any proposal for abortion on demand inequitably transforms a woman's admittedly important and legitimate interest into an arbitrary, unreviewable power of decision.

The concept of a valid "foetal interest" in the abortion decision is also the stumbling block to the argument which purports to ensure government neutrality. This argument follows these lines: Abortion, it is contended, is essentially a private, moral decision on which the State should be neutral. If the State prohibits abortions, they are denied to those who find the procedure unobjectionable. Thus, prohibition has a coercive effect on those who disagree. On the other hand, if the State allows abortion on demand no one who conscientiously objects to abortion will be coerced to have one. The first policy (prohibition) denies freedom to those who disagree; the second policy (availability) respects the freedom of all. If the only legitimate interest in abortion were that of the pregnant woman, this argument might be convincing. It is not convincing because it conveniently overlooks the coercive, indeed deadly, effect on those whose interest is neither articulated nor protected, the foetuses' interest in life.

If one accepts, as I do, that the stigma of illegality deters human conduct, it follows that criminal prohibitions will reduce the number of abortions performed. (I have already pointed that this is implicit in agitation for abortion on demand.) In such circumstances, is government neutrality possible? After all, comparatively few people favour either extreme position on abortion: that no abortions should ever be performed for any reason, or that abortions should be routinely available for any reason, or indeed, without reason. Amongst other things, what divides people is how to frame acceptable grounds so that the number of abortions will be kept to a justifiable minimum. In other words, the acceptable incidence of abortion is in dispute. In our system, what is not prohibited is permitted. For government to remove criminal prohibitions would be to side with those who favour greater availability of abortion and, inevitably, more abortions. Pro-abortionists may argue that this is good, but it is hardly neutral. They are confusing *laissez-faire* with neutrality. I readily admit that retaining criminal prohibitions is not neutrality either. The point is that government neutrality on abortion is impossible and its invocation, by either side, a sham.

The final objection to the "woman's right to control her own body" argument is that it is faulty in anatomical and biological terms. It is not "her body" that she seeks to "control" but the body of another temporarily housed, for growth and development, within her body. The foetus lives within, grows within, and depends upon its mother's body: just as fish live within and depend upon an aquarium. But the fish are not appendages of the aquarium, and the foetus is not an appendage of the mother.[44]

The Quality of Life Argument

In earlier days it was relatively common to hear pro-abortionists claim that the foetus was something less than human. Had they but known it, developments in foetology had long since passed them by. Today most do know it, and the honest pro-abortionist will concede that a foetus is both human and live. The argument has shifted away from life itself to the "quality of life." Today, one hears talk of concern for the unwanted child, the sick and deformed, the retarded and the mongoloid — all those unfortunate children who, if allowed to live, will never experience that quality of life which presumably makes life worth living. Better for them, and for their unfortunate parents, that the suffering and the sadness be averted by abortion. It sounds humanitarian. It appears persuasive; so persuasive, in fact, that foetal indications (i.e., the possibility of abnormality or deformity) have been legitimized as a statutory justification for abortion in some American jurisdictions and in the English *Abortion Act* of 1967.

Conceding that it is an agonizing issue, I remain unconvinced and wish to question whether the "quality of life" argument, with its pervasive implications, is either ethical or humanitarian. I submit that it conveniently leaves unanswered the two pivotal questions: What criteria determine when human life is "worthwhile," and whose criteria?

Obviously, a retarded or deformed child will be a much greater burden, emotional and financial, on its parents than a healthy child. It is also obvious that there are many pursuits in life forever closed to that child. Yet is its life worthless? What is it about life that makes it worth living?

Often philosophers and poets, in the twilight of their years, have reflected that the truly significant experiences of life were natural experiences: the feel of the sun on one's face, the invigorating coolness of fresh water, a friend's companionship, the restorative qualities of sleep. There is no reason to believe that the retarded, the

deformed or the handicapped child cannot share these life experiences.[45]

What criteria determine that one person's life is worth living, another's not? Is it vocational success, or a spring walk in the woods; is it running for political office, or an evening's sunset; is it earning, in the competitive marketplace, the respect of one's peers, or enjoying, as one's birthright, the love of one's parents?

It is not just the criteria to be applied that concern me but who is to decide them. Who has the training, the experience, the wisdom or the mandate to decide?

A court of Solomons and a legislature of philosopher kings would probably decline jurisdiction. Yet too many contemporary "quality of life" advocates show little reticence in deciding explicitly what are the criteria that make life worthwhile — is it by coincidence that lives which would meet their criteria bear a striking resemblance to their own?

There is a smug arrogance about this position which is disconcerting. Every time and generation, I suppose, implicitly believes in its own infallibility. Yet history teaches that each generation but sees through the glass of truth darkly, and that man's presumptive omniscience is a dangerous and destructive myth. Do today's eugenicists know more about what life is worth living than did St. Augustine, St. Francis of Assisi, Aristotle or Hippocrates?

The Oath of Hippocrates has been the ethical norm of the medical profession for centuries. In its original form it required doctors to swear that they would not assist a woman in an abortion. Today, many doctors in every part of Canada knowingly violate this oath. In some Canadian hospitals, the number of abortions exceeds the number of live births.

No doubt some of these abortions are lawfully within the criminal code definition — where ". . . continuation of the pregnancy of such female person would or would be likely to endanger her life or health." But most abortions are not performed because the mother's life or health is seriously jeopardized; rather they are illegal abortions, authorized by therapeutic abortion committees who have extended the word "health" to include social or economic factors which threaten the quality of life of the woman and her family.

Even as I write these words, an ominous reminder of the distance we have gone on the road to Buchenwald comes from an unexpected quarter — a report to the Anglican Church of Canada from its Task Force on Human Life. The report recommends that severely retarded infants and hydrocephalics be killed after birth. The report states:

> Our senses and emotions lead us into the grave mistake of treating human-looking shapes as if they were human. In fact the only way to treat such defective infants humanly is not to treat them as human . . . We must consider the suffering of the parents and the burden which society assumes, particularly the diversion of services and opportunities which could better be used for the care of humanity as a whole rather than in sustaining a life that is not human.[46]

The Task Force Chairman, Dr. Lawrence Whytehead, elaborated:

> Severely retarded children are like family pets — cats or dogs — and, as such, the kindest thing for that child is to end its life ... within days of its birth. If you have an injured animal, the most humane thing to do to that dog would be to kill it.[47]

Another member of the Task Force, nurse Muriel Barry, commented:

> One has to look at the sort of life that child could be expected to live. What we are trying to point out is that the quality of life is the most important thing. One has to assess what the quality of that life is.[48]

The sad fact is that many Canadian doctors have accepted the premise that it is the quality of life, not life itself, that matters. In the vacuum created by society's inability or unwillingness to demonstate its commitment to the sanctity of all human life, a large segment of the medical profession, under the compulsion of daily practice, have abandoned the Hippocratic Oath. I do not charge the medical profession with wilfully usurping society's prerogative to decide life and death questions. Rather, I mourn the apparent loss of a societal consensus that life, in and of itself, is a miraculous gift beyond man's giving, which compels his respect, humility and reverence in all circumstances and under whatever conditions or disabilities.

Conclusion

There are many facets to the abortion debate and many perspectives (medical, ethical, sociological, etc.) from which it may be analysed. The preoccupation in this article with legal questions reflects my professional training, not any parochial belief that law is the paramount issue, still less any naive hope that law provides a solution. It is not law which divides people about abortion.

I have learned that what divides people on abortion (and on euthanasia and other related life issues) is, at bottom, their view of the nature and purpose of life, and this is less a factor of reason than of spiritual temperament.

The pro-abortion position, with its contemporary emphasis on "quality of life," appeals to those who see man as ultimately perfectable, as the measure of all things, as captain of his destiny.

Others, among whom I number myself, see man as the protagonist in a divinely-shaped drama whose creation, flow and denouement are alike beyond his control. In this cosmic drama, all life has its part; not just the Grade A approved, red-brand, certified people that the modern eugenicist would allow.

Two sparrows, we are told in the New Testament, are sold for a farthing and yet one cannot fall to the ground without God's concern; are we not all, young or old, genius or retarded, healthy or infirm, of greater concern than a sparrow?

This, of course, is to express the sanctity of life in religious terms which many today find unpersuasive. But the sanctity of life has also been expressed in secular terms: Edward Shils, a Nobel Prize winner in Medicine and Physiology, has written:[49]

> If life were not viewed as sacred, then nothing else would be sacred . . . Is human life really sacred? I answer that it is, self-evidently . . . it is believed to be sacred because it is life. The idea of sacredness is generated by the primordial experience of being alive, of experiencing the elemental sensation of vitality and the elemental fear of extinction. Life's sacredness is the most primordial of experiences.

Can we, with equanimity, arrogate to ourselves the omniscience to decide what life is worth living, and when? Are we sanguine at the prospect of abandoning the sanctity of life principle on the basis of which laws have been enacted, moral rules propounded, political priorities established, and human rights claimed and defended? Are we satisfied to have our legal protection rest on others' conception of the "quality" of our own life? Can wise legal precedents be built on so mutable and subjective a foundation?

These are large questions requiring convincing answers. To date, I have heard no answers. Until convincing answers are forthcoming, the widespread practice of abortion demonstrates that our society has abandoned its commitment to the sanctity of all human life. Lament for the future.

NOTES

1. A concise review of early legislation on abortion will be found in: Granfield, *The Abortion Decision* (Image Books, Doubleday, 1971), c. 2.
2. H. de Bracton, *The Law and Customs of England,* Twiss ed. (1879), p. 278.
3. Coke, III *Institutes of the Laws of England,* 3rd ed. (1660) p. 50.

   > If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder; but if the child be born alive and dyeth of the potion, battery or other cause, this is murder; for in law it is accounted a reasonable creature, *in rerum natura,* when it is born alive.

4. Blackstone, I *Commentaries on the Laws of England* (1809), p. 130. Where Coke had described abortion after quickening as "a great misprision" Blackstone calls it "a heinous misdemeanour."
5. *Miscarriage of Women Act* (1803) 43 Geo. 3, c. 58.

6. *Offences Against the Person Act* (1861) 24 and 25 Vict. c. 100, S. 58.

7. *Infant Life (Preservation) Act* (1929) 19 and 20 Geo. V, c. 34.

8. *R. v. Bourne* (1939) I.K.B. 687 at 693:

> . . . if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuation of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother.

9. *Offences Against the Person Act* (1854) 22 Vict. c. 91.

10. Criminal Code, s.251 (1): "Everyone who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offense and is liable to imprisonment for life."

11. No dictionary definition of "therapeutic" (e.g. "curative"; "the art of healing"; "that branch of medicine concerned with remedial treatment of disease"; *Shorter Oxford English Dictionary,* 3rd rev. ed., 1956) warrants its adjectival use in conjunction with abortion.

12. Criminal Code, s. 251 (4)(c).

13. Opening debate on the bill in the House of Commons, his successor, Justice Minister John Turner stated:

> This legislation is the most important and all-embracing reform of criminal and penal law ever attempted at one time in this country.
>
> ... It will be identified in the future with the indelible imprint of our Prime Minister.
>
> *Hansard,* January 23, 1969, p. 4717 and 4723.

14. Mr. Gaston Clermont (Gatineau), *Hansard,* April 29, 1969, p. 8123.

15. *Hansard,* April 29, 1969, p. 8124.

16. *Ibid.,* March 6, 1969, p. 8397-8.

17. "Statistics Canada, Report on Therapeutic Abortions," 1975, p. 1: "The 10 provinces and 2 territories have officially declared 49,390 therapeutic abortions in hospitals within their jurisdiction between January and December, 1975."

18. (1973) 93 S. Ct. 705; per Blackmun J.: "... we need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." (at 730).

19. The Liberal party clearly sought to ride both horses in the abortion debate. To pro-abortionists they pointed proudly to the 1969 amendments as proof of their sympathies. To opponents of abortion, they stressed the legislative restrictions and reiterated opposition to abortion on demand. The technique successfully served to mystify all concerned as to what, if anything, was the Liberal party's position on abortion.

Justice Minister John Turner's letter to the author of 15 November, 1973 is typical: (i) It begins: "One must try to separate one's own private moral convictions from one's sense of duty as a legislator in a pluralistic society to advance the public good ..." (One may be forgiven for wondering if fidelity to, not the abandonment of, one's private moral convictions is not a prerequisite to a legislator advancing the public good. But onward ...)

(ii) "The fact that the sanctions of the criminal law may be withdrawn from certain types of conduct does not mean necessarily that such conduct is condoned ... What happens is that the law becomes neutral about that type of conduct." (Any lawyer must know that this is not only fatuous but demonstrably false, and the geometrical rise in the incidence of abortion in Canada since the amendment demonstrates this).

(iii) His letter concludes with a penned, handwritten note reassuring me that "There is very little likelihood that the present law allowing abortion only when the life or health of the mother is in danger, will be changed to permit abortion on demand."

It is not surprising that the Liberal's duplicity on abortion was criticized in the House by Eldon Wooliams, M.P. (Calgary North):

> Clearly this government is talking out of both sides of its mouth. To those who want abortions it is saying 'Look at what a great reform party we are' and to those who do not want abortions it is saying 'We are really not that kind of party after all, we just want to be very careful in this area.'

Hansard, April 28, 1969, p. 8090.

20. *The Report of the Committee on the Operation of the Abortion Laws* (Badgely Committee) Queen's Printer, Ottawa, 1977, p. 22:

> "... it is apparent that a substantial number of hospital boards and physicians want no part of this procedure."

21. *Ibid.*, p. 212.
22. *Blackstone's Commentaries,* 1771 (4th ed.), 1, p. 129-30:

> "The [unborn child] is capable of having a legacy or a surrender of a copyhold estate made to it; and it is enabled to have an estate limited to its use, and actually to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours."

23. *Thellusson v. Woodford* (1798) 31 E.R. 117 at 163.
24. Cf. *Dietrich v. Inhabitants of Northhampton* (1884) 138 Mass. 14; *Walker v. Great Northern Railway Company of Ireland* (1891) 28 L.R. Ir. 69.
25. *Smith v. Fox* (1922) O.L.R. 54; (1923) 3 D.L.R. 785.
26. *Montreal Tramways Company v. Leveille* (1933) S.C.R. 456; (1933) 4 D.L.R. 337.
27. Citing *R. v. Seniour* (1832) Moody's C.C. 346.
28. *Op. cit.*, n. 26 at S.C.R. 464.
29. (1972) 26 D.L.R. (3d) 460; Ontario High Court.
30. *M'Alister (or Donoghue) v. Stevenson* (1932) A.C. 562:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question ...

31. *Hedley Byrne v. Heller* (1964) A.C. 465 at 516.
32. (1972) V.R. 353.
33. *Ibid.*, at 377.
34. If a prize were given for the most bizarre example of linguistic distortion, a recent Planned Parenthood poster would be a contender; it read: "ABORTION: A positive approach to inconvenient pregnancies".
35. "Abortion and Rights," in *The Right to Birth,* ed. by Fairweather and Gentles, Toronto: The Anglican Book Centre, 1975, p. 5.
36. *United Nations Yearbook,* 1959, p. 193.
37. S.O. 1961-62 c. 93.
38. The Preamble begins: "WHEREAS, recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..."
39. *Roe v. Wade, op. cit.*, n. 18.
40. *Dred Scott v. Sandford* (1857) 60 U.S. 393.
41. *Edwards v. A.G. for Canada* (1930) 1 D.L.R. 98.
42. "The abolition of slavery gave legal rights to those who never possessed them; the liberalization of abortion abolished the legal rights of those who had possessed them for centuries." David Granfield, *The Abortion Decision, Op. cit.*, n. 1, p. 156.
43. The A.C.L.U., it will be remembered, fought tenaciously in the Courts to thwart Gary Gilmore's often expressed desire to have his death sentence carried out. Now this is passing strange. The A.C.L.U. also defends, literally to the death, the right of a pregnant woman to terminate by abortion the life of her unborn child. Why should Gary Gilmore be denied that freedom of choice in respect of the termination of his own life which, in respect of others' lives, the A.C.L.U. so assiduously advocates?
The logic of the A.C.L.U.'s position becomes even murkier when one recalls that attempted suicide is no longer a crime in most jurisdictions. Had either of Gilmore's two previous suicide attempts been successful, he would have committed no crime. Does the A.C.L.U. envisage its mandate as pleading with the Courts to deny one's right to do that which is not illegal?
44. Dr. Dawne Jubb, 1973 *Canadian Bar Journal* (September) 10:

> At no time is the new human life a part of the maternal organism although it is usually nourished and protected within a maternal organ (the uterus) which is for this specific purpose.
>
> From conception on, human life is a complex, dynamic, rapidly growing organism with a specific pattern of maturity and function. The pace of growth and development in the first forty weeks (intra-uterine) is faster than that after birth, but the process is the same — as long as the specifically suitable nourishment and support systems are supplied the maturation process continues in an orderly pattern and the functioning genes are programmed in at the appropriate times, e.g., heart begins beating at 24 days, reflexes begin at 42 days, airbreathing begins at birth, secondary sex characteristics develop at puberty, etc.

> Any honest review of the current medical status of human intra-uterine life demonstrates conclusively that a separate human life is present from conception and that this human life matures and grows according to an orderly and predictable pattern which begins intra-uterine and continues through the immediate postnatal period, infancy, childhood, adolescence, maturity and old age.

45. Mr. Paul McPhail, supervisor of the Southwestern Ontario Regional Centre, which accommodates 10 of the most severely retarded children in Ontario has spoken strongly against the "quality of life" argument: "Profoundly retarded youths react to vibration and music, they enjoy having their cheeks stroked ... They've gotten a lot of enjoyment out of outings to a lake. They play in the water. They sit in the sand. How do we know they are enjoying it? They smile. They sit in our laps ... As a creature of God they certainly deserve the best of care and an opportunity to develop to their maximum potential". *Globe and Mail,* July 27, 1977, p. 2.
46. *Globe and Mail,* Toronto, Wednesday, July 27, 1977, p. 1.
47. *Ibid.*
48. *Ibid.*
49. *Life or Death: Ethics and Options* (Seattle: University of Washington Press, 1968).

The *Argumentum ad Spiritum*

James F. Csank

BLAISE PASCAL said it perfectly centuries ago: "The heart has its reasons, which reason does not know." It may be as presumptuous to attempt to explicate that statement, as it would be to attempt to improve upon the Mona Lisa. Two persons may disagree on the aesthetic merit of daVinci's masterpiece, either as a matter of taste, or because one of the viewers is lacking an artistic sense. Neither of the disputants will ever convince the other, but their disagreement and the fact of its irreconcilability are unimportant. We cannot be so cavalier, however, when we consider the truth of Pascal's aphorism. To one who understands the statement, the acceptance of it as true follows axiomatically since the statement is self-reflective; that is, it is accepted as true by the very intuitive sense to which it refers. To the person who does not understand, the statement can never be true; his lack of understanding reflects either the complete absence of the intuitive sense or an unwillingness to listen when that sense speaks. But this disagreement, concerning as it does human knowledge and the human spirit, entails great and dangerous consequences.

The heart of man is capable of knowing, says Pascal, and not only does the heart know on a level different from the level on which the reason knows, but the things which the heart knows are incapable of being known by the reason. Reason can either accept what the heart knows and move on from there, or it can attempt to refute the heart's knowledge. "We know the truth," he goes on, "not only by reason, but also by the heart, and it is in this last way that we know first principles; and reason, which has no part in it, tries in vain to impugn them."

This knowledge of the heart arises from the human spirit, indeed, *is* the human spirit, which resides in each man and makes him man, and which can be denied by man only at the cost of denying his humanity. The first and most basic thing which the heart knows is that it knows; and the second is that the individual is human and that each and every other is also human. All other propositions, whether of the reason or of the heart, are meaningless unless these first two are accepted. Any denial of these basic propositions must

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be seen as an invidious threat to each of us, both as individuals and as members of a society.

American history provides an instance of such a denial, of the reaction to the denial, and of the consequences resulting from the antagonism thereby engendered.

Abraham Lincoln considered slavery a great moral wrong. This judgment was based upon his awareness of the humanity of the black man, which, since he accepted all the implications and consequences of such awareness, was a knowledge of his heart and not just his reason. Whence came this knowledge? In his famous Peoria speech of October 16, 1854 (in discussing the claim of the southern slaveholders that they were entitled to the protection of the laws in the federal "territories" so that they might go there with their slaves) Lincoln appeals to the knowledge of the heart:

> Equal justice to the South, it is said, requires us to consent to the extending of slavery to new countries. That is to say, inasmuch as you do not object to my taking my hog to Nebraska, therefore I must not object to you taking your slave. Now, I admit this is perfectly logical, if there is no difference between hogs and Negroes. But while you thus require me to deny the humanity of the Negro, I wish to ask whether you of the South yourselves have ever been willing to do as much. . . . The great majority, South as well as North, have human sympathies. . . . These sympathies in the bosom of the Southern people, manifest in many ways, their sense of the wrong of slavery and their consciousness that, after all, there is humanity in the Negro.

Later in the speech, Lincoln rephrases the same point:

> All these free blacks are the descendants of slaves, or have been slaves themselves, and they would be slaves now, but for *something* which has operated on their white owners, inducing them, at vast pecuniary sacrifices, to liberate them. What is that *something?* Is there any mistaking it? In all these cases, it is your sense of justice, and human sympathy, continually telling you, that the poor Negro has some natural right to himself — that those who deny it, and make mere merchandise of him, deserve kickings, contempt, and death. (Emphasis in the original.)

Lincoln never goes beyond this appeal to human sympathies; he does not try to prove by reason or by empirical evidence that the slave is a man. Any evidence that reason has to offer will not convince, it will only confirm what the heart already knows; assuming, of course, that the heart is open to the truth. For if it is not, no appeal to reason can ever convince a closed heart.

The appeal to the heart, like the *argumentum ad hominem,* is addressed to a faculty other than the reason of the man in the audience. While the latter appeals to his prejudices and selfish interests, the former is addressed to his spirit, and so can properly be called the *argumentum ad spiritum.*

The argument is usually the last to be brought out in any discussion with an opponent; it is last because the debaters usually attempt to find a level of reason upon which their disagreement can be resolved prior to recourse to first principles; and it is last because there is no going past the recourse to first principles, there is no attempt to prove the truth of the heart by appeals to reason. Pascal again: "It is as useless and absurd for reason to demand from the heart proofs of her first principles, before admitting them, as it would be for the heart to demand from reason an intuition of all demonstrated propositions before accepting them." He who appeals to the heart, only to have the appeal rejected, realizes that the gulf between him and his opponent is impassable. In the example from history, when the leaders of the South rejected Lincoln's appeal to their hearts, when they refused to acknowledge the truth of the *argumentum ad spiritum* that the Negro was a man, Lincoln was free neither to force their acceptance nor to abandon the truth, even though a bloody Civil War ensued. For the abandonment of the basic truths of the heart would have destroyed the essential ground of life in society: the recognition of our own humanity and of the humanity of all others.

Analagous to the "positive good of slavery" theories of the antebellum South are the "reasonable" arguments designed to prove the necessity, wisdom or moral neutrality of abortion-on-demand. "A woman should have complete freedom over the processes of her own body," says the abortion advocate, "and this includes the right to choose not to be an incubator." Or: "A woman impregnated by an act of rape should not be forced to carry and give birth to the child." Or: "Until it is actually born, the fetus is not human; its life is only biological and therefore legally and spiritually without meaning; thus we are not bound to grant it any protection, and it has no rights which we are bound to recognize." Or: "What the world doesn't need right now is more people."

Not so, says the anti-abortionist: "The fetus is a human being; its rights come to it as a human being from God, not from the law, or what some infallible tribunal holds to be the law. The freedom of the mother, the guilt of the rapist, and the fact that some people do not have enough to eat are not sufficient reason to destroy innocent human life."

Clearly, the latter is an *argumentum ad spiritum,* almost identical in all respects to that which Lincoln made in response to the arguments of reason that slavery was a good, not only for the white owner but for the slave himself. As some slaveholders turned a deaf heart to Lincoln's argument that the black was a man, so some abor-

tionists cannot hear that the unborn child is a human being. As some slaveholders gave lip service to the humanity of the Negro, while refusing to accept the truth and its implications in their spirit, so some abortionists, admitting the humanity of the unborn, are yet able to find "reasonable" reasons for allowing its destruction. The truth of the heart, if it is accepted only by the reason, can always be rationalized away by other arguments of the reason; only if the heart accepts its own truth, only if it recognizes that the truth comes from the heart, will it be willing and able to acknowledge all the implications and consequences of that truth. The pro-abortionist who is a materialist *cannot* acknowledge the humanity of the unborn; the pro-abortionist who rationalizes away his reason's acknowledgment *will not* allow the truth to penetrate to his heart. In either case, the *argumentum ad spiritum* fails, because the spirit of him to whom it is addressed will not accept it.

Neither side of the abortion debate will ever convince the other, for they are operating on different levels of existence. The appeal to the heart is final; the abortionist listens, but does not hear. The rupture is complete and irreconcilable, until either the one ascends to the level of the truth of the heart, or until the other surrenders his truth.

That at least a million unborn children have been killed in this country in each of the last four years is sufficient ground for the growing intensity of those who oppose liberal abortion. It is not, however, the sole ground. Also of great importance is the prevention of the further spread in our culture of the moral decay which is the inevitable result of denying the humanity of the unborn. Since the acknowledgment of the humanity of self and of others is a basic truth of the heart, the denial by some of the humanity of others inevitably involves an erosion of the grounds upon which each individual can claim his own humanity. What Lincoln taught us about the right to freedom is equally applicable to the right to life: we cannot claim it for ourselves while denying it to others. This is why the pro-life advocate fears that abortion will lead to euthanasia of the old and infirm, why he fears that infanticide of physically deformed or mentally handicapped children will follow euthanasia, until the life of each person is in constant peril of being declared, by some humanitarian committee, meaningless, burdensome, or unproductive, and therefore terminable. This fear is not irrational, but pre-rational; as the concern for the unborn is the concern of a heart which knows that each of us is human, so this fear is the fear of a heart which sees its truth being eroded. When the denial of the humanity of others becomes so widespread that no human life is sacred, when all human

life is to be judged according to self-centered and utilitarian values, then not only the unborn, not only the pro-life advocate, but the abortionist himself will be defenseless.

In 1854, Lincoln wrote the famous "Fragment on Slavery," which reads in part:

> If A can prove, however conclusively, that he may of right enslave B — why may not B snatch the same argument, and prove equally, that he may enslave A?
>
> You say A is white, and B is black. It is color, then; the lighter having the right to enslave the darker? Take care. By this rule you are to be slave to the first man you meet, with a skin fairer than your own. ...
>
> But you say, it is a question of interest; and if you can make it your interest, you have the right to enslave another. Very well. And if he can make it his interest, he has the right to enslave you.

I hope Lincoln will forgive a snatching of his argument:

> If A can prove, however conclusively, that he may, of right, kill B — why may not B snatch the same argument and prove equally that he may kill A?
>
> You say A's life contributes to society, and B's does not. It is worthless to others, then; the more productive having the right to kill the less. Take care. By this rule, you are to be killed by the first man you meet who contributes more to society than you.
>
> But, you say, it is a question of interest; and if you can make it your interest, you have the right to enslave another. Very well. And if he can make it his it his interest, he has the right to kill you.

In 1857, the Supreme Court, in a seven-to-two decision, held that the black slave was not a man and had no rights which the white man was bound to acknowledge. Then, the American people were divided over the issue into three groups: those who approved, those who opposed, and those who had no opinion. Led by Lincoln, those who opposed appealed to the hearts of those who had no opinion, until the majority came to accept the *argumentum ad spiritum* that the Negro was a man — until the truth of the heart became a truth of the American people.

In 1973, in another seven-to-two decision, the Supreme Court held that the unborn had no rights which the rest of us are bound to acknowledge, and that until birth whatever life the unborn has is meaningless. Again, there are those who approve, those who oppose, and those who have no opinion. The great struggle between the pro and the con is to win the assent of those in the middle. The pro-abortionist must so deaden the hearts of the American people that, as a people, we will no longer care whether the unborn are slaughtered or not.

The anti-abortionist, like Lincoln, will never accept the decision of seven men as final; he will never see that decision as anything but a great moral evil; he will never abandon the appeal to the heart for recognition of the truth of the humanity of the unborn. In his appeal to the American people, he has no better recourse than the *argumentum ad spiritum,* until such time as enough of the American people care, until such time as the truth of the heart becomes, again, the truth of America.

It Has Happened Here

Raymond J. Adamek

"Those who do not remember the past are condemned to relive it."
— Santayana

IN A RECENT article in which she sought to answer the question, "Were Hitler's Henchmen Mad?," Molly Harrower concluded that the answer is a definite "No!"[1] She suggested that Hitler's henchmen and many others who committed war atrocities were basically well-adjusted people caught up in the Nazi social movement, and notes that "in the right circumstances ordinary people can commit acts far out of character." She concluded her article, therefore, with the warning that, "It *can* happen here." I submit that her last statement is in error: it *has* happened here. To paraphrase Harrower, well-adjusted people have been "caught up in a tangle of social forces that (made) them goose-step their way toward such abominations as the calculated execution" of millions of unborn children in the last four years. Current trends in the population control, eugenic, and euthanasia movements in the U.S. also seem bound to insure that we will be seeing the "systematic elimination of the elderly and other unproductive people" before long.[2]

The similarity between the "tangle of social forces" in pre-war and Nazi Germany and the contemporary U.S. is ominous. Germany was not, after all, a society of monsters, but one very much like ours, a civilized Western society of Judeo-Christian heritage, somewhat jaded with respect to violence by its participation in recent wars. It was a country frustrated by economic turmoil and concerned about the balance between population and resources. Its freedom to control its destiny was limited by the economic domination of the Allies who had imposed harsh economic sanctions as punishment for its role in World War I. The U.S. today is similar in many ways — a country frustrated and afraid that its destiny in the modern world is no longer completely within its own grasp as the result of political, social, economic, and ecological events; a country threatened and frightened by the world population explosion, and to a lesser extent, by a persistently high unemployment rate, and an uncertain economic future. Like Germany, the U.S. is also a country enamored of technology and cold rationality. And like Germany, its current approaches to solving its problems increasingly smack of elitism,

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that is, "solutions" to problems are devised and implemented by the powerful and privileged few, often to the detriment of the less powerful and underprivileged many.

Frederic Wertham notes, for example, that the idea of killing human beings to solve personal and social problems in Germany did not originate with Hitler.[3] Rather, it was among the educated, respectable, medical-intellectual community that mercy killing was proposed and justified as a means of solving the social problems of mental health and retardation. The first gas chambers were built to kill the mentally ill, not the Jews.[4] In hard economic times, it was reasoned that it was, after all, cheaper to "terminate" unwanted "useless eaters" than to support them with tax dollars. Dr. Louis M. Hellman, then Deputy Assistant Secretary for Population Affairs in the Department of Health, Education and Welfare, made the same point in 1974 regarding the abortion of welfare mothers' children — it's a bargain for the taxpayers, $180 per abortion vs. $2200 for the first year if a welfare mother's pregnancy were brought to term.[5] In the recent U.S. Senate "Death With Dignity" hearings, the cost-benefit argument that it's cheaper to let them die than to support their lives was also applied to justify euthanasia for the severely mentally retarded by Dr. Walter W. Sackett, perennial sponsor of "Right to Die" bills in the Florida legislature.[6] With the Social Security tax squeeze coming because of our changing population structure (proportionately more older people and fewer younger workers to support them), we can also expect to hear some public officials proposing euthanasia as a solution to the "lack of meaningful existence" exhibited by residents of our nursing homes. And it would not be outlandish to expect that they will find sympathetic ears for such proposals among a tax-conscious American public. Fifty-three percent of this public recently answered "yes" to a Gallup poll question asking: "When a person has a disease that cannot be cured, do you think doctors should be allowed to end the patient's life by some painless means if the patient and his family request it?"[7]

Before one objects too strongly that state-initiated euthanasia is a long step from "voluntary" euthanasia, he should realize that in its abortion rulings, the Supreme Court has already established the principle that the basic rights of human beings officially judged to be not "capable of a meaningful life," and not "persons in the whole sense" are *not* protected by the Constitution.[8] Moreover, Joseph Fletcher, the philosopher/ethician of the abortion/euthanasia movements, has supplied us with a long list of "indicators of humanhood" which we might apply to systematically exclude

various other categories of living human beings (the retarded, the senile, the incurably insane) from personhood and thus, from the Constitution's protection.[9] Of course if, from the population control/social planner's perspective, the euthanasia movement is as successful as the abortion movement in convincing large numbers of people that killing is an acceptable solution to personal and social problems, "voluntary" euthanasia may suffice, without having to sanction state-initiated euthanasia. For, if voluntary euthanasia is institutionalized in our legal system, a report on sterilization published by Ralph Nader's Health Research Group notes that individual physicians have already demonstrated a willingness to cajole, pressure, and coerce lower class persons to submit to "voluntary" medical procedures in line with the *physician's* value system and ideas of what is best for society.[10]

Some physicians have already admitted to taking the law into their own hands when in *their* judgment, a patient is no longer capable of leading a "meaningful" life.[11] These cases involve quadriplegics, who, although paralyzed from the neck down and requiring respirators to continue breathing, are capable of thinking, seeing, hearing, and in some cases of talking. Keeping these patients in a drugged state to "protect" them from the realization that they are totally paralyzed, the physicians perform numerous tests to determine if the paralysis is likely to be a permanent condition. If, in their judgment it is, the physicians, *without* the patient's knowledge, and without giving relatives a clear picture of what they intend to do, give "these people their morphine and Valium so that they're groggy," and turn off the respirator. Leo Alexander has pointed out that it was the acceptance of this attitude by German physicians — that some lives are not worth living, at first applied only to the severely and chronically ill — that led some of them to comply with the Nazi state's later directives to exterminate the "socially unproductive," the "racially unwanted," etc.[12] Moreover, in the U.S. today, there appears to be an increasing acceptance of the idea in medical and social-service circles that in controversial areas such as abortion and euthanasia, the professional should simply be an amoral instrument of the will of others, suspending his own judgment of right and wrong, and not allowing it to determine what types of "services" he will or will not provide.[13]

The willingness of some biologically mature, well-educated, affluent, powerful individuals of one nationality or ethnic group to consider and to make the "hard decisions" which will result in the death of millions of their less mature, less well-educated, less affluent, and less powerful fellow human beings of different ethnic

stock is as evident in some quarters of the abortion/euthanasia/population control movements in the U.S. today as it was in pre-war and Nazi Germany. In both cases, of course, such decisions are made regretfully, and only after those in power, considering the harsh realities of the world situation as they see them, "realize" that drastic action is not only desirable but necessary for the welfare of future generations. This is particularly apparent in the concept of "triage" as it applies to solving the world's population problem. Utilizing this principle, the U.S. would divide the world's nations into three categories: 1) those with sufficient food supplies to take care of their own needs; 2) those, who if given food stuffs, agricultural implements, population control technology, etc., could become self-sufficient in a relatively short time; and 3) those nations whose population/food problems are deemed so severe that foreign aid would at best only "prolong their misery" and at worst endanger food supplies for the rest of the world. The triage principle suggests that it would be most humane to allow the needy in countries in the third category to starve now, i.e., to deliberately withhold foreign aid from them, so as not to endanger the rest of the world either now or in the near future. Dr. Garrett Hardin, biologist and long-time abortion spokesman, promotes this type of "life-boat ethics."[14] He pictures the world's rich nations as "adrift in a crowded lifeboat tossing in a sea of starvation and poverty." If the outsiders who clamor to be taken on board are assisted, the boat will be swamped and all will drown. Aid for the starving millions should end, Hardin says, at least until they curb their birth rates.

Philip Hauser, the noted demographer, has pointed out that the triage argument is technically defective for five reasons: 1) given our present state of knowledge, the nations of the world cannot be accurately categorized according to the triage principle; 2) almost 81 percent of all people in the world now live in countries with national programs designed to curb population; 3) if effectiveness of such programs is employed as a criterion for giving aid, none of the developing nations qualify; 4) since the impact of family planning programs cannot be measured in less than 10 year periods, this criterion provides almost no guidelines for immediate decision making; and 5) it is based on the "naive assumption that low fertility and growth are the only population factor prerequisites for development."[15] More to the point of our discussion is Hauser's statement that there are also obvious moral objections to the triage proposal, the most obvious, perhaps, being the ethnocentric character of Hardin's position "that the economically advanced nations should regard themselves as 'stewards' of civilization and as such have

the responsibility of preserving the 'civilization' of the developed nations."[16] Hitler had similar ideas about the mission and destiny of the German people.

Hardin is not alone in his advocacy of triage. Among other influential voices in the population field, newspaper reports indicate that Hardin is joined by Dr. William Paddock, a tropical agronomist and author of *Famine 1975,* Dr. Paul Ehrlich, author of *The Population Bomb,* Dr. Philip Handler, President of the National Academy of Sciences, and Dr. Jay W. Forrester, millionaire computer engineer at the Massachusetts Institute of Technology.[17] Moreover, some government officials are already willing to *act* on the triage principle. In April of 1975, Representative Jerry Litton, along with other Congressmen from California and other agribusiness states sponsored a bill "to cut off food supplies to countries that fail to make 'reasonable and productive efforts' to stabilize their populations."[18]

As in Nazi Germany, it is recognized here that to build a New Order, harsh measures may be necessary with one's own citizens, as well as with foreigners. As early as 1969, Frederick S. Jaffe, currently President of Planned Parenthood Federation of America, in a memorandum to Bernard Berelson, demographer and consultant to the federal government on population issues, listed for consideration (among others), the following proposed measures to reduce U.S. fertility: "compulsory abortion of out-of-wedlock pregnancies," "compulsory sterilization of all who have two children except for a few who would be allowed three."[19] Although the table in which these proposals appear does not go into detail, one wonders what criteria would be employed to decide who would be allowed to have three children. Perhaps those who best exemplified the characteristics of a true Aryan!

The rebirth of a strong interest in eugenics in the U.S. today cannot help but call to mind the Nazi's interest in developing a master race through selective breeding and the elimination of inferior types. Compulsory amniocentesis to detect and eliminate "defective human beings" was recently considered at the National Symposium on Genetics and the Law in Boston.[20] Should some "defectives" slip by this process, Dr. James Watson, co-discoverer of the double-helix structure of the DNA molecule, has suggested that if, legally, "a child were not declared alive until three days after birth," and postnatal abnormalities were discovered, "The doctor could allow the child to die if the parents so chose and save a lot of misery and suffering."[21]

Since the Supreme Court's 1973 abortion ruling, the practice of

redefining who is a live human being has opened up many new possibilities in medical experimentation. In reviewing a book by Paul Ramsey on fetal experimentation, Amitai Etzioni, Director of the Center for Policy Research and Professor of Sociology at Columbia University, states that in the matter of fetal experimentation, "The basic dilemma is created by *thinking* of the fetus as a live human being. . ." Etzioni then goes on to make the astounding (for a social scientist) statement: "The dominant *scientific* and public view is to regard the fetus, up to a given stage of gestation, as previable, hence *not alive, not human,* and basically a piece of tissue." Then, apparently *ex cathedra,* he states: "For the first four and one-half months the fetus is *subhuman* and relatively close to a piece of tissue, to be *preferred* as a subject for experimentation (although not quite so trivially as an animal); it has a special status as a prospective child."[22] (Emphasis in foregoing quotations mine). One cannot help but be struck by the irony of the fact that Professor Etzioni is Jewish, and that his statements regarding those he has defined as not alive, not human, or at best, subhuman, could well have been made (and probably were) by the German physicians who experimented on his co-religionists whom the Nazis defined as subhuman (*untermenschen*).[23]

Indeed, in the contemporary U.S., the unwanted, unborn child is to some population controllers what the Jew was to the Nazis — the cause of much of the world's problems, and their nation's problems in particular. The President's Commission on Population Growth and the American Future, which recommended nationwide abortion on demand almost one year before the Supreme Court's decision, noted that population growth contributes to the following problems: increasing cost of public services, crime control, less effective local governments, pollution, resource depletion, overcrowding, poverty, maternal health, etc.[24] The Supreme Court's decision also noted that in discussing abortion, "population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem."[25] The implication of all this, of course, is that if we can eliminate those humans who are "unwanted," we will be going a long way toward solving these problems. Thus nothing, recent Court decisions have made clear, must be allowed to stand in the way of killing the "unwanted" unborn — not the husband's wishes where the pregnant woman is married, not the parents' wishes where the pregnant woman is a minor[26] and not even — at least for a time — Congress' clearly expressed mandate not to continue financing elective abortions with public tax money.[27] So recklessly[28] does the Supreme Court pursue the unwanted unborn

that Justice White, in a dissenting opinion, found it necessary to state: "I am not yet prepared to accept the notion that normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion."[29]

The elitist nature of some aspects of the abortion/euthanasia/population control movement and the Nazi movement is also evident in their willingness to manipulate the public by short-circuiting the democratic process. Rationalizing that the severity of the problems at hand demanded immediate action, Hitler decided early in his political career that a dictatorship, not a republic, was what Germany needed to solve her problems.[30] Many in the abortion/euthanasia/population control movement are characterized by this same sense of urgency, and by the attitude that they know what is best for the public, and need not wait for its approval to institute "reforms." For example, after her review of public opinion polls on abortion from 1960-1970, Judith Blake concluded that because "80 percent of our white population di. ›pproves elective abortion... it is to the educated and influential that we must look for effecting rapid legislative change in spite of conservative opinions among important subgroups such as the lower classes and women." Noting that a state-by-state change in abortion laws would be "cumbersome," however, she suggested (prophetically or programmatically) that:

> a Supreme Court ruling concerning the constitutionality of existing state restrictions is the only road to rapid change in the grounds for abortion. ... Hence, if we heeded only the fact that 80 percent of our white population disapproves elective abortion, our expectations concerning major reforms would be too modest. We must also take into account the more positive views of a powerful minority.[31]

Discussing the best strategy to advance euthanasia "reform" at a conference of The Euthanasia Educational Council, Cyril C. Means[32] agreed that taking issues to the people's representatives rather than seeking favorable court rulings may be dangerous for a movement. He states:

> I suppose there is nothing wrong with legislation, but getting it presents a problem. ... if it should be debated on the floor and fail by a resounding vote, supposing it was a vote like 85% to 15% against it, then in a subsequent court test, the court might say, 'Well, it is perfectly obvious that public opinion in this State has not moved to the position where you claim it has.'[33]

C. Dickerman Williams, another lawyer at the conference, agreed that:

> ... it is a mistake to try to get legislation at the present time. I think the courts

> are much more likely to be sympathetic with the point of view presented here ... than a body of legislators who are apt to respond to the emotions of the population which would not be as enlightened as all of us here today are.[34]

Not only in their elitist, utilitarian philosophical underpinnings, but also in more specific ways, the anti-Jewish, anti-unborn social movements resemble one another. For example, the quotas for Jewish deportation and extermination which went out to countries under Nazi domination are mirrored by a report of the Alan Guttmacher Institute which estimates abortion "need" in the U.S. by region, state, and Standard Metropolitan Statistical Area.[35] It does not take much imagination to realize that this report may be taken by some social planners as presenting abortion body-count target goals. Indeed, even though they caution that the report's findings are only "provisional estimates" that are based upon population projections which are "subject to error," and upon the computation of abortion rates for socioeconomic groups which "had to be derived from fragmentary information on abortions performed in public hospitals and on ward services of voluntary hospitals and those financed by Medicaid in states where data were available," and are therefore *least* reliable at the SMSA level, the authors state that: "The estimates should be particularly useful to the new health systems agencies ... responsible for facilities and service priority planning in multicounty areas."[36] What is equally disturbing is that in spite of the authors' assertions that the report's abortion "need" estimates are conservative, I submit that they may well be inflated, and as much a function of the authors' philosophical views on the abortion question, and their concern over the world population problem as of their methodological expertise. Their "abortion need" estimates for each area of the U.S. are based upon projections from only two populations — California residents in 1973, and New York City residents in 1971 — both of which had, and continue to have, atypically high abortion rates compared with other areas of the nation. California, which is used as the base to project a "lower estimate of need," for example, is shown in the authors' data to rank second in 1973 among the states (New York was first) in abortion rates. Tietze *et al.* suggest that California was chosen since it was one of the few states in 1973 which had wide experience with a liberalized law for a relatively long period, and since its Department of Health "could provide detailed service statistics based on a larger and more varied population" than other states.[37] While this may be so, it hardly justifies the claim that California's rates provide conservative lower estimates of abortion need for other parts of the U.S. In a later report the same authors

present data suggesting that California and New York State continued to have atypically high abortion rates through the first quarter of 1975.[38] One can hardly project these high rates to the rest of the U.S. without taking regional subcultural differences into account.[39]

Extermination of the unborn in the U.S., like extermination of the Jews in Nazi Europe, is something very few admit they advocate, but many participate in, and even more acquiesce to. Speaking of the Holocaust, Rubenstein notes:

> The destruction process requires the cooperation of every sector of German society. The bureaucrats drew up the definitions and decrees, the churches gave evidence of Aryan descent; the postal authorities carried the messages of definition, expropriation, denaturalization and deportation ... a place (of execution was) made available to the Gestapo and the SS by the *Wehrmacht.* To repeat, the operation required and received the participation of every major social, political, and religious institution of the German Reich.[40]

Similarly, we might state, the courts and HEW bureaucrats drew up the definitions and decrees; the churches revised their teachings; newspapers carried the abortion clinic advertisements; the medical and social service professions staffed them; the telephone company installed their phones; the landlords rented them space, etc.

In bureaucratically dehumanized, economically rational German society, Rubenstein maintains, "Both genocide and slave labor proved to be highly profitable corporate enterprise."[41] One could not say less about the abortion business in the U.S., where non-hospital clinics, virtually non-existent ten years ago, now account for over one-half of all abortions.[42]

Moreover, we play the same game of self-deception with abortion that Germany did with its treatment of the Jews. We pretend it's really not as bad as it is, just as the German people did. Most newspaper accounts, major public opinion polls, and media references to the Supreme Court's decision suggest that the Court permitted abortion only in the first three months. In fact, it permits abortion until normal birth, and between 1972-74, 346,000 unborn children over 12 weeks' gestation were legally killed.[43] Just as the Jews were depicted as *untermenschen,* so the unborn are depicted as non-human. Just as the Jews were reviled as "vermin," and "a plague," so the unwanted unborn have been called "parasites," and "a venereal disease." Just as the Germans had to find euphemisms to talk about their treatment of the Jews (the "final solution" to the Jewish problem, "resettlement," i.e., extermination) to attempt to hide what was happening from the world and from *themselves,* so too we

hide behind semantic camouflage ("termination of pregnancy," "menstrual extraction," "contents of the womb") to keep from our mind's eye the horror of what we are doing. In both Nazi Germany and the contemporary U.S., the seemingly mind-boggling *moral* problems created by the deliberate killing of innocent human beings quickly became translated into merely *technical* problems for the political, legal and medical professions to solve, and for the nation's various industries to respond to (transportation, chemicals, and iron works in Germany, medical technology and the drug industry in the U.S.). In both societies, whole categories of human beings were legally defined to be outside the protection of the law, dehumanized, and made the scapegoats for society's problems, so that we could coldly and systematically kill them in our fear and frustration, and in our frantic individual and national desire to become complete masters of our destinies.

There are also, of course, many differences between the "tangle of social forces" characterizing the contemporary U.S. and pre-war and Nazi Germany. For example, the many issues involved in abortion, euthanasia, eugenics, and population control are being seriously and openly debated here — in the mass-media, in the judicial and political arenas, and among concerned professionals. Furthermore, the issues themselves appear to be more complex, and the right answers to some of them less clear. Nevertheless, I would still maintain that "it *has* happened here," and that there is a good chance that it will get worse before it gets better.

NOTES

1. Molly Harrower, "Were Hitler's Henchmen Mad?" *Psychology Today* 10 (July, 1976), pp. 76-80.
2. Cf. Elizabeth Hall and Paul Cameron, "Our Failing Reverence for Life," *Psychology Today* 9 (April, 1976), p. 104 ff.
3. Frederic Wertham, *A Sign for Cain* (New York: Warner, 1969).
4. Alexander Mitscherlich and Fred Mielke, *Doctors of Infamy* (New York: Henry Schuman, 1949), pp. 90-116.
5. "Abortions Cost U.S. $50 Million," *Akron Beacon Journal* (December 9, 1974), p.A4.
6. "Death With Dignity: An Inquiry into Related Public Issues," *U.S. Senate Hearings Before the Special Committee on Aging* Part I (August 7, 1972), pp. 29-44.
7. George Gallup, "Majority of Americans Now Say Doctors Should Be Able to Practice Euthanasia," *The Gallup Opinion Index* Report #98 (August, 1973), pp. 35-37.
8. *Roe v. Wade* and *Doe v. Bolton. U.S. Supreme Court Report* 35 L Ed 2d (February 15, 1973), pp. 147-222.
9. Joseph Fletcher. "Indicators of Humanhood: A Tentative Profile of Man," *Hastings Center Report* 2 (November, 1972).
10. Bernard Rosenfeld *et al., A Health Research Group Study on Surgical Sterilization: Present Abuses and Proposed Regulations* (Washington, D.C.: Public Citizen, 1973).
11. "Doctors Decide on Life Support End," *Washington Post* (March 10, 1974), p. A1.
12. Leo Alexander, "Medical Science Under Dictatorship," *New England Journal of Medicine* 241 (1949), pp. 39-47.

13. Cf. Christopher Tietze *et al., Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area* (New York: The Alan Guttmacher Institute, 1975), p. 16.

14. "Food Seen a Question for Ethics," *Akron Beacon Journal* (April 20, 1975), p. A21.

15. Philip M. Hauser, "Population Criteria in Foreign Aid Programs," PRB Selection No. 42 (Washington, D.C.: Population Reference Bureau, 1973).

16. *Ibid.*, p. 3.

17. "Let Many Starve, Scientists Argue," *Cincinnati Enquirer* (November 10, 1974).

18. "Food Seen a Question for Ethics," *op. cit.*

19. Robin Elliott *et al.*, "U.S. Population Growth and Family Planning: A Review of the Literature," *Family Planning Perspectives* 2:4 (1970).

20. "Prenatal Tests Mulled," *Akron Beacon Journal* (May 21, 1975), p. A4.

21. "Endorsing Infanticide?" *Time* (May 28, 1973), p. 104.

22. Amitai Etzioni, Review of The Ethics of Fetal Research by Paul Ramsey. *Transaction: Social Science and Modern Society* 13 (March/April, 1976), pp. 71-72.

23. Cf. William L. Shirer, *The Rise and Fall of the Third Reich* (New York: Simon & Schuster, 1960).

24. *Population and the American Future* (Washington, D.C.: U.S. Government Printing Office, 1972).

25. *Roe v. Wade, op. cit.*, p. 156.

26. *Planned Parenthood of Missouri v. Danforth, U.S. Supreme Court Reports* 49 L. Ed 2d (August 20, 1976), pp. 788-825.

27. "U.S. Must Pay for Abortions," *Akron Beacon Journal* (November 9, 1976).

28. Those who think this word may be too strong are invited to read the Supreme Court's major abortion rulings cited above, the dissenting opinions associated with them, and the following critiques of the rulings: Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion," *Fordham Law Review* 41 (1973), pp. 807-862; Archibald Cox, "The Supreme Court and Abortion," *The Human Life Review* 2 (1976), pp. 15-19; Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *California Law Review* 63 (1975), pp. 1250-1351; John Hart Ely, "The Wages of Crying Wolf," *The Yale Law Journal* 82 (April, 1973), pp. 920-947; Dennis J. Horan et al., "Abortion and the Supreme Court: Death Becomes a Way of Life," in Thomas Hilgers and D. Horan (eds.), *Abortion and Social Justice* (N.Y.: Sheed and Ward, 1972), pp. 301-328; John T. Noonan, Jr., "Why a Constitutional Amendment?" *The Human Life Review* 1 (1975), pp. 26-43.

29. *Planned Parenthood of Missouri v. Danforth, op. cit.*, p. 821.

30. John Toland, *Adolf Hitler* (Garden City, N.Y.: Doubleday, 1976), pp. 111-112.

31. Judith Blake, "Abortion and Public Opinion: The 1960-1970 Decade," *Science* 171 (1971), p. 548.

32. Means is the lawyer whose opinion that our original anti-abortion laws were passed only to protect the mother, not the unborn child, influenced the Supreme Court's 1973 ruling (see *Roe v. Wade, op. cit.*, p. 176). For a refutation of Mean's thesis, see Horan *et al., op. cit.*, pp. 312 and 120-122.

33. "Dilemmas of Euthanasia," Report of the Fourth Euthanasia Conference, December 4, 1971 (New York: Euthanasia Educational Council, 1972), p. 22.

34. *Ibid.*, p. 31.

35. Tietz *et al., op. cit.*

36. *Ibid.*, p. 17.

37. *Ibid.*, p. 71.

38. Edward Weinstock *et al.*, "Abortion Need and Services in the United States, 1974-1975," *Family Planning Perspectives* 8 (March/April), pp. 58-69.

39. Tietz *et al.* (*op. cit.*, p. 16) note that opinion polls show more support for permissive abortion in the East and West than in the Midwest and South, but dismiss these as indicators of behavior, since low income persons and blacks have more conservative attitudes toward abortion, but apparently higher utilization rates than higher income persons and whites. They point out that "Fertility studies since 1955 have shown that unwanted and mistimed births" do not vary significantly by region, assuming that because women in different geographical areas are equally likely to define births in this manner, they would (should) be equally likely to abort. This assumption is certainly open to question, since, as the authors themselves argue, attitudes do not necessarily predict behavior.

40. Richard L. Rubenstein, *The Cunning of History* (New York: Harper & Row, 1975), pp. 4-5. Rubinstein, like Harrower *(op. cit.)*, warns that "it can happen here." His main thesis is that the Holocaust was not an aberrant outbreak of barbarism in the twentieth century, but rather the normal outcome of a tangle of social forces including the development of Judeo-Christian thought, "surplus" population, and the emergence of bureaucratic, technological, urban society. While he focuses only on the Holocaust, I would recommend his book to anyone who wants to understand the genesis and

growth of the abortion movement. Paradoxically, Rubenstein himself does not appear to see the parallels, although he warns, "There could come a time when bureaucrats might attempt to eliminate all the ills associated with urban blight, such as crime, drugs, and unsafe streets, by eliminating those segments of the population that are regarded as most prone to social pathology" (p. 86), and "Future bureaucrats might be tempted to set up extermination centers to keep the size of the population from getting out of hand" (p. 84). The time has come, I would maintain, and we have set up such centers. They are called abortion clinics.

41. *Ibid.*, p. 62.

42. Weinstock *et al., op. cit.*, p. 65.

43. "Digest," *Family Planning Perspectives* 8 (March/April, 1976), pp. 70-72.

On Being Alive

Sondra Diamond

I HAVE BEEN physically disabled since birth as a result of brain damage. My disability is called Cerebral Palsy. Many people believe that Cerebral Palsy is synonymous with mental retardation. However, this is not true. When I was born my parents were told that I would never be able to speak, hear or do anything that other children could do. It was suggested that I be put away in an institution. My parents, however, felt that I had as much potential as their two older children.

In the November 12th, 1973 issue of *Newsweek* Magazine in the Medicine section, there appeared an article titled "Shall This Child Die?" It was about the work of Doctors Raymond S. Duff and A. G. M. Campbell at the Yale-New Haven Hospital of Yale University. The article reported that these doctors were permitting babies born with birth defects to die by deliberately withholding vital medical treatments. The doctors were convincing the parents of these children that they would be a financial burden; that they had "Little or no hope of achieving meaningful 'humanhood.'" The doctors recognized that they were breaking the law by doing away with these "vegetables," as they choose to call these children, but they felt that the law should be changed to make it legal to let these children die.

I was incensed by this article in *Newsweek,* although I was glad that the subject finally was coming above ground. For I had been aware of this practice for many years.

Feeling that I had to do something about this article, I wrote a Letter to the Editor of *Newsweek* Magazine. It was published in the December 3rd, 1973 issue, as follows:

> I'll wager my entire root system and as much fertilizer as it would take to fill Yale University that you have never received a letter from a vegetable before this one, but, much as I resent the term, I must confess that I fit the description of a "vegetable" as defined in the article "Shall This Child Die?" (MEDICINE, Nov. 12).
>
> Due to severe brain damage incurred at birth, I am unable to dress myself, toilet myself, or write; my secretary is typing this letter. Many thousands of

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dollars had to be spent on my rehabilitation and education in order for me to reach my present professional status as a Counseling Psychologist. My parents were also told, 35 years ago, that there was "little or no hope of achieving meaningful 'humanhood' " for their daughter. Have I reached "humanhood"? Compared with Doctors Duff and Campbell I believe I have surpassed it!

Instead of changing the law to make it legal to weed out us "vegetables," let us change the laws so that we may receive quality medical care, education, and freedom to live as full and productive lives as our potentials allow.

The physically disabled in our society have historically been second class citizens. And, as such, they have been subject to the same indignities that other minority groups have had to endure. Some 10% of the population of the United States is physically disabled. And that figure is merely an estimate, for these are the people who are on record in hospitals, agencies, and the like.

For most able-bodied people, willingness to contemplate the problems of the physically disabled is tempered by the fact that they have a set of notions and feelings about people different from themselves, whether they be of a different race, nationality, sex — or the physically disabled. I am, of course, especially interested in the feelings about the physically disabled. These feelings can not be ignored; they must be faced head-on. One tends to examine his feelings about the disabled in terms of his own fears, self-doubts, and his own self-concepts about his own body image. It is too easy to project how you think *you* might feel if you were physically disabled. Being disabled is not the same as thinking about what it would be like if you were disabled. Being disabled is not intrinsically a burden. It only becomes so when society makes it difficult to function as a normal person. Technology allows the disabled to move about and function freely. It is only when society says *stop* that a physical disability becomes a handicap. In view of the fact society sees a physical disability as a burden, it is, for many, a natural assumption that the physically disabled would be better off dead. I cannot agree with such a solution.

Perhaps we should take a closer look at how I feel about being disabled. What *is* it like to be disabled? It's happy, it's sad, it's exciting, it's frustrating, it's probably just like being non-disabled. You worry what will become of you when your parents are no longer around to help you with your special needs. You want to go places and do things just like everyone else. You have the same sexual drives, the same hopes and dreams for marriage and a family, the same aspirations for a successful life.

Being disabled is also a puzzling experience because people don't react to you the way *you* feel inside. People look at you and assume

that you are retarded or incompetent or a pitiful sight. But you don't feel retarded, incompetent, or pitiful.

The right to life issue affects the disabled in three principal ways: first, there is negative euthanasia which is practiced on newborn infants who are born with physical disabilities and abnormalities. When a child is born with a disability, many members of the medical profession do not administer the necessary supportive medical services. It is argued that the child will be physically disabled the rest of its life anyway. If this were to be done to a child who would not grow up to be disabled, the courts would intervene. There have been many cases where the parents, for reasons such as religion, have not wanted their newborn infant to receive medical care. Court orders have been obtained by the physicians so that they could perform the necessary procedures.

Second, euthanasia affects the physically disabled when we are hospitalized for medical problems other than our disabilities. To give you a personal example: in 1962 I was severely burned over 60% of my body by 3rd degree burns. When I was taken to the hospital the doctors felt that there was no point in treating me because I was disabled anyway and could not lead a normal life. They wanted to let me die. My parents, after a great deal of arguing, convinced the doctors that I was a junior in college and had been leading a normal life. However, they had to bring in pictures of me swimming and playing the piano. The Doctors were not totally convinced that this was the best procedure — grafting skin and giving me medication as they would with other patients — but my parents insisted that I be ministered to. Mine was not an unusual case. To take the time and effort to expend medical expertise on a person who is physically disabled seems futile to many members of the medical profession. Their handiwork will come to nought, they think.

The third way euthanasia affects the physically disabled is when a person in adulthood becomes disabled. There are two parts to this problem. Firstly, should that person be treated and rehabilitated if he is not going to lead a normal life? Secondly, what if that person asks to die? If you have never been disabled you are not aware of the many options in life. Therapeutic rehabilitation techniques, self-help devices, and prosthetic and assistive equipment make the lives of the disabled very functional. It takes a great deal of time to discover these things. First the medical problem must be overcome and this is up to the medical profession. It is only after the critical period of illness that a rehabilitation team can take over. If a person who knows that he will be disabled for the rest of his life asks to die, it

sounds like an attractive option to his family: Why should he have to suffer? Intensive psychological counseling is needed to show the individual who will be physically disabled (and his family) that life holds a great deal of potential. We cannot deny that there will be problems, but one can enjoy a full and happy life even though physically disabled. I would not give up one moment of life in which I could have another cup of coffee, another cigarette, or another interaction with someone I love.

Many people ask me about the person who is so severely disabled that he or she can only lie in bed. Shouldn't he be allowed to die? they ask me. We cannot know what is going on in that person's head — especially if he cannot communicate with us through speech. Perhaps he is enjoying the sensual experience of lying on cool sheets, or the pleasure of good food, or being held by another human being.

A friend of mine is unable to move as a result of severe arthritis which struck him in adulthood. He cannot see. He can only speak. He is the Editor of a newspaper for disabled people and conducts a very busy telephone life by means of special equipment. Believe me, he inspires many people. My friend is leading a full life and is one of the happiest people I know. Should we put him to death because he can't move the way other people do?

We have posed the problem of euthanasia and its effects on the physically disabled. What can be done to alleviate this problem?

First of all, as I said, you must face your feelings about the physically disabled — the negative ones as well as the positive ones. For you are human beings and must not think "I shouldn't feel this way." In the abstract it is easier to fight against abortion, infanticide, and euthanasia if we know that these children will grow up to be whole human beings. Physical attractiveness has become very important in our society. What I am asking you to do is fight abortion, infanticide, and euthanasia on behalf of people who will be, or are, physically disabled. You can not begin to do this until you throw away your prejudices and preconceived notions about the life of a physically disabled person.

I have concentrated here on the obvious ways euthanasia threatens the disabled, because those dangers are of course most obvious to me. I know that, for most people, the right to life issue means primarily saving the lives of the unborn from abortion. But there is a least common denominator: life itself. It is the right of the disabled to appreciate the gift of life, to celebrate it *for* itself. Thus I think we can help you. I know we *want* to help you, every bit as much as we want you to help us.

Young and Gay in Academe

Ellen M. Wilson

DESPITE ITS dedication to ivory towerism, Bryn Mawr College has managed to spawn an issue which is also stealing headlines in the Outside World. The question (it can hardly be termed a debate, since the outcome is predetermined) is Gay liberation, that most dreary of modern visions. The implications, for those sentimentalists who cling to old-fashioned icons such as wedded love and family life, are disquieting.

Sometime in the 1975-6 academic year Bryn Mawr — one of the Seven Sister colleges, and a sweatshop for hardworking academics — gave birth to the Gay People's Alliance (GPA). Its purpose, so the spokespeople said, was to provide support and a sense of solidarity to its membership, and to educate the college to a greater awareness and acceptance of Gays (while not quoting exactly, I am certainly splicing together the appropriate wordage). The first major event sponsored by the GPA was a dance — open to Gays and non-Gays alike — held in the spring of '76. It was then, I think, that the revolutionary intentions of the GPA (revolutionary in a literal, though non-violent, sense) surfaced. By thrusting themselves directly onto center stage in the college's social life, GPA members were making a bid for normal status — not merely in their own eyes, but in the eyes of the entire campus population. And a fortuitous show of nastiness by an off-campus gatecrasher rallied xenophobic support for the GPA among the "straight" population.

A local male, ignorant of the dance's Gay sponsorship, wandered in uninvited. Once the light of knowledge dawned, he became disruptive. At this point one of the GPA sponsors politely showed him the door, and just to prevent misunderstandings, a security guard ushered him out. But the gatecrasher reappeared before the night was out, and this provoked some minor scuffling: the interloper accused the gays of harassment, while the GPA maintained that they had done nothing to provoke the incident. The matter was taken to court, the GPA passed the hat for legal fees, the editorial page of the campus paper intoned some weighty phrases on discrimination, and the college community quietly rallied round their own in this mini Town vs. Gown controversy. And from that point on, as the cliché-mongers put it, there has been no looking back for the GPA.

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This past academic year the GPA sent out almost weekly notices to all students of meetings and other events, co-sponsored (with the Women's Alliance) a feminist speaker, and threw a few more successful open parties (including a Valentine's Day Dance which was the only campus-wide social event of the evening — scheduled by the students' Social Committee, which seems in this case to have taken pains to short-circuit competition). Signed letters regularly appeared in the opinion page of the campus paper, and a GPA newsletter appeared towards the end of the year, complete with articles on being Gay, and even a glossary of terms for the uninitiated. Following the annual Class Nite Plays (notorious for their unalloyed bad taste) the GPA joined Puerto Rican, Black, and women's groups in protests against jokes at the expense of, respectively, Gays, Puerto Ricans, Blacks, and women. GPA visibility peaked during Gay Week, a spring extravaganza which featured speakers, movies, etc., and culminated in a Gay Day Picnic, for which occasion all students were requested to wear jeans. (An article comparing the incidence of jeans-wearing on this vs. other statistically-comparable occasions appeared in the following issue of the paper.)

And so at year's end I decamped from the groves of Academe, blinking in the bright white light of a world in which Gay Rights bills are actually voted *down*. And I consider that perhaps the appropriate question is not: "What is the matter with Miami?" but rather "What is the matter with Bryn Mawr?" Without doubt, there were undercurrents of uneasiness, covert jokes, and an inchoate sense of being threatened. Rumbles of discontent assumed the following form: No one would dispute the right of homosexuals to organize and associate openly, and everyone could sympathize with Gay demands for non-discriminatory treatment. But — weren't the Gays now forcing upon the community their own views of what was normal? "What do you think it has been like for us?" replied GPA spokesmen, quite drowning out those internal voices of common sense which whispered, "But isn't that the point, somehow? Isn't there a difference?" In short, Bryn Mawr discovered that there is no middle ground between acceptance and rejection of a way of living and thinking so radically opposed to the prevailing heterosexuality; "toleration" of the ambitious claims of the GPA entails at least tacit admission of the normality of a deviant life style. A choice such as this is no choice at all to a good guilt-ridden institution like Bryn Mawr: it surrendered without a fight.

But an assortment of intellectual flotsam and jetsam contributed to that philosophical surrender. First, there is that old stand-by, the equality of ideas in the academic marketplace. The original, John

Stuart Mill-type version held that we must allow all ideas to compete freely, for, in this quite passable of all possible worlds, Truth will emerge triumphant. The present degenerate version exists as an almost universal prejudice (in the Burkean sense of an unexamined opinion), and commands the homage of countless scholars who are less than sure about man's ability to recognize Truth when he sees it, and more than doubtful about the very existence of absolute Truth. Mill, at least, reserved the individual's option of arriving at personal conclusions; I have heard a highly-respected historian argue that objectivity in his field or any other is wholly illusory — that records of births and battles are quite as subjective as descriptions of philosophies and party platforms. What has all this got to do with Gay Liberation? Well, paradoxically this equality-of-ideas theory gives the edge to any *fresh* contender for the title of Truth. From the argument that all ideas *can* be questioned we descend precipitously to the position that all ideas *ought* to be questioned (no soft rides for orthodoxy!). Each new idea appears as potential truth, potential progress, while the *status quo* symbolizes a calcified tyranny. This mode of thinking permits, nay encourages, an irresponsible attitude on the part of the thinker, since he does not claim that the cause he champions here and now will be always and everywhere defensible. Rather, he claims its "right to be heard," and his "right to think what I wish."

Bear in mind, please, that I am discussing an "unexamined opinion," and not a rigorously-reasoned philosophical argument. I don't claim that victims of this prejudice submit themselves to such a reasoning process, nor do I claim that they would accept my admittedly unsympathetic portrait. But there is one claim which I can make, while the opposition's own arguments deny it to them: that I am right and they are wrong.

In any event, it is clear where the "marketplace of ideas" people fall in a controversy between heterosexuality and all comers. For the traditional, majority view argues that heterosexuality is right, homosexuality wrong, case closed. But for shoppers in the "marketplace of ideas," the stores are always open.

This leads us to a somewhat more recent arrival in the academic community, from the regions of pop psychology and sociology. It is the notion that normality in the traditional sense does not exist: at most it is a statistical entity, afflicting more than 50% of the population. I am not opening fire here on psychology and sociology departments. I am isolating a sentiment floating about in the academic atmosphere, an "I-have-a-room-mate-who-took-Soc. 101-and-he-

says" sort of expertise. But, after all, that is the most widespread kind.

Next, there is what one might call the Freudian poisoning-of-the-well treatment, the psychological questioning of motives: "Are you *insecure* about your own sexual identity?"; "Why are you denying feelings which everyone has?" and the like. At Bryn Mawr, the choice of living situations offers further complications: Do you live in a coed or a single sex dorm, and why?

Predictably enough in an academic community, a watered-down version of Platonic homosexuality as higher love is available (again, I am registering no complaints about classroom, textbook philosophy). The college setting inadvertently contributes to this floating myth, because it accents the communal living and close friendships of the dormitory rather than the diverse relationships of the family. An occupational hazard for academics is, of course, an over-emphasis upon the life of the mind, with a corresponding depreciation of the material — a Manichaean sort of heresy. Thus, it becomes easy to exalt creative acts of the mind above acts of physical creation, and in such an environment the intrinsic sterility of homosexuality can assume the aspect of a virtue.

With notions such as these muddying the academic waters, the surfacing of the GPA, and Bryn Mawr's almost unquestioning acceptance, followed naturally (I might almost say inevitably, but that would back us into yet another intellectual controversy). Such conditions not only make the present situation understandable, but bode ill for the future; like a low white blood count, they leave the patient vulnerable to any passing virus. For the homosexuality question allies itself with a whole range of issues, whether implicitly or explicitly, each giving aid and comfort to the others.

The GPA and the Women's Alliance, for example, share a symbiotic relationship, as well as a healthy portion of their membership. For feminism — in its radical, Susan Brownmiller, man-as-eternal-rapist form — finds a comfortable accomodation in lesbian circles. Certainly not all lesbians hate men, but at least the more politicized among them consider a you-can't-trust-'em attitude justifiable.

A friend of mine found herself in a very nasty situation as the object of a lesbian's love. This professed lesbian admitted that her deep involvement in the women's movement had led her to conclude that homosexuality was the natural expression of her feminist convictions. This episode offers a revealing look at the flaccid acceptance which passes for high-minded tolerance among college administrators. A member of the administration accused my friend of

callous insensitivity toward this lesbian, and added, "After all, we *are* a liberal institution." "Oh?" answered my understandably riled friend: "Excuse me, but I thought this was a liberal *arts* institution."

In a curiously self-contradictory way, the radical-feminist discussion of sexual differences — "nature vs. nurture," innate vs. learned — generates defenses for homosexuality from opposite directions. If one argues that there are no intrinsic differences between the two sexes beyond the most blatant physical ones, then traditionally "feminine" and "masculine" traits must lurk within each of us, male or female. Only the genetically-allotted proportions will vary in highly individual combinations of sexual traits and preferences (homosexual, heterosexual, bisexual). And, backtracking to our psychological survey, none of these variations can be considered *abnormal;* in fact, they cannot even compete for the title of most normal. Whatever sort of attraction one "naturally" feels is O.K. — for oneself.

I have already identified the Susan Brownmiller, man-as-eternal-rapist theory as another school of thought. It is also used to shore up the theoretical underpinnings of the homosexual position. If throughout history men have subjugated women through sexual intimidation, then a woman's sexual relations with a man are necessarily contaminated by these underlying brutal and brutalizing intentions. Heterosexuality becomes somehow deviant, since the only equal, non-exploitative relationship a woman can form is with another woman.

Although both of these feminist approaches to the sexual-differences controversy are compatible with female homosexuality, the two appear, otherwise, mutually exclusive. Theory A posits male and female psyches unsexed; Theory B suggests deeply-ingrained differences (ineradicable according to some, curable over the long haul according to others). This inherent incompatibility does not mean that champions of Theory A wage constant warfare on standard-bearers of Theory B; often the same mind expands to encompass both, by virtue of that hazy operation which passes for thinking in most of us most of the time. Remember, we are not insisting upon rigorously logical thought processes in the opposition; we are testing the pollen count of a certain atmosphere, and for our purposes the relative quantities of beech, and ragweed matter little, since our subject reacts to both.

A person's inclination to accept homosexuality, whether for himself or for others, is also related to the extent of his sympathy for radical politics and anti-family positions. I am not spinning theories now, but attending to the voice of experience: the GPA,

the Women's Alliance, and the Social Action Caucus repeatedly found themselves on the same side of the barricades in social and political battles. There are common sense reasons for this unholy alliance. Homosexuals cannot propagate by means of homosexual liaisons; since homosexual unions are barren, in the literal sense, they are antithetical to family life. Thus, militant homosexuals are spared the strong, sentimental attachment toward the family which poses a hurdle of greater or lesser proportions to many social revolutionaries. From the opposite, pro-family perspective, an unrepenting homosexual would lack the psychological and emotional resources which sustain the heterosexual traditionalist. In other words, homosexuals who campaign for universal acknowledgment of their normality are likely to be social revolutionaries in all areas, since their definition of normality dethrones the family from its sovereign position as the foundation of society.

This is a reciprocal relationship. It becomes natural for family planning advocates, Zero Population Growth supporters, etc., to view the homosexual community with approval, however qualified. Gays, after all, are not infesting the environment with still more human beings. (The word "sterile" has positive as well as negative connotations for our society.) The understandably unenthusiastic attitude of Gays toward family life accounts in part for their frequent alliance with pro-abortionists; once again, they either lack, or are rebelling against, those strong instinctual ties which bind babies to the affections of most heterosexuals. And the inertia which afflicts most party followers — the tendency to vote the party line as a matter of course — also swells the number of homosexual pro-abortionists. But I think that one can isolate yet another "reason": there is a similar self-centeredness in the concerns of pro-abortionists and militant homosexuals. Both, pushing aside the social and ethical demands which life imposes upon us, ask, in effect: "But what about *me*?" We are often told that anti-abortionists are insensitive to people in difficult situations: to the poor, to unwed mothers-to-be (especially teenagers). It is at least as legitimate to charge advocates of abortion with a self-absorbed egoism which shuts out the mute cries of the children dependent upon them.

In a similar way, the homosexual bidding for "normal" status is locked within a narrow perspective from which he is unable or unwilling to recognize the explosive effects of his own "liberation" upon society. Heterosexuals are accused, often with good reason, of insensitivity toward homosexuals. But if homosexuality is as normal, as justifiable, as heterosexuality, what need is there for "special" treatment? The thoughtful and humane heterosexual, it

seems to me, sympathizes with the inherent tragedy of the homosexual's life, and wishes to help him cope, *for the very reason* that he considers homosexuality a "problem," an abnormality. Both Gay and pro-abortion activists, then, lack the larger vision which would enable them to break through the boundaries of their own constricting "life styles." And this similarity forges a nexus which is psychological, if not logical.

From the seemingly self-confining topic of Gay Liberation, I have ranged far afield. But this comprehensiveness is precisely the point I am trying to make. The controversy over Gay rights cannot be relegated to scientific seclusion; it is inextricably related to most of the issues contending in the social arena: e.g., feminism, family planning, global population control, abortion. Our deliberations about this issue are affected by our moral and political convictions, and the latter are colored by our conclusions about Gays. The relationship is that close.

The Gay liberation issue is especially dangerous because admission of homosexuals' normality seems to hurt no one. I disagree. Gay Liberation is related to the other watershed issues of our time, in some cases directly; in some, by strange subterranean routes of the mind, and in still others by a process most closely resembling osmosis. But whether or not my explanations for these relations are convincing, the relationships *do* exist: witness life at Bryn Mawr. And thus, the many homosexual "fellow travelers" — those willing to accord Gays normal status — threaten family and pro-life values just as certainly as pro-abortionists. Remember, the vast majority of students at Bryn Mawr are not homosexual; they are either worshipping the false god of an unquestioning toleration, or exercising that vestigial civility whose function, it appears, is now restricted to such select occasions. Granted, the situation on campus is not an exact microcosm of society at large — else there would be no victories in Florida. But that does not license us to indulge a false sense of security, or to deny that Bryn Mawr may be a harbinger of things to come. As we at Bryn Mawr like to say: college is just like the real world, only more so.

Bogus Sex: Reflections on Homosexual Claims

M. J. Sobran

IN AUGUST 1977 a New York public official named Adam Walinsky wrote a short newspaper article arguing against the proposals of militant homosexuals for legislation in their favor. It was not a memorable article: I read it, and found it neither distinguished for insight nor tainted by malice. Probably it would have caused no stir except that Walinsky held a minor municipal post, which caused some readers to suppose that his private views somehow represented (or at least could influence) public policy.

A few nights after his article appeared, a mob of homosexuals gathered outside his home, equipped with bullhorns, and chanting slogans. Among other things they threatened to burn down the house, then and there, with Walinsky and his family inside it. No doubt this was mere bravado, but all the same it was an ugly incident.

It brought an editorial rebuke from *The New York Times.* The editorial, in turn, moved one reader to write the following letter:

> This is in response to the statement in an Aug. 16 Topics item on your editorial page that the zap of the home of Adam Walinsky by homosexual activists was an intolerable violation of "privacy and safety."
>
> As a homosexual citizen, I cannot walk the streets of New York City or the suburbs thereof without being subjected to derogatory comments by perfect strangers regarding my homosexuality. My privacy and safety are thereby violated.
>
> Mr. Walinsky is one individual who would stir up hatred against a large class (group) of people. If on one night he is subjected to some of the hatred which he has forced on large numbers of other citizens on a constant basis by his ill-informed writing, then my sympathy does not lie with him.
>
> The Times would do well to concern itself with the privacy and safety of a large group of citizens (homosexuals) rather than that of one bigot.

Now one would think that the incident, so reminiscent of a Ku Klux Klan rally (except that it occurred not in a secluded rural hideaway but at the urban home of its intended victim), would mortify any civilized partisan of the cause in whose name it occurred. Yet the writer virtually says that Walinsky had it coming to him (as did his wife and children, one presumes). Even more remarkably,

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he accuses Walinsky of wanting to "stir up hatred" and of being a "bigot."

But this should not amaze us. Man is vengeful, and never crueler than when he fancies that he has been insulted. Hitler did not think he was persecuting Jews; he thought the Jews had been persecuting him and his fellow Aryans. I once saw a televised interview with a young man who had murdered eight or ten young women, and he spoke of them, their bad manners and self-centeredness and insensitivity to others' feelings, with a tone of genuine grievance; what is more, he was strikingly intelligent and articulate. It may be that he only killed particularly annoying young women. For that matter, Hitler may have been singularly unfortunate in his Jewish acquaintances. Perhaps they merely (as we say) overreacted — like the young fellow who thinks threatening to incinerate a family is justified by occasional "derogatory comments" about homosexuals.

Militant minorities frequently cultivate a morbidly exaggerated sense of the wrongs done them. Often there is much truth in their complaints, which makes it awkward to gainsay them: the degree of their victimization can never be exactly determined, and one risks seeming unfeeling if one points out that the wrongs are, after all, finite. But failure to say this may encourage violence. For if all of society is engaged in oppression, then any victim of that oppression may excusably strike out at any member of that society. That proposition was most vividly expressed a few years ago by Bill Walton, the basketball player, who said that, given the history of racism, he wouldn't blame any black man who took up a gun and shot him, Bill Walton, at random, simply because he happened to be white.

Such secular theodicies, which come to terms with the ugly facts of crime by deducing that society has brought death and destruction on itself, have resulted in a whole strategy of intimidation in politics. James Baldwin warned of "the fire next time," and even Martin Luther King, though carefully confining his explicit advocacy to non-violence, used to predict "a long, hot summer" if Negro demands were not met. Even the women's liberation movement issues such threats from time to time, and male hecklers have been beaten up at rallies. One young feminist went so far as to shoot and wound Andy Warhol. She was thought to be deranged, though perhaps she was merely ahead of her time.

But feminist and homosexual movements, which consist of relatively affluent and well-educated people, are unlikely to resort to physical assaults on any large scale. As urban rioting has disappeared, even spokesmen for the Negro causes have been unable

to sound plausibly ominous. Instead the strategy of intimidation has depended, increasingly, on accusations. The putative victims now resort to charging their opponents with evil motives: "racism," "sexism," "bigotry," and so forth. In a word, he who resists the claims of these groups, for whatever reason, is threatened with opprobrium. It has not been sufficiently realized that this familiar tactic has seriously damaged our public discussion, making it difficult to consider issues of public policy and morality impersonally and on their merits. The civilized presumption of the good will of one's adversary is rapidly eroding. The homosexual's letter, appearing in the pages of our greatest newspaper, is a vivid illustration of this process. It shows how the fanatic may attempt to browbeat the well-meaning but weak-minded citizen into acquiescence.

To define as a "bigot" anyone who disagrees with you is itself a bigoted way of thinking, and a form of rhetorical terrorism as well. But such question-begging tactics are common enough. James Q. Wilson has pointed out the tendentious uses of the word "reform." Is permitting women to have their unborn children killed in their wombs a step forward for civilization? Well, it is known as "abortion reform." There are now people advocating the destruction at birth of seriously deformed children. Perhaps this will soon be known as "infanticide reform." We call people "civil rights advocates" when the measures they espouse actually diminish civil rights, in the sense that they weaken the individual citizen *vis-a-vis* the state.

The phrase "gay rights" is full of ambiguity and confusion. Does it refer to rights a) peculiarly due to homosexuals, and not to others, or b) due to all alike, but peculiarly withheld from homosexuals? Now a) is obviously repugnant to our political ethos: everybody has the same rights, and a "right" enjoyed by some but not others is no right at all, but a privilege (literally a private law). As for b), that is closer to what is meant by those who advocate so-called gay rights: present laws and even informal mores "discriminate," it is held, against homosexuals. But this is only to say that we as a culture disapprove of homosexuality. Laws prohibiting homosexual behavior "discriminate" against homosexuals only in the Pickwickian sense that laws prohibiting theft discriminate against thieves. The law condemns acts, not a class of persons. Sodomy laws, after all, are like most other laws in that respect: they do not even recognize violators as constituting a distinct class of persons. They have to do only with discrete offenses, regardless of the general inclinations of the offender. Discrimination has to do with the intent to single out persons. Such an intent might be present where the law punished as illicit only sexual acts committed with a partner of one's own

sex; however, this is not a typical homosexual complaint. Prosecution of homosexual acts nowadays is rare, and homosexuals admit this.

Sometimes homosexuals protest discrimination in non-sexual matters like housing and employment. Though they typically insist that they are asking only for acceptance, not approval, they demand that everyone else act as if homosexuality were perfectly respectable. Probably respectability is their ultimate goal, as the outraged complaint about "derogatory remarks" suggests. In any case, we all recognize many kinds of discrimination as legitimate and even non-invidious. A man may have nothing against students, yet prefer not to rent an apartment to them or hire them in his shop because they tend not to stick around long. These are matters of discretion; and if he makes a misjudgment in the case of a given student, well, that is his business; just as it is his business if he marries the wrong woman, or goes to the wrong church, or votes for the wrong candidate. Why homosexuals should be specially protected among all the possible subjects of discrimination is not clear.

That partly explains why militant homosexuals like to compare their woes with those of historically persecuted groups like Jews and blacks. The trouble is that these minorities were made to suffer for circumstances beyond their control, and independent of the individual choices and behavior of their members. They were persecuted, in fact, for membership itself. It is disingenuous for homosexuals to insinuate that they have suffered group persecution, when it is hard to see how they can have been regarded as a group at all until their recent efforts to band together for political reasons. Even granting that they have been persecuted, a group of persecuted people is not the same thing as a persecuted group.

But whether they are in fact "persecuted," even as individuals, depends on whether they are singled out for pursuit and dealt heavier penalties than those who commit offenses of comparable gravity. There was a time when pickpockets were hanged in England. To say that the penalty was too severe is not, however, to say that pickpockets were persecuted, since the severity was not animated by a malice uniquely directed against pickpockets. Perhaps gentlemen of that trade were given, in private, to condoling with one another on the law's rigors, and to agreeing that their sufferings were rivalled only by those of the early Christians; but their contemporaries would have thought them bathetic had they said so openly, and they knew it, which distinguishes them creditably from today's organized homosexuals.

It is true that those whom society defines as deviants are prone

to band together for companionship and consolation. Thus we frequently hear about the sentiments of the "homosexual community" of this or that city. But in what sense does such a community exist? Communities usually consist of such constituent parts as are almost by definition impossible where homosexuality prevails: families, tribes, lines of descent, and associations based on and incorporating these, like religious and fraternal bodies, charitable organizations, clubs, and so forth. Their mark is continuity and permanence. Homosexuality, on the other hand, is centrifugal, seeking transitory pleasures and generally resisting long and stable relations. Propagandists for homosexuality are unconvincing on this point, especially when their assertions are set against the personal ads in *The Village Voice*. Homosexual pornography features an inordinate amount of sado-masochism, if the ads are any indication. Furthermore, while heterosexual pornography exists in profusion, it is protested by many heterosexuals as debasing to proper sexuality. It is a striking fact that homosexuals seldom (to my knowledge, never) object to homosexual pornography on similar grounds; from which it would seem that the homosexual subculture makes no value distinctions among kinds of sexual relations but is, in principle, promiscuous.

This point is of some importance because the arguments for the legitimation of homosexuality seem to require the rejection of any sexual norms. This is implicit in the false opposition between heterosexuality and homosexuality characteristic of homosexual polemics. One would think, to listen to them, that the law simply permits all voluntary heterosexual relations while forbidding all homosexual acts. Obviously this is not so. Such sex laws as exist tend to favor a particular norm of intercourse that is heterosexual, yes, and much more besides: monogamous, for instance. Fornication and adultery were punishable offenses for a long time (and still are, in some places). One does not perceive an alternative ideal of sexual relations animating homosexual protest; on the contrary, it is the absence of ideals that is striking. Hence the homosexual movement is essentially one of revolt, not reform. Its social organization is based on a lower common denominator than "straight" society; its tendency is not toward integration and community, but, on the contrary, toward decreased responsibility.

This false duality also enables homosexuals to skip over a difficulty raised by their claims. If homosexuality is not to be regarded as deviant behavior, what is? Anything at all? What about intercourse with animals? Shall we forbid the landlord to refuse to rent to the man whose partner in sex is his pet? If not, are we granting a

special status to heterosexuals and homosexuals who prefer human partners, and thereby "discriminating" against others? What about sex with children? With the dead? Are these too "valid lifestyles"? The homosexual is annoyed when such questions are posed, but there is no reason in principle why he should be. As Dr. Johnson observed, the levellers always want to level *down* to themselves, but can't bear levelling *up* to themselves. Their assault on standards is ambiguous: for all their rhetorical relativism, they really want some positive value ascribed to *their* preference. They want it to be accepted as a complement to "straight" sex in normality and dignity. They want the stigma removed. They want to be told there is nothing wrong with them, and they want to force the larger society to say it. This view has already been more or less accepted by the American Psychiatric Association, which recently voted to declare that homosexuality is not a mental illness. Whatever the truth of this matter, it is odd (as Edith Efron remarks) to find members of an allegedly scientific discipline settling such a question by a show of hands.

The progress of the homosexual cause is interesting. For centuries the general Western view was that homosexuality was a sin; a willful and therefore punishable perversion. Then modern psychology was invoked on behalf of homosexuals to convince the public that their inclination was a maladjustment, more to be pitied than censured — involuntary, and therefore not subject to punishment; a view which was accepted as enlightened for some years. The current view, sponsored by homosexual pressure groups, has reverted in part to the view that it is indeed voluntary (as the old morality held), but (contrary to erstwhile "enlightenment") non-pathological: a mere "preference."

Since there is little prospect of punishment, it is now safe for homosexuals to take this position — the same one St. Paul has lately been derided for taking, though of course he held that it was not an innocent preference. The important point, for our purposes, is that the word "preference" is meant to suggest that homosexuality is a matter of sheer personal predilection, beyond objective value judgment, and, moreover, that it is a matter of choice rather than of compulsion and neurosis. Articulate homosexuals are now waspish toward that kind of tolerance that regards them as helplessly afflicted. One gets the impression that they could be "straight" if they wanted to be, only they don't want to be. But of course this sounds suspiciously like sour grapes. As Ernest van den Haag has observed, it is incredible that anybody would willingly pay the

immense social costs of being a homosexual if he could easily avoid it. If not an erotic disorder, it is surely a social maladjustment.

The great uproar in Dade County, Florida, this year centered around whether homosexuals were worthy models for children. Though homosexuals accused their adversaries of demagogy for raising this issue, it is surely a vital one. For the homosexual claims of normality necessarily imply that it is a matter of indifference whether social influences tend to make a child grow up homo- or heterosexual. This is an inherently implausible proposition for the simple reason that eros is too near the center of life *not* to matter. I, for one, would find it easier to believe that homosexuality was preferable than that neither was.

There is no area of life in which we are not willing to affirm norms: ethics, health, beauty, literature, music — we discuss all these things on their merits, confident that it is possible to discriminate intelligently. Of course there are fashions and shifts of taste, but we discuss and reason and argue about even these. Some differences don't matter very much. But it does matter whether Shakespeare is more worthwhile than Mickey Spillane, just as it matters whether we habitually eat a balanced diet or junk food.

Sex matters too, and (as I have observed before) one sign of this is the grisly form it takes in war, where victors often mutilate their adversaries and rape the women, these abuses being the ultimate annihilations of the dignity and integrity of the defeated: nothing could more horribly violate their dignity; death and agony do not suffice. This is a cross-cultural phenomenon, reflecting the universal perception that sexual order is at the heart of social order.

Even if there were no real reason to prefer heterosexuality, the fact of its prevalence in our culture would be a reason to encourage the young to prefer it, just as, in a smaller way, the prevalence of right-handedness makes it more convenient to be right-handed. And when a whole civilization is based on the presumption that one should have an erotic preference for the opposite sex, the homosexual is denied full enjoyment of a vast range of cultural activities and works of art, lofty and popular. The estrangement is too pervasive to be dismissed.

As Chesterton remarks, the old songs do not celebrate lovers; they celebrate true lovers. The ability to fully enjoy sexual rapture and yet to subordinate it to the discipline of fidelity is a genuine human achievement — and a fruitful one. It gives resonance to individual lives and health to whole societies. This kind of permanence is not typical of homosexuality — or, more accurately, of male sexuality except when, as George Gilder has put it, the abrupt male

impulses are subordinated to the deeper, more long-term sexual rhythms of woman. Our literature testifies to the sense of transfiguration men feel in devoting themselves to a single permanent union, and women, though perhaps somewhat less ecstatic, are perhaps more naturally adapted to it, as their aversion to casual and promiscuous sex shows (even in lesbian relationships). There are simply and obviously few greater forms of human happiness, few richer satisfactions, than are found in such abiding erotic complementarity. The appreciation of, and hence capacity for, this kind of union is surely one of the finest things we can hope to bequeath to children. It can hardly co-exist with a readiness to indulge in casual intercourse, based on shallow congenialities, with either sex. One must be either disingenuous or egocentric to confuse the propagation of erotic norms with specific persecution of homosexuals.

Of course the plainest reason of all for encouraging heterosexual monogamy is simply to give children the capacity and disposition to enjoy responsibly one of the basic and perennially satisfying human experiences: parenthood. This is not to say that everyone should be a parent; or that everyone will succeed as a parent; or that people who are incapable of successfully begetting and rearing children should not frankly face the facts. It *is* to say that among all human potentialities, this one should be fostered by the community, because most will choose the vocation of parenthood anyway, and because it can do no harm to help see that it is within the reach and among the options even of those who may not choose it. We do not refrain from teaching children to read merely because some of them, as adults, may choose never to crack a book. That adults have a certain freedom to turn their backs on the norms of the community does not oblige the community to relinquish those norms; most particularly it does not require the community to stop upholding those norms pedagogically, as guides to the young. The textbook institutionalization of sodomy is a greater perversion than the toleration of sodomy. One might almost say that it is a greater perversion than the practice of sodomy.

When homosexual spokesmen make common cause with feminists of the contemporary kind and with abortion advocates, on grounds that they have "the same enemies," they are right. The enemies of both are those who believe that the family is the harbor of earthly happiness, and that sexual intercourse is best subordinated to community and futurity. Feminists who scorn family satisfactions in favor of jobs forget that most jobs are not "rewarding" — or, as Gilder has more accurately pointed out, that men find them re-

warding principally as sources of self-validation *within* the family, in that jobs help make men valuable to the family, giving them roles of importance, i.e., as providers complementary to the childbearing and nurturing roles of mothers. Abortion advocates who categorically and uncritically affirm abortion as a "right" regardless of morality or circumstance are, like homosexual polemicists, guilty of nihilism in the area of sexual morality, since they too fail to suggest a positive norm to govern and delimit the demands they so vociferously advance. Would they admit there are circumstances in which a woman may be unjustified in getting an abortion? It is frustrating even to try to get ideologues of this sort to face such questions.

If I may repeat myself once more, it is a little odd to speak of having "sex" with one's own sex, just as it is odd to speak of talking to oneself as "conversation." Perhaps, by analogy with junk food, we can speak of junk sex. Obviously that applies to other vices (to use the old-fashioned term, which I choose not only for its moral bias but also precisely for its lack of pathological implication) besides homosexuality. But to speak of that vice in such terms is to risk offending homosexuals, since homosexuality, in the present state of things, is widely regarded as a kind of quasi-ethnic category, so that to derogate *it* is to insult *them*. This in itself is a tribute to the success with which the propagandists have sown confusion.

Of course homosexuals are people who possess rights and dignity like the rest of us. Often they are otherwise good people, capable of achievement and even heroism — like the rest of us. But we distinguish between the sin and the sinner; and if a man chooses to identify himself with what others regard as his defect, he must bear the consequence of that, and not accuse others of violating his dignity when they disagree with him and disapprove of his "lifestyle." We should not encourage homosexuals in their weakness; nor harass them for their peculiar temptation.

Still, it is precisely because of their human dignity that we should be concerned about that temptation, whatever form our concern (always charitable, one hopes) may take. It would be a victory of humanity to undo the damage of the gay rights movement by persuading its members, without humiliating them, that they need not pretend that their vice is a virtue in order to belong to the moral community. To put it another way, homosexuals should be encouraged to realize that homosexuality is unworthy of them.

The Christian Faith and Woman

Erik v. Kuehnelt-Leddihn

TO BEGIN WITH I must disappoint those readers who believe that Christianity contains a ready-made "theology of woman." All too many people assume that the Faith is a sort of filing cabinet from which the initiated can draw the answer to any question. The truth is, that in the Christian *depositum fidei* there are, for each well-defined article of Faith, a thousand undecided questions — and this applies to the Catholic Church too. What follows here is merely the opinion of *one* Christian whose book on "The Mystery of Love" *(Das Rätsel Liebe,* Vienna 1975) is subtitled "Materials for a Theology of the Sexes" which means that it represents merely a collection of source material waiting for future elaboration.

However, there are clues to be found in Scriptures, there are dogmas and codified basic principles and traditions, but one must beware of accepting as facts certain die-hard tales and legends handed down through the ages. One of these claims that at the Council of Macon it was debated whether woman is a human being; a French bishop who knew very little Latin is responsible for this tale because, in a conversation, he used *homme* for *vir* (*"elle n'est pas homme"*). The legend of the "Popess Joan" is another example.

The Bible tells us that God created man *as* man and *as* woman. ("...male and female he made them.") According to the more detailed second account of the creation He made man first and only when Adam, in the company of animals, felt lonely and became sad, did God make Eve out of one of his ribs. (The subconscious memory of his early, lonesome stage may account for man's tendency to use animal names as terms of endearment for a beloved woman, whereas this happens very rarely the other way round.) Only now is Adam happy, he has a helpmate (*Äsär*) who is flesh from his own flesh, bone from his bone. The harmony is broken through Original Sin which engulfed all of creation, but Eve ("Life") was undoubtedly hit harder than Adam by the ensuing punishment. Does this mean that hers was the greater fault? Not necessarily. "Thy desire shall be for thy husband and he shall rule over thee" — here we see the roots of woman's tragedy and here is the point at which domination

Erik von Kuehnelt-Leddihn, a prodigious author, lecturer and linguist, is well-known as an authority on matters great and small (and far too numerous to mention). He now lives in the Austrian Tyrol.

enters the world. All efforts to annul Yahweh's curses — democracy as "self-rule," contraception,[1] painless childbirth, labor-saving technology, etc. — are only illusory solutions.

The Biblical account which, in a kind of code, states *absolute* truths, is brutally confirmed by tangible facts. The original harmony between man and woman is cruelly broken, each fragment tending to grow independently and often at the other's expense: sexuality, which in itself is not love, seeks merely gratification; Eros, which *is* a form of love, is directed toward union; friendship seeks and rests on mutual understanding; charity which is selfless, gratuitous love — they frequently do not harmonize. A man might desire a woman without loving her, a woman might love a man without being physically attracted, friendship might be endangered by a sexual urge — the dichotomy in the relations between the sexes is all too evident. And it must be stressed that modern biology is discovering more and more basic differences between them. One can well imagine how man and woman, under ideal conditions, supplement each other in full harmony, whereas in this Vale of Tears they often find it difficult to meet and to understand each other and this is true in the sexual, the erotic, and even in the spiritual-intellectual sphere. No wonder, since we know from Scriptures[2] that all of nature is fallen and awaits Salvation. Physical development, maturity, and procreative powers are not simultaneous in man and woman, their sexual reactions radically different (even among "primitive" peoples), and their intellectual achievements of a very different character.

Since 1958 we know for certain that the male cell has an additional element ("Y") lacking in the female. Man, though less oscillating is, at the same time, the more complex, the less "natural" being. (That woman's life-span is today, on the average, longer, is merely the result of medical progress: *femme grosse a un pied dans la fosse* — pregnant woman has one foot in the grave — is no longer true. In woman, sex and Eros are better integrated, but toward each other as well as within themselves the sexes stand in contradiction.

Undoubtedly one cannot ascribe any specific character trait to either man or woman alone. There are brutal women and gentle men, taciturn girls and loquacious boys — and this in spite of the fact that in the female brain the left part, where the linguistic faculties are located, has a better blood supply; that woman is the more communicative, histrionically gifted (from childhood on); the more adept at learning foreign languages, and an able competitor in the field of literature. There are first-rate women writers and poets, but hardly any composers, mathematicians or philosophers. Women

find it difficult to think in abstract categories because they are more "personal" (and, at the same time, more easily influenced by other personalities; they are more corruptible and seduceable, if intuition does not come to their aid). Their world is a very concrete one full of details which are more important to them than to men who strive for a total synthesis of the general. The "typical" woman loves a man for a conglomerate of, for her, attractive single traits; a man loves a woman's "totality." (A woman's love can be impeded, if not destroyed by "unattractive" minor traits — a completely baffling fact for the man in question.) But her sense for detail, for the little things in life, makes her an ideal helpmate (though rarely a good comrade), a reliable secretary who stands with both feet on the ground and manages to put into practice her boss's dreams. She is also the more peace-loving, the more earthbound, man the more unsettled, disorderly, lazy and aggressive. (Nomadic cultures are very patriarchal.) All these traits can be explained biologically and are therefore not to be treated negligently.

The fact that man, at bottom, is the more creative is not to be doubted and cannot be explained by "the suppression of women over thousands of years." Unisexual heredity does not exist; every woman (just as every man) has an "emancipated" paternal as well as a "repressed" maternal pedigree. Still, it is true that women have suffered (and still suffer) from male suppression and accusations — one need only remember how many were disgraced and even abandoned because they bore no sons, whereas today we know that the father alone is biologically responsible for the sex of his children.

But woman's physical disadvantages constitute a serious handicap in any circumstances and from this point of view one must understand the Jew's morning prayer in which he thanks God for having been born a man, whereas the Jewess merely thanks for being human. God is quite evidently not a democrat and treats us differently according to His unfathomable counsel. Let us repeat: in regard to intellect and character the differences between man and woman are merely "statistical" and in most cases women are able to do the same things as men — and vice versa — except for certain points: men cannot bear or nurse children and armies of amazons are a perversity. The horrors committed by the Finnish Red Women's Battalions or of the King of Dahomey's female warriors in the "Evil Night" *(Zenanyana)* are legendary. Killing and dying belong more to man's realm because he is the more transcendental being. He *causes* life (and decides its sex), but woman *gives* it. Therefore female hangmen, triggerhappy pistoleers, *pétroleuses,* abortionists, i.e., murderesses of infants, are monstrosities. In the Nibelungen Saga

Theodoric kills Kriemhild because, as a woman judge and murderess, she has become unbearable, unsupportable.[3] The ancient Germanic death rune (adopted by the Nazis[4] and, lately, by naive Americans as a "peace symbol") represents the male genitals, the birthrune the female ones. In the symbolism of colors man is dark, woman light. Therefore the Devil is given male, the angels (against all theology) female traits.[5] The (theoretically) attractive male is "tall, dark and handsome," the charming voice on the telephone is "blond." Black is the color of death or liberty — and of the clergy (until recently, at least). The stereotype female Saint is young and usually a virgin, the male Saint advanced in years, if not old.

If male and female characteristics did not overlap in certain respects, any understanding between the sexes would be impossible (it is difficult enough for fallen man anyhow). Very few men understand women and no woman ever understands a man. (Physically, too, he penetrates her, not vice versa.) Women know very well how to treat men, how to "manipulate" them — but there are excellent drivers who know nothing about the motor, all they do know is how it reacts to what they do. Hardly any good portraits of men have been painted by women, (nor are there many good children's portraits painted by men). The list of famous woman painters is limited: Angelika Kauffmann, Rosa Bonheur, Mary Cassatt, Paula Becker-Modersohn are more or less the lot.

However, a female factor does play an important part in the intellectual-spiritual sphere, though it is difficult to grasp and to explain: inspiration (which even Georg Simmel tried in vain to decipher).[6] In studying the lives and achievements of great Europeans, even of some Saints, one does well to remember the principle *cherchez la femme.* There is rational understanding, at which men are usually better, but there is also intuitive knowledge defying rational analysis and this is woman's domain. Except for the Old Testament, prophetesses always had priority over prophets.

If we study the different cultures, especially the great ones, we find that male pre-eminence was the rule almost everywhere. Genuine matriarchies, especially those with polyandric traits, are rare indeed. But the evaluation of woman has undergone enormous fluctuations. One thing is nevertheless certain: the more spiritual a culture, the greater the appreciation of women, and this for the very qualities inherent in her *as* woman. Sociologically woman's position in the working layers — peasants, farmers, workmen — is not bad, it is usually most depressing in the lower middle classes of yesterday, improves the higher one climbs on the social ladder, and is usually best in ruling families. One must not allow oneself to be misled by

externals. In the progressive democracies, woman's position is by no means more exalted than in the old feudal societies. (It is, for instance, worse in monogamous Japan than in polygamous China.) Aristocratic French women were emancipated in the 17th Century (whereas their American middle class sisters had to wait for the 20th Century), as American travellers, like Benjamin Rush, noticed with surprise in the 18th Century.[7] Between 1650 and 1850 women played an important part in French literature, but in the Third Republic their numbers had dwindled to practically zero. The first countries to admit women to the universities were neither Switzerland nor the Netherlands, neither England nor the United States,[8] but the Russian-dominated Grand-duchy of Finland (where women were given the vote in 1906!) and Imperial Russia. The high quality of women there struck almost every visitor, whereas in the Soviet Union they are merely easily available beasts of burden, a source of cheap labor, as Solzhenitsyn pointed out three times in his *Letter to the Leaders of the Soviet Union.*[9] Admittedly women of genius are exceedingly rare and I consider myself fortunate to have known some. Among the Nobel Prize winners there are, except for Baroness Suttner and the two couples Curie and Joliot-Curie, only writers and poetesses and even these not in great numbers.

In one domain statistics cannot be made or applied, and that is individual destiny. Without doubt the female sex is the more tragic — women cry more, not only because tears come to them more readily, but because they have more reason to cry. This gives them a certain nobility and should strengthen man's *general* affection for women (not only individual infatuation). I am thinking not so much of chivalry (in the Old World we thank God for Eve by kissing her hand) as of a profound sympathy, a word that derives from *sympatheia,* "co-suffering." Misogyny has no place in Christendom, certain Gnostic Puritanical and Jansenistic influences in the past notwithstanding. In Europe we find great friendships between men and women mostly in a zone stretching from France and the Germanies to Central Europe and Russia; north of it Puritanism makes itself felt, and south of it the impact of Islam.

The Christian Faith regards our life on earth as a time of trial and suffering. The Earth is our exile — "exiled children of Eve" we are called in the *Salve Regina* — a short but, for eternity, crucial sector of our existence. We are assigned parts in the World Theater whose audience is God. Given the great diversity between man and woman (which only people ignorant of biology, such as Simone de Beauvoir, consider to be purely a product of cultural influences), the parts assigned to the sexes are basically different. Of course, on

the stage certain male parts are played by women and vice versa. We know of men who "abdicate" and of women who *have to* take the place of men, but these are the exceptions confirming the rule. In the *theatrum mundi* man has precedence, no preeminence. Karl Barth has defined this very well:

> A comes before B, man before woman. Order implies sequence, not inequality. Order means precedence and subsequence, ranging above and ranging below. Only insofar as he accepts her as a fellow human being, only *together* with her can he be the first *in relation* to her ... any [other] kind of precedence and preeminence of man that is not understood as being intrinsically *service* would never correspond to the Divine Order, it would only express a specific form of human disorder.[10]

But life on earth is subject to natural as well as supranatural orders which overlap and within these we are proved and tried. These orders are based on service — we are primarily in the service of God, but also in the service of our fellow men and, in varying degrees, of mankind in general.

Each kind of service, however, presupposes specific inherited or acquired qualities and abilities. Only thus can Church, State and Society function and survive. If, to mention one example, neurotic, *manqués* painters, haberdashers, highwaymen and alcoholics are at the head of great powers — as it happened in 1945 — we are in for trouble. One can imagine a political *salon* led by a clever, sensitive great lady, or a queen presiding with tact, humor and intuition over a cabinet of ministers and experts and coordinating their various opinions, but a conclave of cardinalesses? True justice does not mean equality although, due to a confusion of values, we often tend to believe that an even distribution is also a just one. (Why should little Joe and little Jane have exactly three apples each? And how idiotic to give them each a toy locomotive or a doll!) And if equality is regarded as identity, the disorder becomes even more apparent. Ulpian's dictum *suum cuique* — to each his own — expresses factual justice. In America today one has begun to employ people "in the name of social justice" according to a complicated code which assigns to each sex, race and ethnic group a specific number of jobs or positions (even in universities). The results are of course, dismal. This kind of "balance" may be suitable for a zoo, but certainly not for a factory or a college. We have already drawn attention to the brutal exploitation of women in the USSR where they are given the hardest and dirtiest work — in the name of equality.

Women should be given primarily those jobs or positions which they can fill better than men. I prefer a female to a male nurse, but

if I need a brain surgeon, I will go to a man. (In regard to dentists I am neutral.) A Nigerian newspaper published, before the war, the letter of an Ibo, stating that only Ibos can be expected to do intelligent and responsible work. A Yoruba replied, confirming this, but added that in the eyes of God even the simplest household chores, if done well and conscientiously, are worth the same as the most highbrow and complicated research. In the *Opus Dei,*[11] a Catholic organization of (largely) laymen, which originated in Spain, the sanctification of labor is aimed for and the members are university professors, generals, taxi drivers, and peasants. Of course, there must be no iron rules as to what positions should be reserved for women (or men) because personality is an element cutting straight through any systematization. It would be silly to exclude women from any given field of study. Statistics must not suffocate talents. Still, I do not want to see women in mines or steel mills — and, least of all, as rosy sex-dolls on porno posters.

Order also implies relatively fixed positions for each person. In the name of equality among pupils one could do away with exams and marks (as many would like to do); in a marriage there are many possibilities for compromise, but a "democratic" majority decision is impossible between only two people. There are also questions that can only be answered unequivocally, without compromise. A child is to go to this or to that school, one takes a vacation trip or one stays home, one buys this car or that one — a fifty-fifty solution is impossible. Marriage should be entered on a clear basis and in a mixed marriage this implies the children's religion. Such questions must not be left to be dealt with later in endless quibblings and quarrellings (as a celibate professor of theology with misunderstood irenic leanings suggested). Man's primacy is stressed in Scriptures, but in the same breath his duty to love his wife as Christ loves the Church is also emphasized. And when St. Paul says that man is God's glory, woman, however, the glory of man, this *also* means that woman is God's glory.[12] One may object that St. Paul had read neither Simone de Beauvoir nor Kate Millet or Betty Friedan, but Scripture remains Scripture. Every true woman will, *in principle* wish for the primacy of man in marriage. Barth says in this connection: "The man who has to fight for his primacy has already lost it — *poor* wife!"[13] And Friedrich Hebbel found here another source of woman's tragedy, because she wants to be able to look up, to be led. He says: "Thus she strives for a goal which, once achieved, makes her unhappy."[14] Like so many problems in our world, this poses an insoluble dilemma.

America is the land of modern female emancipation, but the

downright ferociousness of *Women's Lib* is a sign that there the relationship between the sexes is particularly faulty. Before the onslaught of this movement, whose leaders (usually) were unsuccessful in fighting male competition, American women lived in an enormous Ghetto where they were practically omnipotent. This Ghetto comprised the family, social life, cultural activities, primary and secondary schools, esthetics and middle-brow intellectual pursuits and here women are still supreme; but in the four key positions, in business, politics, sports and fraternal societies, they simply do not count. The men, who feel uncomfortable in the female Ghetto, take refuge in male associations and clubs where they enjoy themselves and feel at ease.[15] For the American man, women mean sex and Eros but rarely friendship. And yet, friendship between the sexes is all-important. As St. Thomas Aquinas said, it is the non-physical keystone of marriage:[16] faithfulness belongs to friendship, not to sex or fleeting erotic love. In a society where the sexes do not have regard or real fondness for each other, everything is in disarray, misogyny and misanthropy are the result. Fortunately a women's organization called SCUM is still a unique phenomenon. (Incidentally, it is commanded by Lesbians.)[17]

Undoubtedly there are not only natural, but also cultural-psychological obstacles preventing women from achieving the same outward (and, from the point of view of eternity, only temporal and external) successes as men. Some women believe naively that these limitations impede their "self-realization," but —though promised by many Gurus and described as *the* aim in life — from a Christian point of view, self-realization is not the ultimate goal of fallen man who must shed "the old Adam" and, passing through a *metanoia,* become "another." This is as true of men as it is of women. And Sartre is only too right when he claims that the history of every person is the history of a defeat. *In regard to this earth* this is the case always and everywhere although it is up to us, whether we founder nobly or ignobly. (And what does it really matter? After our death Christ is going to dry all the tears we have shed in a lifetime.[18]) As for the World and the Times (the *aiou*) we must remember the words of the Apostle to the effect that we are not to adapt ourselves.[19] None of us is spared the cross we must shoulder. Those who find it too uncomfortable may appeal to the UN's Human Rights Commission.

It is not surprising that in an age as misogynist as ours (one need only think of the dwindling veneration for the Virgin, of modern films and novels) tendencies to "compensate" this are making themselves felt even in the Churches. The consecration of "priestesses"[20]

is contrary to Scripture which must be accepted in its totality — to pick out agreeable tidbits, to dismiss inconvenient passages as interpolations and to "demythologize" the rest is swindling and country-fair trickery. Once the reeking smog caused by a certain school of modern theology has evaporated, we shall see and think more clearly. All the outstanding women I know reject such scurrilous experiments without exception. The great majority of women would despise priestesses — whoever knows anything about inter-female relationships will have no illusions in this respect. And with the women the Church would lose *much more* than just a large part of its "infantry." What is suitable for the Syrian cult of Astarte or the followers of Aimee Semple McPherson has no place in a patriarchal faith such as Christianity. From an ecumenical point of view, and in regard to the Eastern Church, "priestesses" would be a catastrophe, the father-principle being one of the strongest uniting bonds, a red thread running through all orthodoxy. But whoever speaks of fatherhood (which is always based on faith, not on knowledge) automatically includes physical and spiritual motherhood.

The sexes were not created as such for reproduction — God could have decided on a quite different mode for the procreation of intelligent beings — they were created for the sake of love, love of one human being for another, not just a vain reflection of oneself but for a creature different in the profoundest sense of the term. It may be more difficult for a man to make a woman truly happy than it is the other way round;[21] woman's primary task is to grow roses in our temporal desert, as Friedrich Schiller says in a famous poem.[22] And Andrenio, the hero in Baltasar Gracian's *El Criticón,* says:

> I assure you: of all things I have seen in this world — gold, silver, pearls, precious stones, palaces, buildings, flowers, birds, stars, the moon, even the sun — none has given me as much happiness as woman.[23]

Gracian was a Jesuit and, later, a famous Humanist,[24] but the Church — which is in, but not of this world — knows about the triad of sex, Eros and friendship. Possibly for this very reason she has, up to this day, never developed a "theology of woman," or found it necessary to invent a "theology of the male." In the *general* "royal priesthood" of Christians men as well as women have their share.[25] And women have played their part in the Church as saints, as organizers, as artists and thinkers, to an extent way above that of women in any other religious body. It is not necessary to mention names. (There is no lack of negative examples either, remember the Jansenist nuns, for instance.) And yet I do not want to see women officiating and acting as clerics. Under any circumstances I want to

spare them this. And for *Ecclesia* St. Paul's words still stand, now as ever.[26] Let us not tamper with them.

Today the Church is more than ever concerned about the ties between the sexes which are being attacked by all the Forces of Darkness.[27] Neither should we forget that love between the sexes frequently constitutes the breakthrough to the love for God and thus has — implicitly or explicitly — a metaphysical dimension. However, it is important that men and women accept their respective sex as an unalterable fact and fate; there can be no arbitrary exchange of parts, only courage, endurance and honesty on the road to mutual sanctification — in marriage and also outside of it. This is the vocation of the sexes, their natural and their supernatural task.

NOTES

1. *Genesis* 3:16 considers frequent conception as part of the curse. Such is not only the translation of the Vulgate but also of the (pre-Christian) Septuagint.

2. Cf. *Romans* 8:19-23.

3. She slayed (after having become Attila's wife) Hagen from Tronje, the murderer of Siegfried, her first husband. Thereupon Theodoric (Dietrich von Bern) drew his sword.

4. One can "admire" such runes on the graves of deceased National Socialists who had rejected the Christian symbols.

5. *Ho angelos, angelus* is in both Greek and Latin distinctly male. Raphael or Gabriel are male names. Yet we are rarely tempted to call a man "an angel."

6. Georg Simmel, a noted German philosopher, known better as a sociologist in the United States, dealt with this theme in an essay "Weibliche Kultur" in *Philosophische Kultur* (Potsdam:Kiepenheuer, 1923). Simmel lived from 1858 until 1918.

7. Cf. *The Selected Writings by Benjamin Rush,* ed. Dagobert D. Runes (New York: Philosophical Library, 1947), p.380.

8. Women have been admitted to America's Ivy League universities only in the last five to 15 years.

9. Cf. his *Pis'mo vozhdyam Sovyetskogo Soyuza* (Paris: YMCA Press, 1974), pp.35,39,47. This situation, in a way, is being admitted in the USSR. Cf. the articles in *Literaturnaya Gazeta,* No.5,7,8 and 26 of the year 1967. (Articles by Edward Shim, Larisa Kuznyetsova and G. Kuzbasov.)

10. Cf Karl Barth, *Kirchliche Dogmatik* (Zurich: E.V.Z., 1951), Vol.3, p.189.

11. *Opus Dei* means literally: "The Work of God." It is little known that this "Association of the Faithful" (not a "Secular Institute") of Spanish origin caters not solely to Catholics but to all theists. In the higher ranks the members must be celibate in order to devote themselves more wholly to their "work."

12. Cf. *I.Cor.*11:7. If A descends from B, and C from B, then C also descends from A.

13. Cf. Karl Barth, *Ibidem,* p.201.

14. Cf. Friedrich Hebbel, *Tagebucher* (Stuttgart: Reclam, 1963), p.364, No.5648.

15. Not such a long time ago an American Airline had special flights "respectfully reserved to men only," so that their male passengers could be fully "at ease."

16. Cf. Thomas Aquinas, *Ethicorum Lib.VIII,* lectio 12. (Commentary in the 10th book of the *Nicomachian Ethics.*)

17. SCUM is in this case the abbreviation for "Society for Cutting Up Men." A critical and, at the same time, constructive book on the role of women in America is Professor Page Smith's *Daughter of the Promised Land* (Boston: Little Brown, Inc., 1971).

18. We are quoting a well known song by Fr. Andre Duval, S.J., based on *Revelations* 21:4.

19. Cf. *Romans* 12:2. Literally translated this passage means: "Do not fall into the same scheme as this world-and-time." And there is one certainty of everything "modern" today: it will be old-fashioned or obsolete tomorrow.

20. This problem among the various Christian denominations is not always the same one because the Churches of the Reformation do not have the concept of the ordained priest as the *alter Christus.* Still,

from an ecumenical point of view, further unnecessary steps in opposite directions must always be deplored. Last, but not least, the issue of female ministers also divides the various branches of the Reformation Churches in themselves and among themselves.

21. In all polls on both sides of the Atlantic men are "in their marriages" happier than the women are and would, more frequently, elect, if given the choice, the same partner. Interestingly enough, love poems addressed by men to women abound in all literatures. The opposite is very rare. Equally rare are famous love letters from female pens. The celebrated "Letters from a Portuguese Nun," as we now know, are a *male* forgery.

22. Ehret die Frauen! sie flechten und weben
Himmlische Rosen ins irdische Leben. (WURDE DER FRAUEN)

23. Cf. Baltasar Gracian S.J., *El Criticón,* Bk. 1, ch. 10. This book was first published in 1651.

24. This term, today, is entirely misused in the United States signifying a person believing only in man, but not in God. If the great Humanists — Erasmus, Adelmann, Pico della Mirandola, Marsiglio Ficino —would hear that they are godless man-worshippers, they would turn in their graves.

25. Thomas Aquinas called all Christians "Kings and Priests" *(De regimine Principum)* based on St. Peter's "royal priesthood" of all believers *((I. Peter,* 2:9.). However, only the bishops are priests in the narrowest sense of the term. Even "lay" people, according to Catholic doctrine, can administer Sacraments — baptism and marriage.

26. Cf. *I. Corinthians* 14:37.

27. Whatever one might think concretely about such a preliminary Encyclical as *Humanae Vitae* — "preliminary" because it encourages biologists and physicians to do more research — it must be borne in mind that its basic motivation is the Catholic Church's concern and solicitude about the physical expression of marital love ... a love which in her eyes has a sacramental character. The late Max Horkheimer, the "German Herbert Marcuse," reconverted to Judaism before his death, had well appreciated this Encyclical. Cf. *Der Spiegel,* No.1-2(1970), pp. 83-84.

APPENDIX

[*In the wake of the U.S. Supreme Court's abortion decisions of June 20 (discussed in this issue by Messrs. Byrn and Noonan) the press featured considerable commentary, pro and con. While much was understandably topical, several columns (and at least one editorial) were, in our judgment, of more lasting interest. We reprint here what we think is a representative sampling. First come three syndicated columns by writers — Wm. F. Buckley Jr., Michael Novak, and James Jackson Kilpatrick — who fairly bracket, from anti- to pro-abortion, a reasonable spectrum of informed opinion; then* Newsweek's *regular columnist George F. Will (in a column that first appeared in the Washington* Post, *June 23) provides a more particular view, and, lastly, the lead editorial from the (July 2) issue of the liberal journal,* The New Republic.]*

The Court on Abortion

by Wm. F. Buckley Jr.

You would think, reading the New York Times editorial, that the Supreme Court of the United States had just voted, 6-3, to authorize the spending of public money on concentration camps. The sheer hysteria with which the Court's abortion decision is being met by this tuning fork of eastern seaboard liberalism sometimes makes the impious wonder where was abortion when we needed it most.

People should calm down and listen carefully to the facts of the matter.

1. Do we believe in self-government?

The answer is of course, yes.

2. Do we believe that constituted political authorities — for instance, the state of Connecticut, the state of Pennsylvania, the city of St. Louis — should decide how to spend tax money?

The answer is a qualified yes. It is a routine exercise in political democracy to take funds from the entire community for the benefit of certain members of the community for specified social purposes. There is often disagreement about what social purposes are desired, and in some cases there are constitutional prohibitions. A community cannot, for example, declare that education in the dogmas of Christianity can be subsidized by public funds. Public funds can be used to buy electric chairs, but people who occupy them are selected by a different process.

3. Along comes abortion, and the political entities listed above decide that elective abortion is something public money will not be used to subsidize. That would seem to be a decision entirely within the competence of the respective jurisdictions of Connecticut, Pennsylvania, and St. Louis: and that is *all* the Supreme Court said. The abortion-hungry press has transmuted the Supreme Court decision of 1973 (which was bad enough as it stood) into something entirely different.

An analogue is Brown vs. Board of Education. In that decision, the Court ruled in 1954 that no state could discriminate in education based

on race. Before long every state was being urged to discriminate in education based on race — only they call it affirmative action.

In the abortion decision of 1973, the Court said that no state could forbid abortion. That decision was transformed, by the abortion lobby, into an obligation by the states — and the federal government — to *subsidize* abortion. Not only is the argument bad logic and ignorant history. It is a moral rip-off. For many Americans, abortion is a grave moral wrong. To be required to pay for abortion through taxation is an undesirable form of moral imperialism.

It is rhetorically convenient for the abortion lobby to concentrate now on the new "victims" of the abortion ruling. It is tacitly agreed that the aborted child is not to be considered a "victim." He is spoken of merely as something of a social nuisance, the detritus of a concupiscent evening between young lovers. The New York Times editorialist speaks of abortions as now only "available to affluent women," referring to the Court's decision to "cut off poor women from abortions" leaving them "to unlicensed butchers or their unwanted children to misery."

A couple of telephone calls in New York City establish that you can get an abortion for $150. Good stuff. Licensed doctor. Private clinic: good free enterprise rate. Outside New York things are generally cheaper. At $150, that's about a week's wages for the guy, or — in a joint venture — half a week's wages for the gal, half a week for the guy. The price of a black and white television set. Six tickets to the Led Zeppelin. Three years of Time Magazine. Two years of Hustler. Surely that's not too high a price to pay for saving yourself the nuisance and high cost of a child?

The Movement that Refused to be Aborted

by Michael Novak

Even before the recent Supreme Court decision, the people who oppose abortion refused to be aborted. They have been gathering enormous strength out in the countryside. This strength is especially remarkable in evangelical areas. Many Jews, too, are more strongly anti-abortion than is publicly recognized. So far, most "enlightened" people favor abortion, and their high status once gave abortion a moral glow. That glow is fading. Note these developments:

(1) For a while, pro-abortionists could trade upon the deepest of all intellectual prejudices in this country, anti-Catholicism. (The reformed and the enlightened define themselves against Catholicism — since Vatican II, even some Catholics do.) But it is hard to pin the label Catholic on Senator Jesse Helms, or on the majority of peoples in his native North Carolina.

(2) The evangelicals are becoming aroused and, in most of America, that is a force greater than Catholics have. Abortion is not an issue that falls neatly on one side of the "separation of Church and State." It is an elective, not necessary, surgical procedure. While hospitals and clinics are up to their ears in state regulations, and pro-abortionists want state money for abortions, the recent Supreme Court ruling seems to permit states to elect to pay for them or not. Many evangelicals will not so elect.

(3) The fact that wealthy spokesmen in favor of abortion argue in favor of "the poor and the black" has invited powerful rebuttal on the house floor: "You don't solve the problems of the poor by killing them. You solve them by alleviating poverty." It is, indeed, an odd form of assistance to blacks to do away with life in their midst. Blacks are disproportionately victims of abortion. About 300,000 of the first million abortions were of blacks. Why do liberals desire this? (Incidentally, if 50 million liberals paid one dollar each per year, they could finance abortions for the poor privately, without using the taxes of those who object.) Merely to promote abortion seems not to touch the underlying problems.

(4) The moral glow of abortion isn't what it used to be, either, for doctors and nurses who have to do the killing. Descriptions of the actual proceedings defy propaganda. Abortionists may use a sanitized language as the Air Force did in Vietnam. But the medical profession can now save the lives of fetuses in the first trimester. To reverse the healing instinct is a psychological jolt. It is not pleasant to kill a living thing.

(5) In practice, abortion is a business, subject to greed. For a few moments' work, a clinic can collect $200 or $300. A Miami TV station documented, two years ago, a clinic that "aborted" poor and ignorant women who were not even pregnant.

(6) There is a small but growing movement to amend the Constitution

in order to include the unborn as subjects of human rights. Explicit parallels are made to the Dred Scott decision. The prospect for success, of course, is slim. But it would be foolish to sell an aroused populace short.

The Congress is the co-equal branch closest to the people. Quite in opposition to "Opinion leaders" in every state — to the universities, the media, the professional class — millions are making themselves heard in Congress. Their resilience under early defeats has been impressive. They are taking heart from recent victories in Congress. They are winning handsomely in state houses, too. The recent Supreme Court decision brought an unexpected lift.

The nation has gone far in recent years in the promotion of irreligious, secular values, out of harmony with the deep and perennial sources of human values in a large proportion of the public. For our people are more strongly religious than those of most other nations. They see rather connections between their religion and certain moral principles. They are amazingly tolerant, even quiescent, under forms of leadership that violate their beliefs and hopes. Once aroused, however, they are practical, energetic, persistent, and effective.

It is important for liberal, intelligent leaders to read the tides of public opinion and to lead them into creative outlets. When the people wish to be delivered from evil, it is important to lead them not into temptations of demagoguery. If liberals don't lead, others will.

Does it seem liberal to defend the privileged living, at the cost of the defenseless? It does not seem liberal to suggest that "women" favor abortion, when women are rather more opposed to it than men. And for good reason: While men wait outside, women pay its moral cost in person.

Buy Me a Printing Press?

by James Jackson Kilpatrick

WASHINGTON: The uproar continues over the Supreme Court's opinions of June 20 in the matter of abortion. To listen to the clamor of the pro-abortion crowd, you might suppose the Court to be composed of six monsters and three angels of light. The denunciations are getting out of hand. They are wholly undeserved.

This is what the Court held, and all that it held: (1) No woman has a constitutional right to an abortion at public expense. (2) Federal law allows the states, but does not require the states, to provide elective abortions under their Medicaid plans.

These common-sense holdings are clearly in accord with both the federal statute and the United States Constitution. The statute (Title XIX of the Social Security Act) scarcely requires construction. The law plainly leaves it to each state, in fashioning its Medicaid plan, to determine "the extent of medical assistance" that will be covered. The statute does not require that every state fund every medical procedure known to medical science.

The constitutional principles are equally self-evident. It is simply bizarre to argue, as the complainants argued in these cases, that because the government agrees to pay for poor Jane's delivery, the government denies "equal protection" when it refuses to pay for poor Susan's abortion. The framers of the Fourteenth Amendment, if they could hear of this nonsense, would roll over in their graves.

The six-man majority sought to distinguish between the existence of a right, and the subsidized exercise of that right. Is that so hard to comprehend? During the first trimester of pregnancy, women have a right to obtain an abortion; the state may not make it a crime to perform such abortions. But there is no accompanying right to elective abortion at public expense.

A dozen analogies spring to mind. I have a right of free press. Does this mean the government must buy me a newspaper? Every citizen has a right of free speech. Must the taxpayers hire him a hall? We have a right to the free exercise of religion. It is not contended that the Treasury must finance churches and synagogues so the right may conveniently be exercised. There is a right to keep and bear arms. Do we have a right to free rifles?

Let us move closer to the status of those on public welfare. Every indigent person has a right to travel. Such a person may want to visit Hawaii; indeed, he may "need" to visit Hawaii; but for want of money it may be difficult or impossible for him to pay his own way. It is fatuous to argue that the taxpayers, because they may provide free urban bus fares for the elderly, therefore must buy the indigent a round-trip ticket to Honolulu. Yet in principle, this is exactly what the petitioning pregnant women have demanded in the abortion cases.

Such reasoning was lost on the Court's three-man minority. Justices Brennan, Marshall and Blackmun variously denounced the majority's view as alarming, appalling, brutal, disingenuous, distressing, disturbing, insensitive, punitive, sad, specious, tragic, unacceptable, vicious, ethically bankrupt and plainly erroneous. The effect, said Justice Marshall, "will be to relegate millions of people to lives of poverty and despair."

For what it may be worth, I myself agree with Justice Marshall's pathetic exposition of the realities. In my own view, the states should include elective abortions in their Medicaid programs. Unless poor women can obtain hospital abortions through Medicaid, they will resort to the brutal services of back-alley butchers, or they will go at themselves with coat hangers and button hooks. Otherwise, they will carry their infants to full term, be delivered at public expense, and dump their progeny on the taxpayers for life. In both human and economic terms, state prohibitions against Medicaid abortions are tragic and costly.

Nevertheless, as Mr. Justice Powell sought vainly to emphasize, federal judges must not impose their own notions of wisdom and social desirability upon the law. When it comes to such sensitive policy choices as the subsidizing of elective abortions, "the appropriate forum for their resolution in a democracy is the legislature." That is sound jurisprudence; it ought to be praised, not condemned.

The Unborn and the Born Again

The New Republic

Until June 17, the battle against government restrictions on a woman's freedom to have an abortion seemed won. Indeed, it seemed a thing of the past. Then suddenly and unexpectedly, everything came unstuck. First the House of Representatives voted to ban the use of federal money to pay for abortions. This was nothing to get alarmed about, because a lower federal court had ruled that a similar ban enacted last year was unconstitutional. But three days later, the Supreme Court ruled that neither the federal Medicaid legislation nor the US Constitution prevents states from barring the use of Medicaid money for abortions. Nothing in the Court's decision suggested it would not apply to a federal ban as well. Then the day after the Supreme Court decision, the Senate Appropriations Committee voted to ban the use of federal money for abortions except in unusual circumstances, for example when the mother's life is threatened. President Carter and Secretary of Health, Education, and Welfare Joseph Califano support this ban. Medicaid pays for almost one third of all legal abortions performed in this country. It appears certain that a ban on Medicaid abortions will be enacted and upheld. Other restrictions on abortion—in federal or state-financed hospitals, under other arrangements with government ties—seem possible.

The pro-abortion forces have brought this disaster upon themselves. Or rather, they themselves have brought it upon the hundreds of thousands of poor women who will be forced to bear and raise children they don't want; and upon the taxpayers who will be forced to support many of these unwanted children. By relying on the courts to do their job for them, they loftily have abandoned the processes of democracy to the ardent right-to-lifers. In doing so, they have shown an unseemly willingness to misuse that valuable tool provided to the reflective elite as a way of curbing the reflexive mass, the United States Constitution. The irony is that a majority of Americans—67 percent by one recent poll, 81 percent by another—favors abortion on demand. But the political process does not respond. The right-to-lifers—spurred by each legal defeat and undaunted by the arrogant dismissals of their genuine anguish, and impugning of their motives—have it all locked up.

In the early 1970s, anti-abortion laws were on the way out. States were gradually relaxing their restrictions to the point where abortions were available virtually on demand in many places. This cautious progress of reform is a common pattern; it is happening now with anti-marijuana laws. Then, in 1973, came *Roe v. Wade,* in which the Supreme Court found in the Constitution a detailed abortion law that divides pregnancy into "trimesters" and permits abortions virtually without restrictions in the first two. State laws placing greater restrictions on abortions, the Court held, invaded a woman's privacy in violation of the Due Process Clause of the 14th Amendment. Critics of *Roe v. Wade* pointed out its similarity

to notorious Supreme Court decisions during the first three decades of this century, in which the Due Process Clause was invoked to invalidate state attempts to regulate businesses—such as health and safety and minimum wage laws—as intrusions on "freedom of contract." This magazine wrote of *Roe v. Wade.* "Again, it seems, it may take some time before the realization comes that this will not do."

Roe v. Wade killed off the movement for abortion reform, by making it seem superfluous. But this was the moment life began—conception, "quickening," viability, birth: choose your own metaphor—for the right-to-life movement. In four years it has become one of the most powerful political lobbies in the country. This power is based not on numbers but on passion. It is inspiring, in a way. Since the end of the antiwar movement, these misguided people represent the only major pressure group on the political scene whose cause is not essentially self interest. They speak for what is in their minds a truly unrepresented minority: fetuses.

The right-to-lifers' argument is simple: a fetus is a human life, and the government should not sanction the taking of human life except in the direst circumstances, such as when another life is threatened. None of the most common pro-abortion arguments deal with this issue head-on. Would "a woman's right to control her own body" permit her to kill another adult person who has committed no offense against her? Would we sanction the murder of children who are unwanted and unloved, just as we sanction the destruction of fetuses because they might turn out that way? Would it evoke much sympathy for a "legalize terror bombing" movement, to be told that terrorists often injure themselves with amateurish home-made bombs?

The most unfair argument against the anti-abortion movement is the smear of guilt by association with the Catholic Church. A 1975 report of the US Commission on Civil Rights said that government limits on abortion "would give governmental sanction to one set of moral and religious views and inhibit the free exercise of any other moral and religious views on the issue of when life begins." But the government has to inhibit the free exercise of different moral views. It would be no defense at a trial for child murder to argue a belief that, "Life begins at 40." For the government to take a truly agnostic position on the issue of when human life begins, it would have to protect fetuses from the moment of conception in case Roman Catholics are right: you don't walk away from a flooded mineshaft because there's only a 50-50 chance someone's trapped at the bottom.

Those who believe a woman should be free to have an abortion must face the consequences of their beliefs. Metaphysical arguments about the beginning of life are fruitless. But there clearly is no logical or moral distinction between a fetus and a young baby; free availability of abortion cannot be reasonably distinguished from euthanasia. Nevertheless we are for it. It is too facile to say that human life always is sacred; obviously it is not, and the social cost of preserving against the mother's will the lives of fetuses who are not yet self-conscious is simply too great.

The Supreme Court declared last week it no longer will save us the trouble of defending our uncomfortable position. To appreciate the arguments the Court finally refused to swallow in *Maher v. Roe* requires a little history of 14th Amendment doctrine. The part of the Constitution on which practically all the great civil rights decisions of the past quarter century were based is the phrase in the 14th Amendment guaranteeing every person "equal protection of the laws." The problem in recent years has been deciding what this means. Every law or government action treats people unequally—granting some a benefit or causing others a deprivation of some sort. The Court has had to decide what kinds of distinctions are inherently "suspect" and therefore worthy of "special scrutiny." The easiest came first: the distinction between blacks and whites. Others followed: aliens and citizens, illegitimate and legitimate children. Government policies making male-female distinctions usually are treated as violations of the Equal Protection Clause. The Warren Court occasionally suggested that distinctions based on wealth were suspect, but the Burger Court has shied away from that thicket.

Since the Constitution does not require states to provide *any* free health care for the poor, it could hardly be argued that the Constitution requires free abortions. Instead, it was argued that once the state decided to offer Medicaid services to pregnant women, it could not discriminate between assistance for normal births and abortions. In other words, the proposed "suspect classification" was between two different categories of poor pregnant women: those who want an abortion and those who want to have the child. The Court rightly rejected this artificial classification. To rule otherwise would be telling the government it couldn't offer an aspirin to someone with a headache unless it also was willing, upon request, to chop off his head.

The Court also rejected a second argument: that the state was unfairly interfering with a pregnant woman's constitutional right to reject childbirth and choose an abortion, by offering to pay for one and not the other. The Court said a state can *influence* a choice it is not free to *deny,* and pointed out that offering free childbirth does not in any way *burden* the right to an abortion. It offered an interesting analogy. It is unconstitutional for a state to deny parents the right to send their children to private school. This doesn't mean the state can't influence that decision by offering public schooling for free.

Well, that's constitutional law for you: arid logic far removed from genuine human motivations and needs. That is why we have politics. As the Court said last week, "The Constitution does not provide judicial remedies for every social and economic ill.... [W]hen an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature."

Which brings us to our craven legislature, and our President and our Secretary of Health, Education, and Welfare. They are free—indeed they

are obligated—to make the decision the Supreme Court cannot. It is grotesquely unfair to deny poor women the choice of having an abortion, when this choice is available to wealthier ones. Of course the poor do without a lot of privileges the rich enjoy, because the government's redistributive impulses are limited. This we can understand, even if we do not always agree. But no money is saved by cutting off Medicaid funds for abortions. Quite the opposite: the average first-year cost to the government resulting from childbirth on Medicaid is $2200, compared to less than $200 for an abortion. And of course in most cases the first year is not the end of it.

So why is this injustice tolerated? We know that Congress has no backbone in the face of pressure from special interest groups, but where is the moral leadership from the executive branch? We do not doubt the sincerity of Carter's religious views, or Califano's, in opposition to abortion. But more than a million legal abortions are performed every year now in this country, and only 300,000—probably the ones that relieve the most misery, whatever the countervailing evil—can be stopped by this desperate backdoor ploy. We submit it is a crude moral calculus indeed that arbitrarily would wreak so much havoc in so many lives, in exchange for such a partial victory for the unborn.

A Shift to the 'Appropriate Forum'. . .

by George F. Will

The smoldering issue of abortion was not, as abortion advocates jubilantly thought, extinguished by the Supreme Court's 1973 decision. Three related decisions have stilled the jubilation.

The Court has ruled, 6 to 3, that neither the Constitution nor federal welfare law requires states to pay for medically unnecessary ("nontherapeutic") abortions. Harry Blackmun, who wrote the tortured 1973 ruling, now is tutored by the majority concerning the meaning of what he wrote.

Dissenting in the three latest cases, Blackmun says: "The Court concedes the existence of a constitutional right but denies the realization and enjoyment of that right on the ground that existence and realization are separate and distinct." What is remarkable is that such a reasonable distinction strikes Blackmun as remarkable. Americans have a constitutional right to read newspapers, encyclopedias and, generally, pornography. But government does not "deny the realization" of that right if it refuses to buy newspapers, encyclopedias and pornography for the indigent.

The majority says the 1973 decision protected a woman's "freedom to decide whether to terminate her pregnancy" but that right "implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."

When the mayor of St. Louis directs public hospitals not to perform elective abortions, he is, according to the Court, making a constitutional policy choice that is "subject to public debate and approval or disapproval at the polls."

When Connecticut refuses to subsidize elective abortions for poor women it imposes "no restriction on access to abortion that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation."

Of Pennsylvania's refusal to fund elective abortions under its Medicaid program, the Court says: Nothing in the federal statute "suggests that participating states are required to fund every medical procedure that falls within the delineated categories of medical care."

"[T]he state has a valid and important interest in encouraging childbirth. . . . We will not presume that Congress intended to condition a state's participation in the Medicaid program on its willingness to undercut this important interest by subsidizing the cost of nontherapeutic abortions."

Justice William Brennan, dissenting, defends a lower court's judgment that when a state "refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weighs the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion."

Although Brennan does not think abortion kills a person, he calls a woman seeking an abortion a "mother." Even stranger is his theory that it is unconstitutional for social policy to encourage the choice of childbirth rather than abortion. The two other dissenters are comparably confused.

Justice Thurgood Marshall denounces the "ethical bankruptcy" of persons who do not understand that "under present social policies" it is better to be aborted than to be born poor in America and suffer "second-rate" schools and other problems. Marshall supported the 1973 decision that imposed an extremely liberal abortion policy on the states. Now he says that states that stop short of subsidizing elective abortions are trying to "impose their moral choices on the rest of society."

Blackmun asserts that refusal to subsidize unnecessary abortions "punitively" impresses upon the poor a community's "concepts of the socially desirable." Blackmun thinks it is socially desirable and constitutionally necessary to compel taxpayers to fund a form of killing that many taxpayers consider murder.

The dissenters embraced some particularly repellent and revealing language from a 1975 Court ruling: "Abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy." Abortion enthusiasts are enraged because the decisions reject the idea that social policies must treat childbirth as merely a "medical method" in no way preferable to abortion.

The three recent decisions stop the pro-abortion forces short of their goal, which is to use courts to coerce society into abandoning its moral sensitivity about unrestricted abortion-on-demand. Regarding policy choices as sensitive as the funding of elective abortions, the Court majority says: "The appropriate forum for their resolution in a democracy is the legislature." Advocates of unrestricted abortion-on-demand are depressed because they know what awaits them there.

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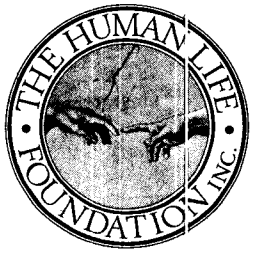
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