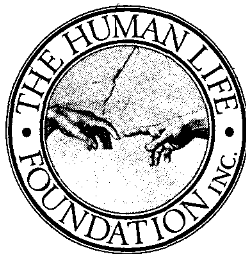
the HUMAN LIFE REVIEW



SUMMER 1977

Featured in this issue:

Governor Edmund G. Brown on .... Voluntarism

John T. Noonan Jr. on .... The Law as Teacher

James Hitchcock on .... The Roots of Violence

Bryan Griffin on. .... Genetic Engineering

Prof. Thomas D. Sullivan on .... Euthanasia

Mark Lally on. .... Abortion and Deception

Germain Grisez on .... Abortion in the Soviet Union

M.J. Sobran on .... Pornography

Also in this issue:

A Letter from the Hon. Henry J. Hyde

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. . . about THE HUMAN LIFE REVIEW

In this, our eleventh issue to date, the constant reader will note several changes. If you notice a subtle change in our typeface, you have a sharp eye (we have switched, primarily for reasons of cost, to a modern phototype); editorially, we think this issue broadens considerably our "area of concern," which, given the title of this journal, ought to be almost unlimited.

We are greatly encouraged by the steady interest in all (ten) previous issues, and accordingly have once again published full information as to how new readers may get any or all of them (see inside back cover for details). Also, in the next issue, which will complete three full years of publishing, we hope to publish in addition a short description of all issues to date for the convenience of those (may their tribe increase) who want a particular article or issue.

We also expect to include an index in this year's final number, both for the current volume and, if possible, the previous two (1975-76) volumes.

In this issue we publish a selection by Germain Grisez taken from his book, *Abortion: the Myths, the Realities, and the Arguments.* It was first published in 1970, and until the U.S. Supreme Court handed down its *Wade* and *Bolton* decisions in January, 1973, was widely considered the definitive study of the abortion question. In our judgment, it *remains* a definitive study (albeit outdated in some portions by subsequent events); in no other single book will the interested reader find such wealth of material, both on the historical background of the abortion issue, and finely-reasoned analysis derived therefrom. In the expectation (and hope) that concerned readers may well want a copy, we have acquired a small supply ourselves, and will be glad to make the book available to you. (Write direct to: The Human Life Foundation, Inc., 150 East 35th Street, New York, NY 10016; simply ask for the "Grisez book," and enclose $6 per copy. We will pay all postage and handling involved.)

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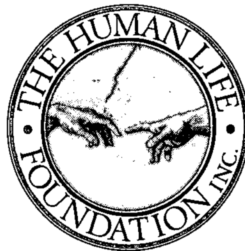

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INTRODUCTION

"WHEN THEY reach a certain age, it costs $600-700 per month for strangers to take care of people that not too many years before would have been. . .in a rocking chair in the living room."

That line caught our eye, while reading our daily office penance (the New York *Times*) which, one early June morning, carried excerpts from a recent speech by California's Governor Edmund G. Brown Jr. We have long believed that one of the little-noted tragedies of our society is the ever-increasing separation of the aging from the "mainstream" of human life.

We immediately contacted the Governor's office, which graciously supplied a transcript of the entire speech, from which this issue's lead article is adapted. As the full text makes plain, the main theme of Governor Brown's talk is "voluntarism." Well, we are interested in — and for — that too, and are happy to know that so prominent a public person is willing to speak his mind on such subjects.

In any event, it signals a departure, in this issue, from our "usual" concerns, which we imagine many readers will appreciate; and it is followed by another such unusual article by fellow-Californian John T. Noonan Jr., who writes here about something so obvious that nobody ever seems to notice it: the fact that a *primary* purpose of the Law is to *teach,* and not merely to regulate, or jail. To be sure, Professor Noonan gets into the abortion question, but only because it so clearly illustrates his main point. We hope that you will ponder this article, which we consider one of the very best we have been privileged to include in this journal to date.

Prof. James Hitchcock follows with yet another unusual piece, discussing a subject — "American violence" — about which much has been said in recent years. The analysis Mr. Hitchcock applies here may well disturb some, but we think it deserves careful attention. Certainly it would seem to explain any number of current events, otherwise baffling, which support his own unhappy conclusion that, given the prevailing atmosphere, "violence of all kinds can only continue to increase."

We next have our promised article on genetic engineering and its galaxy of satellite concerns. In our judgment, we have something more than that: a new writer of impressive talent and perceptions. Mr. Bryan Griffin first came to our attention some months ago when he wrote a lengthy letter to Wm. F. Buckley Jr., explaining in fine detail his objections to *National Review;* Buckley did the obvious (and typical) thing: he published the whole of it in NR itself. We too did the obvious thing, and invited Mr. Griffin (whom, we soon discovered, spends most of his time writing, and can produce long and impressive letters on *any* subject) to contribute something to this journal; he not only agreed but also tackled for us the thorny problem of "recombinant DNA" — which he describes as "another fashionable phrase, which is merely a convenient way of making reference to research which creates combinations of DNA from organisms that do not normally exchange genes in nature." Now you know.

The next article also concerns a subject much in the headlines: euthanasia. Prof. Thomas Sullivan (who also makes his first appearance in our pages) makes here, we think, some very relevant distinctions in challenging what is in danger of becoming the "accepted" view, in the medical profession, of "permissible killing." It boils down to *intention,* he argues, in terms which will not surprise traditional

moralists, any more than they would have surprised what we used to call the "family doctor." How much such arguments mean to today's specialists remains the open question.

Then Mr. Mark Lally weighs in with what he assures us is his *first* published article (even though he has already turned 30, and writes as if he had been at it half again as long). It is the kind of thing every editor imagines he'll get plenty of, but seldom does: the thick manila envelope arriving one day "over the transom," no information or explanation, just page after page of good stuff. And, in this case, page after page of good *footnotes* as well (Mr. Lally seems to believe in saving some of his best arguments for the fine print; we urge the reader — even if it means finding a spy-glass — not to miss such gems as Note #11!).

The argument is often made, by those who support abortion on demand, that "the Court has spoken," and that good citizens must accept legalized abortion as the law of the land; historically speaking, however, it is true that Americans generally *have* come to accept, in due course, what the Supreme Court tells them — *Dred Scott* being the most glaring exception to the rule. So the question arises: will the *Abortion Cases* come to be accepted? If so, they will need to have young thinkers of Mr. Lally's caliber *supporting* them as convincingly as he *opposes* them here.

To anyone who has gone deeply into the abortion question, the author of the next article needs no introduction. Professor Germain Grisez, while at Georgetown some half-dozen years ago (he now teaches in Canada), completed a huge volume titled *Abortion: the Myths, the Realities, and the Arguments.* To those on *both* sides of the issue, it immediately became a most-quoted reference (it is hard to find a serious book on abortion written in the early seventies that does *not* quote from Grisez, and/or make copious references to his book in notes). It was generally considered *the* definitive study of the subject until the Supreme Court's 1973 decisions, which of course so radically changed the existing situation as to make any book then in print more or less outdated. Rereading the book now (a feat we have just accomplished), the verdict in Grisez' case is obviously *less:* it remains an enormously useful sourcebook, a compendium of information and finely-reasoned argument. (Grisez' book can't be found in your local bookstore, but *can* be obtained: for information, see the inside front cover of this issue.)

We publish here a section on abortion in the Soviet Union. It is in no way outdated. On the contrary, the current world-wide rekindling of interest in "human rights" makes it, if anything, more timely than when it first appeared, and we recommend it to your careful attention.

We conclude this issue's articles — as we have often before — with another essay from M.J. Sobran, this time on another "new" subject for us, pornography. But readers who savor Sobran (and there are many) know that, whatever his title or subject, he remains a one-man embodiment of McGuffey's Eclectic Reader, drawing on any and all good things available to his purpose.

Just before we went to press, we wrote Congressman Henry Hyde to ask a question (with an eye to a future article); his reply was so immediate and impressive that we decided to add it here, just as we got it. We hope it tops off a very readable issue.

J. P. McFADDEN
Editor

Society *by* the People

Governor Edmund G. Brown

AS THE RATE of change in our mobile society accelerates, increasing numbers of people are becoming dependent; they're becoming dependent on someone. That someone is going to be the government together with individuals — be they in the structure of a family, a church, a labor union, a neighborhood, a community association, or a volunteer group of one kind or another. And that diversity, that mixture of the public and the private sector, is a very important ingredient in the survival of this country as a free people. Because the needs are not going to go away.

There are more older people living longer, needing more care. There are more younger people who need attention, need skills, need value in the structure. We have the mentally ill, we have all sorts of people who need others. That is what society is all about. We need individuals who fit into a context of culture and the community.

Now in order to make things work, we have to invigorate the private sector. People sit back and wonder why their taxes keep going up; why it is that government keeps getting bigger. And it has gotten bigger. It has taken a dramatic jump forward under the leadership of individuals whose entire philosophy and public utterances are to the exact opposite. So I think we have to ask ourselves (and I'm not raising this as a political question, just as a way to understand the nature of reality that we all face): Why is it that despite the public philosophy of those in key positions government gets bigger and bigger, more complex, more involved, and your taxes keep going up?

The very simple reason is that it takes more than words to put some limit on that growth. There are certain needs and obligations in the community that just have to be taken care of and if you don't do it through some volunteer movement, some other arrangement outside of the public sector, then inevitably government will assume those obligations. If you meet every need that can be identified, you would have to double and possibly even triple the existing

Edmund G. Brown Jr. is the Governor of California. This article is adapted from his extemporaneous remarks to the Voluntary Action Center and Junior League in San Jose on April 26, and is printed here with permission from the Governor's office.

government activity that we now have at the state, local, and federal level.

Take something as straightforward as police activity. How many police can you hire and how many can patrol the streets? The ratio will never be high enough unless people assume a greater degree of responsibility for their own defense and protection. That's not to say that we don't need police — sure we have to have them — but unless the public sector will link itself with the citizens, then all the money in the world will not make the streets safe.

There is no substitute for neighborhoods, for mutual support systems in the private sector. Whether it be neighbors who know each other, who have some responsibility for someone other than themselves and their family — you can't get away from it. The idea that you can put it on government, if you want to, is going to triple your taxes because then you have to hire a full-time person who doesn't have the commitment that you do.

That's my message: that voluntarism is not a luxury; it is a necessity for a civilized society that wants to truly meet its human needs. And we have to expand it in a dramatic way across a broad front of government and human activity. It's going to grow. The moment is here. There are people with the time and with the understanding. We have to find some way to re-create the spirit of neighborliness and mutual self-support that existed before the mobility and the anonymity and increasing information flow that has been the product of this very prosperous society. We have made tremendous gains, but in spite of all that, we look at incidents of mental abuse, child abuse, crime, loneliness, just simple confusion and for a rich society, it is a burden that is not only unnecessary, but also unacceptable.

When the historians write of California and the United States of America in the 20th and 21st Centuries, what are they going to find? I don't want to see just one big government because everything in government at one point or another tends to get politicized; it's an adversary relationship. When we take basic human needs and give them to a professional class, everyone else sits back and pays their taxes and gets more and more irritated because they want to know why they're going up. That's because you can't just have rights to things, because for every right you have to have a correlative duty or obligation. There is no escaping that. You may think you have more mobility and freedom and liberty — a "do-your-own-thing" kind of ethic — but in reality it comes back in the form of

government, taxation, crime and mental confusion. That's what we have today, and unless you accelerate your efforts even further, we really face a civilization that is not what anybody wants. That's why voluntarism is so important.

When I went back to Williams, California where my great-grandparents came from in the 1850's, I walked into a nursing home. It was a very nice place, people working hard, clean, efficient, residents attended; but I thought to myself, here's a place where we put the elderly. When they reach a certain age, it costs $600-700 per month for strangers to take care of people that not too many years before would have been upstairs in the bedroom, or in a rocking chair sitting in the living room. It would have been a part of the normal life. But in order to expand the productivity, the freedom, the mobility, and the prosperity, we've segregated and specialized so we have nursing homes for the old, child care for the young, mental hospitals for those who act in a strange way, or a little different from the rest of us, and schools that start at an early age and go into the mid-20's, later if possible. We're institutionalizing everybody.

I'd like to de-institutionalize some of these things. I'd like the kind of community that has a more human spirit. I think people are ready for that. I think they're ready to do something more than what they're doing now because they can understand the needs. Needs aren't going to go away. People are living longer, they're going to need more care, and it isn't the work of specialists. That is a myth.

Dying is not a sickness. It is not something you necessarily have to go to a hospital for. It's part of the cycle. And as there is joy at the beginning, there is sorrow at the end. Let's at least make it human.

There's a movement now — hospices for the dying — started by Elizabeth Kubler-Ross, where people actually help those who are going through this necessary human transition. They help them; they are life-support and take people out of hospitals. A woman told me that seventy percent of the terminally ill do not need to be hospitalized. They want to be among friends. They ought to be going out with some dignity and joy and laughter. The same thing is true about lots of things in life. We have got to pull together and try to bear one another's burdens in some human, compassionate way. This is something I've been thinking about for a long time. How do we bring that about?

One strategy is to get a bill, a tax, and more people on the public payroll. And the problem with that is, the power is moving out of this community, up to Sacramento, over to Washington, and those

who make the decisions don't have face-to-face contact so they don't understand the real nature of the problem.

What we do is deal with paper, deal with money, and we keep shuffling it around. A lot of good things happen out of that, but it's not the same as people in a local community, who recognize their problems, whether they be low-income people, the elderly, whether they be different cultures from Anglos — Chicanos, Blacks — and try to face up to and deal with the implications, so as to own a society and a culture that we ought to be proud of.

It's not all by government; it's not all by professionals. A lot of decisions, whether they be in medicine or law, welfare or schools, are not just the prerogative of the specialists, or a licensed person with that little seal under the diploma hanging on the wall. That's the myth of specialization and division of labor. What that is creating is a solitary society of dependent people who have to go to a paid professional to tell them how to make basic human decisions. Yes, you need a lot of these professions, I'm not saying you don't. But a lot of what goes on is something you, your friends, your neighbors, those in coalitions — whether they be religious, political, labor, or voluntary — can do to look after yourselves.

The Law as Teacher

John T. Noonan, Jr.

WHEN WE deal with a great human activity such as law, of which we have had several thousand years experience, we are not free, I should suppose, to impose upon its analysis arbitrary limits or artificial boundaries. To understand the phenomena we must look candidly at what is going on. Our account will be successful to the degree we have encompassed the full scope of the activity described.

Now it is evident in all the main systems of law with which we are familiar that there are three principal functions. These functions are simultaneous, they overlap, they vary in their degree of prominence depending upon the form in which they are exercised, but they are analytically and operatively distinct. These three functions are coercing, channelling and teaching.

Coercing has drawn the most attention in modern Anglo-American literature. There is a straight line running from John Austin in a tradition which sees the primary function of law as the compulsion of physical behaviour by the threat of imposition of a sanction.[1] Holmes' is the classic and dramatic expression of this view: law is to be seen from the angle of a "bad man," calculating what sanction will be visited upon him if he engages in behaviour affected by a legal command.[2] No doubt, a legal system without coercion has never existed; but to understand law as merely coercive is to understand one-third of the phenomena.

Channelling is the second great function of law, as in other language, Lon Fuller has demonstrated and Herbert Hart has conceded.[3] In the common law tradition, the law of contracts and the law of marriage stand as striking illustrations of law where the channelling function is preeminent. No one is compelled to make a contract or enter a marriage. But if you wish to do so, the law says you must act in this way and say these words; and if you do, you shall have these benefits and privileges which do not exist for those not associated by contract or marriage. To call these benefits and privileges a sanction is, I suggest, to distort reality. To say that the

John T. Noonan, Jr. is currently teaching law at the University of California (Berkeley), and is well-known as an author and lecturer. This article was written for St. Louis University's conference on "The Function of Law as Teacher and Leader in Society" in April, and is printed here with permission (© 1977 by John T. Noonan, Jr.).

law here gives you a power to affect another's behaviour is to continue to place the emphasis on force.[4] What the law has done is to tell you how to pool your energies and resources with another human being, either in the temporary union of a contract or in the more permanent union of marriage. The law has marked out the path by which your energies and resources may be deployed cooperatively with stability and in fidelity to another person. You have been channelled in your conduct to joint and mutually beneficial action.

Teaching is the most neglected of the three great functions. By some kind of Chestertonian paradox what lies before the eyes of the teachers of law in their daily work has been overlooked by them. The obvious has not seemed worth mentioning and so has been left out of account.

What is the daily fare of law professors and law students? The opinions of appellate judges. How much of these opinions are coercive in character? Normally less than 1% — the final sentence in which the judge writes, "Affirmed," "Remanded," or "Reversal." How much of these opinions act to channel the parties' conduct? Often the opinions mark out ways of behaviour as privileged forms of cooperation. But how much of the typical opinion is teaching? Normally, 90% or more. What the judge asserts is not put forward as fiat, but as reasoned argument. The judicial opinion is an attempt to meld the facts of the case with precedents and statutes and considerations of policy in order to persuade the reader of the reasonableness of the result. If law were merely coercive, the judge's command, "Let this be done" or "Let this be the rule" would suffice. If law were merely channelling, it would be enough for the court to announce what conduct would be rewarded. But in the usual opinion the judge attempts a great deal more. He attempts to say why the result reached is rational.

Ninety percent of what appellate courts do in fact is to teach. Ninety percent of what law students study is this teaching. Law would be extraordinarily easy to study if all a student had to do was to memorize theorems of power. The life of a conscientious judge would be no different from a sultan's if all a judge had to do was to issue a primary rule affecting physical behaviour. But reasoning is the life of the law in the opinions which form the staple work product of higher courts and the staple study object of those being initiated into mastery of the law.

If we turn from courts to other manifestations of law as an activity, what do we find? Consider the three most influential law-

books ever written — Justinian's *Corpus iuris civilis,* Gratian's *Harmony of Unharmonious Canons,* and Blackstone's *Commentaries.* Each is basically the work of a law teacher or, better put, a compendium of the work of law teachers. Each, to be sure, contains a number of commands — the commands of emperors in the case of the *Corpus iuris civilis,* the commands of Popes in the case of Gratian, the commands of Parliament in the case of Blackstone. But, in each, the commands are given context by the commentary of men who are primarily teachers. What would Justinian's work amount to if it did not contain Gaius and Ulpion? What would Gratian be without his having relied on Ambrose and Augustine? What is Blackstone but a law professor's exposition of the laws of England? Constructed by law teachers, citing and incorporating the commentaries of earlier law teachers, these great works became the law of their respective jurisdictions. For if you ask, What was Roman law from the sixth century on?, it was Justinian. If you ask, What was canon law from the twelfth century onwards?, it was Gratian. If you ask, what was the common law of England after 1765?, it was Blackstone. These remarkable books, composed at six hundred year intervals in the development of law in the Western world, stand as giant memorials to the place that the teaching of law has had in forming the Western understanding of what in fact law is.

Finally, if you turn from courts and compendia to individual instances of written law, every statute can be seen as performing, in varying proportions, a coercive, a channelling, and a didactic function. To illustrate, a statute regulating the speed limit may be primarily coercive, but it is not without its channelling and educative impact. A statute authorizing the formation of corporations primarily operates to effect the pooling of resources; it is only indirectly coercive; and it teaches something about human organization and enterprise. A statute on equal opportunity of employment is mainly educative; it is secondarily supported by coercion; and it does channel hiring and promotion. The greatest piece of written law in the American system is the Constitution. It has little coercive impact in itself, although it authorizes coercion. It has a substantial channelling function in establishing the basic political process and the limits of politics. Above all, the Constitution is a great teacher. Its broad phrases "free exercise of religion," "freedom of speech" and "freedom of the press," and "due process of law" have a generality and a vagueness entirely incompatible with a primarily coercive instrument such as a criminal code; the very spaciousness of their dimensions invites study and reflection and intellectual development.

They give no precise commands, but they give the broad lines of direction for the future. Hence it is that in amending the Constitution — for example, on abortion — it is imperative that the task be approached not like a sanction-obsessed jurisprudent drawing a blueprint for social engineering, but with an understanding of the Constitution's sublime and exhortatory character and an appreciation of its teaching function.

In none of these functions is law omnicompetent or uniformly successful. Only a fraction of crimes are reported; a small fraction of criminals are detected; and even a smaller fraction are actually prosecuted; a very small fraction are convicted; and a tiny percentage actually suffer the penal sanctions of the law. Nonetheless, the law acts coercively. As to channelling, not everyone wants to enter a corporation or cast his words in the form of a contract or even to make his sexual union a marriage. Yet affording patterns of conduct, the law offers a model even for those who do not conform to its path. As for teaching, not everyone gets the message. In the age of the ascendancy of the media, the law is a relatively puny communicator, drowned out by the din of less educated teachers on TV and in the press. Yet the law does have a voice that is sometimes heard. It would be as wrong to treat the law as totally ineffective in transmitting values as it would be to suppose the law's demand became instant social reality.

In every age there have been those who have reduced law to the exercise of power by those with power to exercise. The attribution of *plentitudo potestatis* to the emperor in Roman law went extraordinarily far in conveying the notion that the arbitrary will of the emperor was the law. In the canonical system the curious and unChristian notion occurred that cardinals need not give reasons for their decisions, so that courts composed of cardinals had only the obligation of announcing their judgment without any statement of why it was reached. The American system has never deified the lawmakers, and it has been customary in important cases for judges to give the reasons for their decision. But, as no court sits above the Supreme Court, the Justices of that tribunal seem, like emperors and cardinals of a bygone age, exempt from accountability; and in fact there are striking instances, from *The Antelope,*[5] decided in 1827, to *Planned Parenthood v. Danforth,*[6] decided in 1976, where the Justices, allegedly invoking reason, have spoken like emperors or cardinals, whose words of command alone were reason enough.

In any of these legal systems, then, power at the top, apparently beyond legal check or criticism, has existed and has been manifested

in arbitrary exercise. There has been no redress in the individual situation where such willful power has acted. Yet it would be a great mistake to generalize from the abuse and to reduce the process to its perversion. None of these legal systems has been content to rest on such acts of power or to leave them unqualified and unlimited as precedents. Each system devised ways for containing the arbitrary. The decrees of the emperor were accommodated by the jurists to the general structure of the Roman law. The decisions of the cardinals were rationalized by canonists; and to the commentators, professors of canon law, fell the task of assigning meaning and significance to the brute fact of a decision. In the American system, the Supreme Court has been held accountable by dissenting justices; by the succeeding generations of justices; and by commentators, so that there is, even for the Court, a real, if diffuse and delayed, accountability. The words of Robert Jackson in his famous *Jewell Ridge* dissent have always been true: "Power should answer to reason none the less because its fiat is beyond appeal."[7]

The teaching by the law is not constant. The content depends on an interaction between the social environment and the individual. The quality varies with the ability of the legislators and judges. Those who are masters of one topic may often be rank amateurs in another. Consider by way of illustration the abortion decisions of the United States Supreme Court and of the Federal Constitutional Court of West Germany. *Roe v. Wade*[8] is a very long opinion, almost all of it of a didactic character. It is a remarkable mixture of a dissertation on the history of abortion and a detailed prescription for the future treatment of abortion. The history, it is fair to say, reads as though it was assembled from the notes of diligent law clerks. There is a great parade of learning but no penetration to the spirit of those whose ideas are reported. Instead of responding to the persons whose thoughts comprise the history, the opinion recites their notions as a series of dead concepts with no more living presence than the faces of playing cards. The ideas are shuffled through and shuffled off without understanding. After this charade of playing-card history, the opinion writer turns with zeal to what is clearly near his heart: instruction in the treatment of abortion as a surgical process no different from any other surgery. Here the judge as teacher teaches the men and women of the fifty states that they were wrong in all their past learning which viewed abortion as unique because it involved not one human body but two. The opinion writer gives his valuation of life in the womb. Before viability, he values it as less than potential, as zero when weighed against the

mother's interest. After viability, he classes it as potential life, a subject of legal protection but only to the extent the mother's psychological welfare permits — in other words as a potential which is subject to total shrinkage and complete destruction. In this essay on human life, the opinion-writer is a convinced if unconvincing instructor.

The decision of the Federal Constitutional Court is also long and also largely didactic. Its essay on history is devoted not to *Roe v. Wade's* pretentious survey of Western culture, but to a more modest account of German law on abortion from the nineteenth century onwards. In particular the opinion writer focuses on the legislative proposals on abortion in the last twenty years and on the meaning of the framers of Article II of the Basic Law of the Republic. In this effort at historical understanding the opinion writer strives to catch the spirit of the makers of the modern German Constitution. He places the Constitution squarely in the context of the reaction to the Nazi regime and writes,

> Underlying the Basic Law are principles for the structuring of the state that may be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism. In opposition to the omnipotence of the totalitarian state which claimed for itself limitless dominion over all areas of social life ..., the Basic Law of the Federal Republic of Germany has erected an order bound together by values which place the individual human being and his dignity at the focal point of all its ordinances.[9]

In this context, he sees in Article II an affirmation which he repeats: "...human beings possess an inherent worth in the order of creation which uncompromisingly demands respect for the life of every individual human being..."[10]

The opinion writer acknowledges that the German legislature was attempting to teach this value by providing that legal abortion must be preceded by counselling. But he exposes this educational scheme for the fraudulent thing it was by observing that the counselling provided for by the law could be given by the physician who was to perform the operation.[11] What kind of a teacher is it who has a pecuniary interest in his pupil's reaching a certain conclusion? How could an abortionist teach a patient coming for an abortion to respect life? The German opinion writer will not let the legislature shuffle off its obligation to educate by a statute designating incompetent educators. The Germany opinion reaffirms that human life is the value on which human dignity depends and teaches that it must be cherished.[12]

In performing these didactic chores, both the American judge

and President Benda refer to norms outside themselves — to their respective Constitutions; and both sincerely, though with varying success, try to give the objective meaning of these documents. But seeking to be objective, neither can be absolved from personal responsibility for his act of interpretation. A Constitution is not self-executing nor is it self-interpreting. It speaks to us, yes; but when it speaks to us through the mouth of a judge, he speaks, too. It is now his teaching as well. It is for that reason that we celebrate the name of Ernst Benda, while the name of that other will finally be forgotten with the opinion which he authored.

Comparing the two opinions it is evident that it has made no difference to the teaching function that one, the American one, has dealt with what purports to be a real case or controversy between actual parties, while the other, the German, is what American lawyers would call "advisory," an opinion on the abstract constitutionality of the law, issued at the request of a group of parliamentarians and German states. There is no difference on this score because the American case itself has the character of an advisory opinion. The plaintiffs are pseudonymous; no actual controversy exists, for the passing of time has made it impracticable or impossible to abort them; the Supreme Court is passing on a question substantially moot. It might be assumed that the teaching function is most easily performed in this kind of situation where no individuals are immediately touched by the court's decree.

To the contrary, I would argue that the best teaching — that is, the teaching most responsive to the needs of human beings — occurs in those cases where real persons are before the court, where the court sees how its doctrine will affect them, and where the court adapts abstract rule to individual exigency. In the *Abortion Cases,* I suggest, better teaching would have been given if a really pregnant woman had pressed her claim against motherhood while an actual guardian of her particular baby opposed her demand. Does and Roes and feigned cases are abominations, encouraging the judges to wander in an abstract and unreal world. That teaching is best which emerges like the teaching of Jesus confronting the actual case of the woman taken in adultery. I would even go so far in the cause of better teaching as to propose that appellate judges always see before them the persons whose lives their decisions will affect. How many courts would uphold the death penalty if the prisoners to be executed sat before them in the court room as their opinion was delivered?

The *Abortion Cases* are illustrative. A didactic function is, in general, inseparable from the articulation of law by judges. But

who is educated by them? In the first place, the judges themselves. Like any other teacher, they can only teach if they understand their subject; and an understanding of their subject comes with the labor of research and composition. If he educates no one else, the author of an opinion will have at least ordered his own thoughts, formed his own conclusions, and shaped their expression; he will at least have engaged in self-education.

From this truth there follows a corollary. To the extent that judges rely on clerks to compose for them, to that extent, they default on their obligation as teachers. Teaching is a preeminently personal act. Imagine a professor who only deputizes assistants to teach for him. A judge who lets his assistants do this work for him is in no better position. The increasing number of clerks working for Justices of the United States Supreme Court and the increasing reliance on their draftsmanship are bad signs for the Court. A bureaucracy acting by agents is not a good instrument of teaching. Justices putting their approval on gobs of material prepared by assistants are scanting their duty as teachers.

Beyond the judges themselves, no doubt, the bar is educated by opinions — by the bar here meaning that segment of it concerned with the subject matter of the case plus professors of law and students studying the subject. All these portions of the profession will draw lessons from the reasoning employed by the court. At the very least the court's phrases will guide the preparation of the next argument and the next law school examination on the topic. At the very most the court's reasons will shape the structure of conduct planned by lawyers for one corner or another of society.

Will the opinions educate the laymen as well? More often than not, perhaps, the parties to a case are concerned only with the judicial bottom line, "Affirmed," "Remanded," or "Reversed." Addressed in a language which is not theirs, laymen do not pore over the niceties of judicial expression. Nonetheless, in the areas of conduct affected by constitutional law in particular, the layman may well draw broad lessons, and in the areas of conduct determined by governmental action, legislators and officials will be guided by the Court's words. In America, where as Tocqueville long ago observed, every political issue is turned into a legal issue, the Supreme Court, like the Constitution itself, is a teacher of morals. When it pronounces conduct to be legal, a majority of Americans often understand it to say that the conduct is right. When the Court says an act is a constitutionally protected liberty, many Americans read it to say that the act is a constitutionally privileged good.

"To know the law," reads an old Roman maxim inscribed on the wall of Langdell Library, "is not to know the words of the law, but its force and power." The force and power of the law lie not only in the sanction it can invoke and not only in the privileges it can bestow, but in the response it can elicit as it addresses judge, lawgiver, official, and citizen and teaches what is good. It is an American tragedy that recently in the great area of marriage, the family, and embryonic life, the teaching has been so bad. But whether done well or poorly, whether the content is good or bad, the future of law is inseparable from its function as a teacher.

NOTES

1. See John Austin, *The Province of Jurisprudence Determined,* Lecture I.
2. O.W. Holmes Jr., "The Path of the Law," *Harvard Law Review* (1897) 10:457 at 459.
3. See Lon L. Fuller, "Human Interaction and the Law," *American Journal of Jurisprudence* (1969) 14:1 at 6-13, and H.L.A. Hart, *The Concept of Law* (1961), 79.
4. Hart, *op. cit.,* p. 94 puts this kind of emphasis on power.
5. 12 *Wheaton* 546 (1827).
6. 96 *S. Ct. Rep.* 2831 (1976).
7. *Jewell Ridge Coal Co. v. Local 6167 UMW* 325 U.S. 161 at 196 (1943).
8. 410 U.S. 913 (1973).
9. *West German Abortion Decision,* February 25, 1975, trans. Robert E. Jonas and John D. Gorby, *John Marshall Journal* 9:605 at 662 (1976).
10. *Ibid.* at 662.
11. *Ibid.* at 658.
12. *Ibid.* at 642.

The Roots of American Violence

James Hitchcock

CONVENTIONAL OPINION about the 1960's is wrong about two major contentions: that the essential thrust of '60's politics was a program for social change based on "idealism," and that this thrust was essentially frustrated. In fact a revolution of major significance *did* occur in the past decade, and its repercussions grow increasingly stronger. In certain important ways the would-be revolutionaries of the '60's won their war without realizing it, because the revolution they succeeded in bringing about was not the revolution to which they had officially committed themselves.

One of the least-discussed yet most significant facts of recent American history has been the process by which the morally "idealistic" middle class began by joining hands with the underprivileged lower class to improve the lot of the poor but ended by learning to see itself as the truly oppressed class and its *own* grievances as deserving of its major expenditure of moral energy. The campus revolts, with the assertion of "the student as nigger," began the process. Women's liberation, homosexual rights, the sexual revolution, legalized abortion, the drive to legalize drug use, the "human potential" movement, and the broad-fronted crusade on behalf of every variety of "alternative life style" have followed. In an important sense, even though its clientele come mostly from the lower classes, the prisoners' rights movement is part of the same revolution.

Far from being in a period of conservative retreat, America is now in the midst of the harvest season of ideas which were planted in the heyday of the New Left. The communications media, the schools, the churches, the "enlightened" segment of the middle class, the courts, and a not-inconsiderable number of politicians are responsive to all these causes. The "revolution" dreamt of in the 1960's continues in ways not predictable in Marxist categories. But it may be winning the battle for minds.

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What seems to be occurring is the triumph of a perception which the literary historian Quentin Anderson has shown to be persistent and recurrent in American culture — the "Imperial Self."[1] Anderson regards Ralph Waldo Emerson as the seminal articulator of the belief that "realized human greatness consists in a demand for the immediate realization of our widest vision . . . our momentary sensations of omnipotence and omniscience tell us what we ought to become, what state is appropriate for us." The truly realized individual seeks finally for "the power to dispose of the whole felt and imagined world as a woman arranges her skirts." The 1960's were not the first time in American history when people dreamt of "the act not of identifying oneself with the fathers, but of catching up all their powers into the self, asserting that there need be no more generations, no more history, but simply the swelling diapason of the expanding self."

In a misleading way American society appears now to be overly politicized, in the sense that every conceivable social question inspires its own ideology and fuses together its own coterie of warriors, who mount the demand for ostensibly political actions in relief of their stated needs. But on a more important level, what has occurred has been the abandonment of politics, or its annihilation, in favor of public and organized forms of therapy. Emphasis is less and less on the general material needs of the citizens, with which the state has some possibility of coping, and more and more on the formerly private, personal, and subjective aspects of their lives, which the state is expected, somehow, to respond to in symbolically comforting ways. What the New Left primarily accomplished was to establish a particular style of public discourse which enables emotionally-frustrated people to express themselves in cathartic ways. It provided the mechanisms by which inhibitions were systematically shed.

The virtual youth-worship characteristic of the past decade is by no means accidental (given the Romantic, and now normatively modern, conception of the young as free, spontaneous, open, and as yet unformed and undeformed by society). The adolescent personality has been enshrined as the ideal model of human behavior, by which standard what has usually been thought of as growth can only be decline, and authentic human life is only achievable through rejuvenation.

The Janus-like character of the adolescent personality has not been formally acknowledged, but it has, perhaps unconsciously, imprinted itself on the behavior of those who regard themselves as the culture's advance guard. Officially committed to an ideology of love,

joy, freedom, tenderness, and peace, they often behave with petulance, hostility, and violent aggressiveness. (At his trial in San Francisco for kidnapping and armed robbery, the upper-class guerrilla, William Harris, shouted out in court that "Che Guevara once said a true revolutionary is guided by feelings of love. In whatever Emily and I did we did not abandon that important ideal.")[2]

Characteristically adolescent attitudes are now endemic to much of what passes for adult politics. There is a persistent love-hate relationship with authority figures, so that conventional authorities are routinely rejected as oppressive while incense is offered distant but symbolically-potent figures like the late Chairman Mao. There is a constant high-pitched demand for freedom, rarely accompanied by any consideration of how competing demands can be reconciled with one another. Boredom comes easily, despite a multiplication of the kinds of diversions available. One's maturity and adulthood are militantly asserted, but one's failings are commonly blamed on others. Courage and independence of mind are celebrated, but peer approval and passing fashion largely determine beliefs.

Lines like the following are recognizable and perennially adolescent, including the mechanical repetition of clichés meant to suggest original thought: "I am unhappy when my spontaneity and creativity is stifled. . . . I need to have control of my life. I need the freedom to lead myself in directions that spring from my heart, not in the directions chosen by others. . . . I have a wonderful mind, can see thousands of possibilities before me, but I feel trapped in a bureaucratic and heartless system." As a high-school student's lament it is a pure example of a familiar genre. When a fifty-year-old columnist for a major daily newspaper reprints it to illustrate the truth about society it is indicative of willful personal regression.[3]

The pseudo-politics of the present moment create many of the "problems" which it then endeavors to solve in precisely the way that unthinking parents and counsellors create "problems" in certain adolescents — by constantly encouraging a preoccupation with self, a compulsively repetitive introspection which will always discover something over which to agonize. To the often-repeated assertion that institutions no longer work as they once did, it might be retorted that they perhaps work better than in the past. What has changed are the expectations people have of these institutions, expectations which are often vague, highly unrealistic, and constantly increasing.

The central problem of contemporary culture is a threatening solipsism — the failure to realize and accept the existence of other beings distinct from oneself. The political effects of this have been

significant and deleterious, and the ultimate logic of solipsism is necessarily the dissolution of all politics. Quentin Anderson writes of "a drastic reduction in the capacity to imagine that encounters with others will further a definition of self. For our visionaries, their most inclusive sense of the world is not at risk in encounters with others; the self has been walled off by the faith that it cannot be defined by its reciprocal relationship . . . a part of the process of becoming a self in such a culture is precisely the need to deny the efficacy of the operative familial and social constraints in fixing a sense of the self."[4]

Contemporary solipsism manifests itself most dramatically in the evidently common experience of social forms as merely threatening and oppressive. No part of the self is invested in society, which therefore assumes a wholly alien and sinister visage. Furthermore, the imagination is unable to conceive of the real existence of other persons so different from oneself that society might in fact have legitimacy in their eyes. Social forms are recognized only as giant conspiracies which impose themselves on individual egos. Hence personal survival depends on a continued and frantic resistance to this attempted invasion of self.

Classically, justification for revolution has been sought in the measurable material conditions of life — extreme poverty, despotic rulers, palpable social injustice. Now, however, the call for "revolution" looks for its legitimacy only in the subjective sense of grievance which certain people have, even if they live in relative material comfort and political freedom. "Repression" is an essentially personal experience, the reality of which cannot be legitimately questioned.

Although often unrecognized, the dominant model of political life now operative for many people is the Hobbesian war of all against all, not only in the sense that society is experienced as a great devouring beast but also in that the natural posture of man is thought to be self-assertion, the end result of which is a cacophony of contending egos. To a degree that would have seemed horrifying twenty years ago, aggressive hostility has been accepted by many people as natural to the most basic human relationships, such as families.

At no time in history has there been so much celebration of "love," "community," "commitment," "concern," and "involvement." At no time have so many people claimed to have found the elusive keys to such joys, and been so eager to share them with others. Yet in the midst of this celebration personal bonds of all kinds continue to dissolve quite visibly, often precisely among that segment of the

population which claims to have at last discovered how to live. Herbert Hendin, in his book *The Age of Sensation*,[5] has graphically anatomized the pathological inability to love or sustain commitments on the part of many young people, their fear of others, and their varied efforts to withdraw from all demanding personal relationships. It is perhaps not coincidental that a paranoid style of politics, in which people were encouraged to believe that murderous conspiracies ultimately governed the social order, should finally issue in an inability to trust even one's supposed allies and friends. In many ways the favored political style of the past decade has served simply to legitimize hatred. Rarely have people shown themselves so ready to believe the worst of each other.

Solipsism feeds on the sense of an empty universe waiting to be filled by an infinitely expanding and expansive self. Life becomes weightless, in that nothing concrete and tangible is allowed to impinge from the outside, to define the limits within which one must live. (Drugs are used deliberately to eliminate all such boundaries, and the concept of human existence revealed in that use tends to govern other areas of behavior also.) What begins as "idealism" often ends as nihilism precisely because of the need to annihilate everything objective and weighty which impedes the expansion of the self. Rebellion is often a deliberate testing of boundaries, a probe to see exactly how far the impingement of reality can be rolled back. (The unexpected flimsiness of social constraints is then the occasion for antinomian exhilaration, followed by even more severe disorientation and need for self-assertion.)

In this atmosphere legalized abortion is an issue of almost incalculable symbolic significance, precisely because the decision to abort is one of the most radical assertions of the solipsistic mind—the denial of one of the most sacred bonds linking human beings to one another. Motherhood is reduced to an inconvenience, and apologists for abortion go to great lengths to deny any responsibility which the mother may have, even to denying the humanness of the fetus. Given certain prevailing cultural assumptions, the notion of the fetus as a "parasite" or an "invader" in the womb has a perverse logic to it.

Despite what some of its defenders claim, abortion is no longer regarded as the lesser of two evils, which may be reluctantly chosen in certain difficult situations. There has been an almost maniacal drive to remove all hint of moral stigma from it, to elevate it to an almost privileged position among medical actions (a situation reflected in several court decisions, for example). The contention that the helpless unborn child can make binding claims on its mother

must not only be denied but eradicated. In the process the will of the mother is rendered fully sovereign, answerable to no other person.

Increasingly in recent times ideas have been evaluated for their beauty rather than their truth. The mundane process by which general assertions are measured against discernable realities has been scornfully dismissed in favor of criteria which primarily value "creativity," "daring," and "originality," the willingness to think the unthinkable, to make assertions no one has ever before dared make (often because the assertions are demonstrably untrue). Susan Brownmiller's contention, for example, that rape is the means by which all men seek to keep all women in subjection[6] is not defended by her admirers as literally true but seems rather to be enjoyed as a particularly choice, because outrageous, example of political "thinking." Political positions scarcely need to be justified rationally since they are simply aspects of style, the way in which the self presents itself to the world.

If no necessary binding nexus exists between self and society, then even the possibility of a real politics is foreclosed and all of what passes for political activity is merely, in one form or another, a dramatization of self. (Lionel Trilling wrote of a culture which has a "principled indifference to the intellectual and moral forms in which the self chooses to be presented.")[7] Often now, terrorism is excused not merely on utilitarian grounds but because of the sincerity and idealism of the terrorist: it is his "statement" and therefore must be treated with respect.

The ability of the Imperial Self to make continually more outrageous assertions implies the ability of the audience, largely composed of other would-be imperial selves, to accept everything outrageous with equanimity. The culture of the past ten years has worked hard to exorcise from people even the ability to be shocked, to break down all sense of a distinction between appropriate and inappropriate assertions. (The destruction of legal barriers to such expression is often intended as a means towards the destruction of psychological barriers as well.) The justification for the freest possible speech is not made primarily in terms of society's need to hear unpalatable truths but in terms of the individual's need to express his or her inner needs. Since all such needs are subjective and purely personal, there is finally no basis for distinguishing between true and false statements. The act of expression is its own justification.

The educated classes have consequently developed in recent years the fine ability to provide justification for every kind of idea and

action, often on the flimsiest of rational bases, since the right to self-expression — however *bizarre* — has come to be the central political issue of the day. Public questions are more and more symbolic rather than substantive, a conflict of style and personality rather than of definable programs. Anti-social deeds increasingly abound as expressions of the burgeoning power of the self, as in the prevalence of gratuitous vandalism as a protest against the obdurate thing-ness of reality, the need visibly to reduce order to chaos by an act of the will.

The rage which seems to lie close to the surface of many people's lives, and which renders social life tense and strained, is an expression of the inability to tolerate the existence of anything larger than the self, the compulsive need to reduce everything to one's own size, to manipulate cultural symbols without regard for the matrix out of which they grow, solely for one's own convenience. Bored adults and impressionable adolescents are especially prone to such feelings, often reinforcing one another.

The supreme social irony of the past fifteen years is the fact that a broad-fronted movement which promised a society that would be loving, non-competitive, gentle, and communitarian has resulted in one characterized by stridency, suspicion, hostility, rampant egotism, and the breakdown of all social bonds. The line from the ideal to the reality is perhaps straighter than it might at first seem, however, because what links the two is essentially the stance of self-assertiveness, the conviction of one's own rectitude defiantly flung up against all constraining social limitations. Genuine idealists did not reflect that such passions, cultivated and marshalled in the service of good causes, might become for many people simply a way of life.

The identification of show-business personalities like Jane Fonda and star athletes like Bill Walton with leftist causes has been one of the symptomatic cultural shifts of the past decade. But on reflection it should not have been surprising, since athletes and movie stars have long been privileged persons whose egotism has been indulged and applauded, and for whom social rules were always made to be broken. Their support of "radical" causes, in the sense of systematic attacks on the legitimacy of society, are thus quite natural. True virtuosi of the self are no longer content with the limited opportunities presented by one profession or cultural role. (Recently, when New-left lawyer William Kunstler spoke at a Midwestern university and attracted only thirty listeners, he pronounced the campus "sick" and said, "You ripped the heart out of me tonight. . . . I didn't want to

come out here, but I thought of the money.")[8] There is a continuing need for such persons to escalate their outrageousness in order to maintain an image of specialness.

Extremist political movements, whether of the left or the right, usually fail to provide the promised better society, in part because of the kind of people attracted to them. Those who resent most bitterly the tyranny imposed by an existing society are often those with the strongest sense of their own worth and power, and if they succeed in overturning the oppressor they can scarcely resist imposing their own wills in turn. The ultimate goals of peace and love are belied by the turbulent personalities of those committed to achieving them. Even a superficial acquaintance with American leftist groups of the past decade reveals an abundance of authoritarian personalities. (Alan Adelson, a worshipful chronicler of Students for a Democratic Society, describes a Columbia University member who had been expelled from the fifth grade for kicking a teacher who disagreed with him over the interpretation of a book, and who became depressed whenever fights and violence were not materializing on the campus.)[9] The familiar phenomenon of upper-class leftism is perhaps not unrelated to similar authoritarian urges. Those whose birthright is to command are the least inclined to obey.

Sara Jane Moore, the "idealistic, religious" woman who attempted to assassinate President Ford, said at the time of her sentencing to prison that she regretted her act because "it accomplished little except to throw away the rest of my life." She added, however, that "at the time it seemed a correct expression of my anger."[10] Earlier she had told reporters that "there comes a time when the only way you can make a statement is to pick up a gun."[11] Characteristically, the aristocrats of terrorism regard other lives taken as of no consequence, for the felt needs of their own existences are of surpassing value. Murder, often for no definable political advantage, is the ultimate expression of the Imperial Self, the self for whom the very existence of certain other people is a blight on one's own happiness. Karleton Armstrong, who killed a student by bombing a laboratory at the University of Wisconsin, complained after his arrest that the press treated him as "a mad bomber who doesn't have any scruples" and asserted that charges against him should be dismissed. He also complained of "the crimes committed against me in Canada, where officials kept me in isolation for months."[12]

Taken in this context, the concern for the rights of both accused and convicted criminals, which is now so important a cause for American liberals, has somewhat disquieting implications. There is

much to be said for such concern — the rights of accused persons must be safeguarded, and neither society nor the prisoner gains from a needlessly harsh penal system. But concern for the rights of accused persons has now moved beyond the insistance that established legal procedures be followed. Individuals accused of crimes which have even slightly political overtones now automatically become cult figures. Prestigious committees rush to their defense, and the question of their guilt or innocence becomes largely irrelevant to a determination not to allow society to crush a free spirit. When an accused criminal is acquitted, even if there is strong suspicion of his guilt, the triumph of justice is proclaimed. The conviction of even heinous offenders is met with silence or regret.

Conventional liberal theory about criminality, which is only beginning to be seriously challenged, in effect holds that criminal behavior can be significantly inhibited only if potential criminals are persuaded (through education, therapy, or social reforms) voluntarily to refrain from anti-social acts. The autocracy of the individual will is thereby conceded, and attempts to forcibly restrain criminal behavior are either proclaimed as unworkable (contrary to a good deal of evidence) or cast under a moral cloud. During the "Zebra killings" in San Francisco in 1974, when citizens were being shot down on the streets at random, the articulate liberal community mainly expressed outrage at the police dragnet set up to question suspects. There appeared to be far more emotional concern over the potentiality of a "police state" than over recurring actual murders.[13]

Philosophical distinctions are sometimes made between "political" crime and "ordinary" crime, with a special moral advantage conceded to the former. But it is a short step (already taken by some) for all crime to become political, in the sense that criminals are by definition rebelling against an oppressive society. Why else would they act as they do? The feminist ideologue Ti-Grace Atkinson, who at one time would not be seen in the company of males, later bestowed an "honorary sisterhood" on the reputed Mafioso Joseph A. Colombo, Sr. "Criminals don't identify with the establishment, and it's the establishment that oppresses women," Ms. Atkinson explained.[14]

Bourgeois society, often ridiculed for its hysteria over the counterculture, was correct in sensing certain murderous realities beneath the official talk about love. The speedy deterioration of hippie ghettos into burnt-out centers of vice and violent crime is well known, a result, evidently, both of a naive belief that law was unnecessary and

of the systematic indulgence of every kind of personal "need." A classic confrontation between the "straight" and hippie worlds took place in the small Missouri town of Harrisonville in 1972. For some months a group of long-haired young people loitered around the streets, allegedly harassing passersby and being in turn harassed by the police. One evening a 25-year-old man, who earlier had told police that "Simpson's my name and revolution's my game," without warning shot and killed two policemen, wounded four other people, and then killed himself. One of his friends explained to reporters that Simpson had simply come to feel too much pressure from "the system," adding that "liberal ideas don't reach a small town for some time."[15]

The special concern which many "enlightened" people have over the treatment of criminals perhaps has something to do with a sneaking admiration — conscious in some cases, less so in others — for the individual who has made the ultimate act of self-assertion. Relatively few people openly defend criminal behavior. But condemnations of even the most atrocious crimes are commonly formal, restrained, and without evident deep conviction, while true passion and outrage are reserved for real or alleged violations of the rights of the accused and the convicted.

The favored sociological explanation for crime — that it occurs primarily because people are poor and thus is motivated chiefly by the need to support one's self and one's dependents — is called into question merely by a glance at newspaper headlines culled at random over the period of a few years: "Man Kills Widow, 71, by Setting Her Afire." "Boy, 12, Beats and Kills 83-Year-Old Woman." "Charged in Killing of Girl to Win Bet." "Gangs Attack and Kill Motorist Stranded in Flood." "Girl Thrown Off Roof Again. Father Held." "Acid Tossed into Crowd. 40 Burned." "Bodies of Two Boys Found in Sewer." "Baby Mugged When Mother Resists Holdup." "Youths Beat, Rob Legless War Veteran." "Two Girls Set Afire after Rape." "Victims Tortured, Killed in Utah Robbery."

American society at present harbors people for whom the very existence of others is apparently an affront and for whom the temptation to annihilate those who affront them is overwhelming. Fathomless and motiveless malice obviously underlies such crimes, and liberal social theory cannot begin to come to terms with such reality, nor does it appear to wish to.

Most champions of convicted criminals obviously do not condone heinous deeds. They rather put them out of their minds. But

that in itself is a political act of enormous importance, since the extreme solipsism of the violent criminal appears to take precisely the form of sundering all connection between his own deeds and the punishment which society visits on him, so that he can sincerely conceive of himself as an arbitrarily-chosen victim of official persecution. In Missouri, for example, a convicted rapist has filed 219 suits against the state, complaining among other things that he is not allowed to have a cassette tape recorder. Another prisoner, who in attempting to escape kicked a policeman in the groin and the abdomen and killed two persons with his car while speeding, filed a one-million-dollar suit against the state for police brutality.[16] When the Supreme Court restored the death penalty last July, several convicted murderers pronounced it "barbaric" and "medieval," and one Oklahoma prisoner proclaimed that no man has a right to kill another, excusing his own murdering of his wife on the grounds that "I did this under great emotional strain. I was not quite all myself."[17]

A revealing insight into the mind of the murderer has been provided by an inmate of Arizona's death row, in the act of trying to arouse sympathy for his plight. Repeatedly insisting that men are sentenced "only because they are poor, black, Mexican, or friendless," he sees no necessity to inform his readers of what specific crimes they may have been convicted or even to bother asserting their innocence. His entire case, charged with righteous indignation, is based upon the supposed noble characters of the inmates and the contrasting meanness and malevolence of their keepers. Most significantly, his diatribe unwittingly almost turns into a case for capital punishment rather than against it, since he attributes the ennobling of his companions to the harrowing experience of having been condemned to death.[18] Proponents of capital punishment might find this account suggestive of the proverbial need to get the mule's attention by first hitting him in the head — some people only begin to develop character when catastrophe threatens them.

The absence from this prisoner's jeremiad of any acknowledgement of actual crimes actually committed points to the most basic flaw in most contemporary liberal writing about penology — the implicit denial that repentance and restitution are a necessary part of any "rehabilitation" process, the concentration on prisoners' grievances to the point where society's right to punish or to protect itself from marauders is virtually denied. That incarcerated criminals should brood over their sufferings to the point of forgetting why they are being punished is understandable. It is much less un-

derstandable that sophisticated outsiders should connive in that forgetfulness.

Richard Harris, a journalist specializing in legal and judicial matters for *The New Yorker*, can contrast the "interests of the state" and the interests of the defendants in Boston police court as though the state were a wholly abstract entity and as though countless citizens, many of them poorer than those who terrorize them, do not also have an interest in restraining and punishing predatory behavior.[19] Advocates like Jessica Mitford[20] and Murray Kempton[21] seem to feel that criminal justice merely enshrines class prejudices, as though most crimes would be wholly tolerable if only the bourgeoisie would expand its imagination. Tom Wicker hypothesizes a muddled pseudo-historical rationale for punishment, deriving it from the Puritan habit of dividing the world into the saved and the damned[22] (as though every society in the history of the world has not imposed penalties on criminals, most of them a great deal harsher than our own). Karl Menninger goes so far as to assert that respectable citizens label others as criminals out of a need to project their own evil impulses.[23]

What can be said about all such theses is that they are fundamentally frivolous, blatant examples of the ability of the mind to become mesmerized by the elegance and ingenuity of its own constructions. As such they are symptoms of the most fundamental malaise of our culture — the inability to appreciate the real bonds linking one person to another and the inability therefore to accept the real consequences of personal acts. For too long a proclaimed "compassion" has been allowed to intimidate all resistance to acts of naked aggression, and in this atmosphere violence of all kinds can only continue to increase.

NOTES

1. Quentin Anderson, *The Imperial Self.* (New York: Alfred A. Knopf, Inc., 1971.) The quotations in this paragraph are from pages 24, 56 and 58.
2. *Associated Press* Dispatch, July 30, 1976.
3. Jake McCarthy, "A Personal Opinion," St. Louis *Post-Dispatch,* January 2, 1976, p. 3A.
4. Quentin Anderson, "Practical and Visionary Americans," *The American Scholar,* Summer 1976, p. 408.
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Genetic Engineering: the Moral Challenge

Bryan Griffin

THE SCIENCE of molecular biology was not yet born when H.G. Wells warned — half a century ago — that "human history becomes more and more a race between education and catastrophe." A man of eccentric politics, Wells was nevertheless a man with a good eye for the shape of things to come; and perhaps if he were around today he would be able to perceive the finish line of that race, somewhere in the middle distance. But even if we ourselves cannot see that last line, we must assume that it is there, out in the fog; and accordingly, because dogged optimism is in our nature, we must assume also that the contest is not quite over, and that there is still a chance to win this race with catastrophe.

What Wells called "education" implies, in our present context, a dual responsibility. On the one hand there is the obvious necessity for the citizenry to instruct itself and its elected representatives as to the potential benefits and hazards of genetic research. Without this minimal public understanding and involvement, debate is ingrown and ultimately futile. The second necessity is of a more subtle nature. It is also, in the long run, likely to be the more difficult of the two. It is simply this: that the time has come — if indeed it has not already passed — for the scientific community to do what C.P. Snow has been urging it to do for twenty years, to divest itself of the ugly trappings of moral neutrality. The first step in such a re-evaluation must be the recognition that scientific activity is an inherently moral undertaking, if only because it has as its primary purpose the search for truth and perfection. Just as it is no longer good enough for a physician (who is a practitioner of an applied science) to define an abortion as "the expulsion of the products of conception," so it is no longer good enough for the nuclear engineer or the molecular biologist to think of himself as merely a technician, to say to his fellow-men, in effect, "You make the policies, I only make the tools." We — and our species — will not die in categories, and it is time we stopped living in categories. Which is merely one way of noting that we are all in this together.

It is unfortunate that education is the strongest runner in this

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contest with catastrophe, because education is traditionally a time-consuming process. And it is possible that there is very little time available. Microbes are frequently affectionate little creatures, and can multiply their population a million times in a matter of hours.

Class, therefore, is in session. For all of us.

The fashionable phrase "genetic engineering" is controversial only insofar as it is used to describe research involving "recombinant DNA" — another fashionable phrase, which is merely a convenient way of making reference to research which creates combinations of DNA from organisms that do not normally exchange genes in nature.

Even the word "research," in such a context, can be misleading, and — like the good scientists they are — many of the laboratory technicians in this country are less given to euphemism. They have their own phrase to describe their new work: they call it "gene-splicing."

And any student of applied science worth his degrees knows that the essential rationale for "gene-splicing" lies in the future prospect of deliberately altering the inherited characteristics of human beings. This socio-scientific vision may or may not make you nervous — depending upon the nature of your inherited characteristics.

What this really means is that the biological sciences have rather suddenly — from the layman's perspective — arrived at the edge of the moral chasm that opened before the science of physics in 1945. After Hiroshima the Australian physicist Mark Oliphant said, "This has killed a beautiful subject." Well, it hadn't. It had killed a lot of people, certainly, but had only given new impetus to the science.

It was perhaps inevitable that it should do so. Scientific inquiry does not — perhaps cannot — stop for anything. Inexorably the applied sciences — physics, biology, medicine, chemistry, electronics, etc. — are running up against, or are going to run up against, similar moral dilemmas. In each case the challenge is, on the surface, a simple one: ought humanity to forgo the possible benefits of this research because of its potential misuse?

A dilemma is not always something to be avoided. It is to be welcomed, to the extent that it offers a choice between alternatives, albeit unpleasant ones. It is a summons.

It is, however, important that those of us who are concerned about the possible moral and practical consequences of genetic engineering take care to identify our allies — and our opponents — correctly. In

other words, it is important that we recognize that the scientists are not the enemy. It is true that, within the research community, the concerned non-scientist is generally seen as an outside agitator. The essential question was put rather casually recently to the director of a large engineering laboratory on the East coast: i.e., how does the scientific community view the unusual public reaction to the new genetic research? His reply was not casual: It is one more case, he said, of ignorant people getting involved with a purely technological subject. It is one more chance for the would-be social commentators to frustrate well-meant scientific research. The safeguards are perfectly adequate, and so forth.

His resentment was understandable, his point well-taken. And to appreciate this we must remind ourselves again that, in the Western societies at least, scientific research has traditionally been conducted with a peculiar absence of ethical concern, an amorality paradoxical in its righteousness. We have been accustomed to calling this amorality "purity." It would be unwise to condemn this tradition in hindsight — it is probably true that its acceptance smoothed the way for technological progress, if we concede that science has been primarily a discipline of discovery and not of intent. In the past, science was rarely able to see exactly where it was going; to attempt to apply moral judgement to such a dimly perceived and as yet unrealized future would have been a singularly irrelevant exercise.

This is no longer true. Indeed, it is one of the most significant and most overlooked developments of the age that scientific research has gradually assumed increasingly precise direction; it is characterized now more by intent than by discovery. There are fewer and fewer laboratory stumbles that lead to great advances; there are more and more clearly defined targets, and target dates. That is why it is now possible — and imperative — that scientists start thinking ahead in other than scientific terms.

And they are doing so. More and more fields of research are being abandoned as "unproductive." Increasingly, research is being directed towards areas that are likely to yield good results — that is, results of theoretical benefit to mankind. The potential benefits of gene-splicing are ... well, limitless. The prevention of much, or all, human disability. An end to retardation. A collective cancer cure. The creation of bacteria which in time could themselves create essential medicines, chemicals — insulin, for example. Already allied research has resulted in a bacterium capable of producing a milk-digesting protein which many people lack. Also in sight is the mass-production of bacteria which are capable of "eating" oil —

though it is worth noting that the appetite exists whether the oil is part of an oil-spill, or in a pipeline ... or in an automobile ... or an airplane. It is a problem, we are told, that is being worked on.

But perhaps it is time to indulge in a little scaretalk. Just what are the potential hazards, apart from indiscriminate oil-eating organisms? The scientific community, so far, has concerned itself primarily with three possible eventualities: the danger to pharmaceutical workers and lab technicians, the danger of an epidemic, and the danger of — the alteration of evolution. The National Institutes of Health (NIH) are developing guidelines to reduce the possibility of these dangers to the level of what is usually called "an acceptable risk." The chief weapon in this effort — and it is not the only weapon — is the development of experimental strains of microbes which, in principle, cannot sustain life outside laboratory conditions.

Our ignorance ought, perhaps, to frighten us more than it does. We are essentially ignorant, for example, of the general principles of evolution — if there are such principles. In both scientific and historical terms we do not yet really have a good picture of our position in the scheme of things, or of the security of that position. We do not know, for example, if there are extant any viruses which are now benign, but which are perhaps only one mutation away from human pathogenicity. There may be no such viruses. Then again.

The Washington *Post* in a recent editorial went so far as to suggest that "it is even conceivable that some scientists might choose to tinker malevolently with the genetic makeup of human beings." It is conceivable. But that misses the point. Malevolent forces can wreak near-to-ultimate havoc now, if they so desire: there are germs, and gasses, and radioactive substances, and bombs and nuclear reactors and terrorists; and there are inexplicable epidemics and mad dictators and cancer-causing substances and not-so-mad dictators. The ingredients for an end to life on earth are there. Good men and women try to take preventative action against malevolent forces: they try to remove some of the ingredients of catastrophe, before it hits. Mostly, though, good men and women stamp out the malevolence and its consequence after the tragedy has struck. In the past, it has usually been possible to do this.

That is not where the immediate threat lies this time. We have to worry about the good guys. We have to worry about accidents, and we have to worry about good intentions. Substantial genetic work is already underway not only in the United States, but in Canada, the United Kingdom, and most of Western Europe. New creatures

will soon be loosed upon the laboratories, and beyond, whether we like it or not. It is perhaps not enough to hope that these creatures will be friendly, or even benign.

It is this recognition — one both of imminent danger and of less-imminent opportunity — that must form the basis for debate. It is, perhaps, the strangest of debates, both because of its unprecedented urgency and because it has arrived upon us with such peculiar suddenness. In the larger sense, though, we knew it was coming: we have felt the tug of the technological whirlpool in the post-war years, and now we are entering the vortex.

The moral issues of our century — most particularly the issues of life and its definition — are lately being referred to as problems in "bioethics." It is typical of our time, and perhaps it is typical of mankind in general, that we should enjoy pretending that our ethical confusions are somehow unprecedented, and deserving of pretentious new descriptive words and phrases. "Bioethics": the study of standards of moral conduct in relation to living things. Not such a new field of study after all. The most common ethical fallacy of the day is the assumption that the variables of the moral problems confronting us are somehow unique in human history. In fact the problems are as old as time — it is merely the potential for disastrous consequence that has increased. Lifeboat situations are not new — it is just that the lifeboat is more inclusive now. Socrates, let us say, would have been perfectly capable of addressing himself to the problems of abortion, euthanasia, nerve gas, or concentration camps — he did not do so because Athens had not the institutional capacity to initiate such procedures on a mass basis. In another sense, of course, Socrates did address himself to precisely these issues, and it is in this sense that the solutions to the problems posed by gene-splicing are to be found in our past, if they are to be found anywhere. It does not matter whether one identifies one's past in one's religion, or in the Greco-Roman ethic, or in the essays, say, of Montaigne: the apprehensions of the fundamental truths — the bioethics, if you will — are the same.

If there is, then, a fundamental division between science and humanism, surely this is at its core: on the one hand, the technocrat's certainty that humanity is advancing, inexorably, to new heights of achievement and knowledge, and ultimately to mastery of the planet — and on the other, the humanist concept of the individual pilgrimage, repeated over and over again, towards ultimate enlightenment.

In such a context, our pilgrimage — and the issues with which we

are concerned — are old hat. We are merely required to do what all men and women have always done: to rediscover and apply the truth to our own circumstance, which is a special circumstance only insofar as our choices may determine the final physical shape of life on earth.

Because that statement is literal, those concerned with the issue cannot afford to be impractical. And it would represent the height of impracticality to pretend that genetic research — as distinct from deliberate engineering — can any longer be stopped. It is going to proceed, in one or another form, not only because it has already been initiated in half a dozen countries, but also because the history of the technological revolution teaches us that it is futile to oppose anything that a) promises to make a good many people a good deal of money, b) offers the prospect of substantial benefit and convenience to a large portion of humanity, and c) is aesthetically and intellectually attractive to the scientific mentality. As I have indicated, it is this third factor that is likely the most crucial. To oppose progress — and progress, in the scientific tradition, is anything new — is to invite ridicule, and to acknowledge one's own impotence. As soon as one allies oneself with the "If God had intended Man to fly he would have given him wings" brigade, one's political usefulness is at an end. It may be redundant to note, therefore, that many people cannot take opposition to applied science seriously, not so much because they find the premise of the opposition unacceptable, but because they are aware — as serious people — that the cause is already lost.

Indeed, many of the socio-political factions that might be allies in the fight against the misuse of genetic knowledge will not be allies simply because of prior commitments and identifications. Scientists, businessmen, political conservatives, liberal planners of Utopia — all have immediate biases in favor of unrestricted scientific research. By the same token, it would be hard to convince the mother of a severely retarded child that genetic research which might put an end to retardation should not be allowed to proceed. Hard, too, to tell a pharmaceutical firm that it ought not to welcome a more efficient method of manufacturing some vital drug, or even to tell a fisherman on the coast of Maine that he can't use oil-eating bacteria to attack the latest spill.

It may, however, be possible to re-emphasize the distinction between pure research — the careful study and investigation of a subject — and actual engineering. It is a distinction that is no longer being made.

In March of this year the National Academy of Sciences spon-

sored a forum for discussion of the issue. At that forum Roger G. Noll, an economist at Stanford, suggested that the debate would probably be the last public discussion of genetics dominated by biologists. He predicted that the issue would either fade away or become political. It has not faded away. But neither — quite — has it become political. And that is where the greatest potential strength of the concerned forces lies . . . like the environmental issue, like the abortion issue, the genetic debate transcends ordinary political battle-lines. Forces on both sides of the issue can conceivably pick up support from those of any and all political, religious, and philosophical persuasions.

In April the Carter Administration asked Congress to impose federal controls on further genetic research; essentially the legislation would allow the research to continue but only under federally approved standards and safeguards. Speaking for the Administration, HEW Secretary Joseph Califano suggested that it might be possible to "relax" such controls sometime in the future — depending upon the results of the research.

This does not mean that the private sector can afford to relax as well, or that the whole issue is now safely contained within a fresh set of HEW guidelines. Nothing is ever safely contained within a set of HEW guidelines — the two concepts are contradictory. The department has a particular talent for complicating even the most simple procedures, and the resultant standards are generally distinguished more for their inflexibility and inapplicability than for their comprehensiveness or logic. There is no reason to suppose that the new guidelines will be any less random or arbitrary than those already in existence. Federal involvement may be welcomed in fact if not in principle, but as long as such standards are imposed in erratic fashion — and there is no reason to suppose they will be applied in any other way — upon a resentful scientific community, they are likely to remain at least partially ineffective.

Accordingly, many states (including Maryland, where most NIH and Army research facilities are located) are formulating their own guidelines in an admirable effort to contribute to the general chaos. The operative principle seems to be that if you can create enough confusion within the research labs, maybe the technicians won't be able to find their way to the benches. They will be too busy filling out forms to get around to any gene-splicing.

Perhaps this is what is required, in the short run — though it seems likely that such tactics will backfire in the long run because of the

antagonism they are sure to generate within the scientific establishment.

This does not mean that all local community action is necessarily self-defeating or ineffective; and such work can be especially valuable when it takes the form of a cooperative effort by the two cultures (the scientific and the governmental). It is precisely in this sense that the action of the city council of Cambridge Massachusetts in restricting genetic research at Harvard earlier this year is most instructive and encouraging. A citizen review board appointed by the city spent weeks learning research techniques, studying guidelines, talking to researchers, visiting labs; and it was the review board itself, following the presentation of the unanimous recommendations, that noted the significance of their existence:

> . . . a predominately lay citizen group can face a technical scientific matter of general and deep public concern, educate itself appropriately to the task and reach a fair decision. ... Decisions regarding the appropriate course between the risks and benefits of potentially dangerous scientific inquiry must not be adjudicated within the inner circles of the scientific establishment.

And yet it is that scientific establishment which has been most generous with its praise for the committee's report. The citizen investigation of the Harvard labs that began in an atmosphere of mutual distrust and fear is concluding in an aura of mutual goodwill and — most importantly — understanding. It is doing so because both factions came to realize that their apparently conflicting interests were ultimately congenial after all. "The inquiry of truth," wrote Francis Bacon in 1597, "(which is the lovemaking or wooing of it) the knowledge of truth (which is the presence of it) and the belief of truth (which is the enjoying of it) is the sovereign good of human nature."

Bacon did not deny scientists their measure of the sovereign good of human nature. Scientists are rarely less good than other men and women; indeed, if the wooing of truth is the essence of goodness, then scientists ought by definition to be the most moral of humans.

Which brings us back to H.G. Wells, the race between education and catastrophe, and the necessity to construct the skeleton of a new scientific tradition. In the sense that the Cambridge Review Board instructed the Harvard scientists to at least as great an extent as the scientists instructed the review board, ours is an educative responsibility. Primarily it is a responsibility to concede that scientific truth is not the only truth, but one of many — just as there are frontiers of knowledge that are simultaneously beneficial and

wicked, so there are paths of progress which lead both to nirvana and to disaster. Divided highways. I have suggested that our present dilemmas are elements in a vortex of conflicting human ambition . . . and it is in the nature of a vortex that one may escape it — or be sucked under — at any point in the whirl. But one does not do so without a struggle, and that is why it is time to emphasize the basic morality that is at the heart of the scientific method, and time to enlist the practicioners of that method in the moral contest.

To do so requires that we accept, at least, the lesson of the post-war years — that human change is not necessarily teleological in character — and that we embrace this understanding in a practical way. Such an understanding does not constitute an admission of defeat, but rather a recognition of choice: we may take any direction, choose between many and various forms of progression or regression. The revelation of a new scientific or medical or cultural truth does not inevitably invalidate an older truth of a different character. Because abortion and euthanasia and contraception and gene-splicing and atom-splicing and space travel are possible, and because many perceive good in them, does not mean that they are not also bad. It confers no moral sanction to say, for example, that institutionalized abortion is a pleasantly convenient prospect, to concede that the procedure constitutes the easiest way of handling problems of population, accidental pregnancy, unwanted children, etc. No sane person welcomes such problems. But to the extent that the acceptance of abortion devalues the meaning of the sexual act, destroys the fetus, and brutalizes the individual and the civilization, it is a bad thing.

The factors are there to be weighed, one against the other. That is the function of a human being: to make the choice. It is not inherently a more difficult choice now than ever it was before. Because the scientific community seeks after one kind of truth in a collective professional and social sense does not mean that its members are incapable of seeking after another kind of truth in an individual sense. It is ironic that the tragic flaw of the scientific era may be that it has not been quite scientific enough: it has neglected those factors which make of a human something more than a laboratory specimen, and — specifically — something more than an assortment of genes. It is precisely because the technological age ignored in the beginning the psychological and philosophical make-up of man, that it has been unable to develop a defensible moral rationale for its own existence. There is nothing in the principles or methodology of the technological advance that forbids the use of its discoveries

for anti-human endeavors. It is this long-standing moral vacuity that has finally arrived to haunt us: for it is the scientific community's curiously unscientific ignorance of humanity, and of the human purpose, that may, in the final analysis, threaten the survival of the species. Or rather — one is forced to qualify — the survival of the species *as we know it.* That is not an extreme qualification. And it may help us to keep the issue in perspective to remember always that for some biologists the prospect — of some genetic alteration in some portion of the human species — is not an unsettling one.

It is a situation that in the end calls for those most unpopular of responses: voluntary self-regulation, and voluntary self-denial. It is in the adoption of this principle of self-denial that our best hope lies for achieving victory in Wells's contest between education and catastrophe. It is a curiously Victorian concept. It implies a rediscovery of various 19th century values and codes of conduct — in matters social, sexual, political, and philosophic. But while in the last century the general habit of restraint was frequently a doctrine of necessity, this time around it must be one of choice, and therefore more difficult to sustain. This time around the self-denial must be not only on an individual but on a national and conceivably a planetary scale: it could mean, in this context, foregoing the enormous potential benefits of genetic research. And let us be honest: it is, in many ways, an unhappy prospect.

But this unhappiness is not only unhappiness. This unhappiness is, and has always been, the source of all our moral integrity, and of our feeble nobility. The dignity is in the tragedy. Therein lies our greatness. It is the oldest truth of all, and it is only in our time that men and women have refused it. And if it is true that our future lies in our past, then we may turn without embarrassment to Carlyle, and see, with him, the beauty of the thing: "Man's unhappiness . . . comes of his greatness: it is because there is an Infinite in him, which with all his cunning he cannot quite bury under the Finite."

In our age, humanity fulfills its greatness to the extent that it exercises its option to voluntarily renounce uncertain improvements in the general condition, not merely for reasons of caution, or in the name of our ancestors and our children, but out of simple rightness of mind and goodness of heart. It is in reconciling ourselves to this ancient summons that we may turn the threat and promise of this century into a chance for the next one.

Active and Passive Euthanasia: an Impertinent Distinction?

Thomas D. Sullivan

BECAUSE OF RECENT advances in medical technology, it is today possible to save or prolong the lives of many persons who in an earlier era would have quickly perished. Unhappily, however, it often is impossible to do so without committing the patient and his or her family to a future filled with sorrows. Modern methods of neuro-surgery can successfully close the opening at the base of the spine of a baby born with severe myelomeningocoele, but do nothing to relieve the paralysis that afflicts it from the waist down or to remedy the patient's incontinence of stool and urine. Antibiotics and skin grafts can spare the life of a victim of severe and massive burns, but fail to eliminate the immobilizing contractions of arms and legs, the extreme pain, and the hideous disfigurement of the face. It is not surprising, therefore, that physicians and moralists in increasing number recommend that assistance should not be given to such patients, and that some have even begun to advocate the deliberate hastening of death by medical means, provided informed consent has been given by the appropriate parties.

The latter recommendation consciously and directly conflicts with what might be called the "traditional" view of the physician's role. The traditional view, as articulated, for example, by the House of Delegates of the American Medical Association in 1973, declared:

> The intentional termination of the life of one human being by another — mercy killing — is contrary to that for which the medical profession stands and is contrary to the policy of the American Medical Association.
>
> The cessation of the employment of extra-ordinary means to prolong the life of the body when there is irrefutable evidence that biological death is imminent is the decision of the patient and/or his immediate family. The advice and judgment of the physician should be freely available to the patient and/or his immediate family.

Basically this view involves two points: 1) that it is impermissible for the doctor or anyone else to terminate intentionally the life of a patient, but 2) that it is permissible in some cases to cease the em-

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ployment of "extraordinary means" of preserving life, even though the death of the patient is a foreseeable consequence.

Does this position really make sense? Recent criticism charges that it does not. The heart of the complaint is that the traditional view arbitrarily rules out all cases of intentionally acting to terminate life, but permits what is in fact the moral equivalent, letting patients die. This accusation has been clearly articulated by James Rachels in a widely-read article that appeared in a recent issue of the *New England Journal of Medicine,* entitled "Active and Passive Euthanasia."[1] By "active euthanasia" Rachels seems to mean *doing something* to bring about a patient's death, and by "passive euthanasia," not doing anything, i.e., just letting the patient die. Referring to the A.M.A. statement, Rachels sees the traditional position as always forbidding active euthanasia, but permitting passive euthanasia. Yet, he argues, passive euthanasia may be in some cases morally indistinguishable from active euthanasia, and in other cases even worse. To make his point he asks his readers to consider the case of a Down's syndrome baby with an intestinal obstruction that easily could be remedied through routine surgery. Rachels comments:

> I can understand why some people are opposed to all euthanasia and insist that such infants must be allowed to live. I think I can also understand why other people favor destroying these babies quickly and painlessly. By why should anyone favor letting 'dehydration and infection wither a tiny being over hours and days?' The doctrine that says that a baby may be allowed to dehydrate and wither, but may not be given an injection that would end its life without suffering, seems so patently cruel as to require no further refutation.[2]

Rachels' point is that decisions such as the one he describes as "patently cruel" arise out of a misconceived moral distinction between active and passive euthanasia, which in turn rests upon a distinction between killing and letting die that itself has no moral importance.

> One reason why so many people think that there is an important difference between active and passive euthanasia is that they think killing someone is morally worse than letting someone die. But is it? ...To investigate this issue two cases may be considered that are exactly alike except that one involves killing whereas the other involves letting someone die. Then, it can be asked whether this difference makes any difference to the moral assessments.
>
> In the first, Smith stands to gain a large inheritance if anything should happen to his six-year-old cousin. One evening while the child is taking his bath, Smith sneaks into the bathroom and drowns the child, and then arranges things so that it will look like an accident.

> In the second, Jones also stands to gain if anything should happen to his six-year-old cousin. Like Smith, Jones sneaks in planning to drown the child in his bath. However, just as he enters the bathroom Jones sees the child slip and hit his head, and fall face down in the water. Jones is delighted; he stands by, ready to push the child's head back under if it is necessary, but it is not necessary. With only a little thrashing about, the child drowns all by himself, "accidentally," as Jones watches and does nothing.[3]

Rachels observes that Smith killed the child, whereas Jones "merely" let the child die. If there's an important moral distinction between killing and letting die, then, we should say that Jones' behavior from a moral point of view is less reprehensible than Smith's. But while the law might draw some distinctions here, it seems clear that the acts of Jones and Smith are not different in any important way, or, if there is a difference, Jones' action is even worse.

In essence, then, the objection to the position adopted by the A.M.A. of Rachels and those who argue like him is that it endorses a highly questionable moral distinction between killing and letting die, which, if accepted, leads to indefensible medical decisions. Nowhere does Rachels quite come out and say that he favors active euthanasia in some cases, but the implication is clear. Nearly everyone holds that it is sometimes pointless to prolong the process of dying and that in those cases it is morally permissible to let a patient die even though a few hours or days could be salvaged by procedures that would also increase the agonies of the dying. But if it is impossible to defend a general distinction between letting people die and acting to terminate their lives directly, then it would seem that active euthanasia also may be morally permissible.

Now what shall we make of all this? It *is* cruel to stand by and watch a Down's baby die an agonizing death when a simple operation would remove the intestinal obstruction, but to offer the excuse that in failing to operate we didn't *do* anything to bring about death is an example of moral evasiveness comparable to the excuse Jones would offer for his action of "merely" letting his cousin die. Furthermore, it is true that if someone is trying to bring about the death of another human being, then it makes little difference from the moral point of view if his purpose is achieved by action or by malevolent omission, as in the cases of Jones and Smith.

But if we acknowledge this, are we obliged to give up the traditional view expressed by the A.M.A. statement? Of course not. To begin with, we are hardly obliged to assume the Jones-like role Rachels assigns the defender of the traditional view. We have the option of operating on the Down's baby and saving its life. Rachels

mentions that possibility only to hurry past it as if that is not what his opposition would do. But, of course, that is precisely the course of action most defenders of the traditional position would choose.

Secondly, while it may be that the reason some rather confused people give for upholding the traditional view is that they think killing someone is always worse than letting them die, nobody who gives the matter much thought puts it that way. Rather they say that killing someone is clearly morally worse than not killing them, and killing them can be done by acting to bring about their death or by refusing ordinary means to keep them alive in order to bring about the same goal.

What I am suggesting is that Rachels' objections leave the position he sets out to criticize untouched. It is worth noting that the jargon of active and passive euthanasia — and it is jargon — does not appear in the resolution. Nor does the resolution state or imply the distinction Rachels attacks, a distinction that puts a moral premium on overt behavior — moving or not moving one's parts — while totally ignoring the intentions of the agent. That no such distinction is being drawn seems clear from the fact that the A.M.A. resolution speaks approvingly of ceasing to use extra-ordinary means in certain cases, and such withdrawals might easily involve bodily movement, for example unplugging an oxygen machine.

In addition to saddling his opposition with an indefensible distinction it doesn't make, Rachels proceeds to ignore one that it does make — one that is crucial to a just interpretation of the view. Recall the A.M.A. allows the withdrawal of what it calls extra-ordinary means of preserving life; clearly the contrast here is with ordinary means. Though in its short statement those expressions are not defined, the definition Paul Ramsey refers to as standard in his book, *The Patient as Person,* seems to fit.

> Ordinary means of preserving life are all medicines, treatments, and operations, which offer a reasonable hope of benefit for the patient and which can be obtained and used without excessive expense, pain, and other inconveniences.
>
> Extra-ordinary means of preserving life are all those medicines, treatments, and operations which cannot be obtained without excessive expense, pain, or other inconvenience, or which, if used, would not offer a reasonable hope of benefit.[4]

Now with this distinction in mind, we can see how the traditional view differs from the position Rachels mistakes for it. The traditional view is that the intentional termination of human life is impermissible, irrespective of whether this goal is brought about by action or inaction. Is the action or refraining *aimed at* producing a death?

Is the termination of life *sought, chosen or planned*? Is the intention deadly? If so, the act or omission is wrong.

But we all know it is entirely possible that the unwillingness of a physician to use extra-ordinary means for preserving life may be prompted not by a determination to bring about death, but by other motives. For example, he may realize that further treatment may offer little hope of reversing the dying process and/or be excruciating, as in the case when a massively necrotic bowel condition in a neonate is out of control. The doctor who does what he can to comfort the infant but does not submit it to further treatment or surgery may foresee that the decision will hasten death, but it certainly doesn't follow from that fact that he intends to bring about its death. It is, after all, entirely possible to foresee that something will come about as a result of one's conduct without intending the consequence or side effect. If I drive downtown, I can foresee that I'll wear out my tires a little, but I don't drive downtown with the intention of wearing out my tires. And if I choose to forego my exercises for a few days, I may think that as a result my physical condition will deteriorate a little, but I don't omit my exercise with a view to running myself down. And if you have to fill a position and select Green, who is better qualified for the post than her rival Brown, you needn't appoint Mrs. Green with the intention of hurting Mr. Brown, though you may foresee that Mr. Brown will feel hurt. And if a country extends its general education programs to its illiterate masses, it is predictable the suicide rate will go up, but even if the public officials are aware of this fact, it doesn't follow that they initiate the program with a view to making the suicide rate go up. In general, then, it is not the case that all the foreseeable consequences and side effects of our conduct are necessarily intended. And it is because the physician's withdrawal of extra-ordinary means can be otherwise motivated than by a desire to bring about the predictable death of the patient that such action cannot categorically be ruled out as wrong.

But the refusal to use ordinary means is an altogether different matter. After all, what is the point of refusing assistance which offers reasonable hope of benefit to the patient without involving excessive pain or other inconvenience? How could it be plausibly maintained that the refusal is not motivated by a desire to bring about the death of the patient? The traditional position, therefore, rules out not only direct actions to bring about death, such as giving a patient a lethal injection, but malevolent omissions as well, such as not providing minimum care for the newborn.

The reason the A.M.A. position sounds so silly when one listens to arguments such as Rachels' is that he slights the distinction between ordinary and extra-ordinary means and then drums on cases where *ordinary* means are refused. The impression is thereby conveyed that the traditional doctrine sanctions omissions that are morally indistinguishable in a substantive way from direct killings, but then incomprehensibly refuses to permit quick and painless termination of life. If the traditional doctrine would approve of Jones' standing by with a grin on his face while his young cousin drowned in a tub, or letting a Down's baby wither and die when ordinary means are available to preserve its life, it would indeed be difficult to see how anyone could defend it. But so to conceive the traditional doctrine is simply to misunderstand it. It is not a doctrine that rests on some supposed distinction between "active" and "passive euthanasia," whatever those words are supposed to mean, nor on a distinction between moving and not moving our bodies. It is simply a prohibition against intentional killing, which includes both direct actions and malevolent omissions.

To summarize — the traditional position represented by the A.M.A. statement is not incoherent. It acknowledges, or more accurately, insists upon the fact that withholding ordinary means to sustain life may be tantamount to killing. The traditional position can be made to appear incoherent only by imposing upon it a crude idea of killing held by none of its more articulate advocates.

Thus the criticism of Rachels and other reformers, misapprehending its target, leaves the traditional position untouched. That position is simply a prohibition of murder. And it is good to remember, as C. S. Lewis once pointed out:

> No man, perhaps, ever at first described to himself the act he was about to do as Murder, or Adultery, or Fraud, or Treachery. ...and when he hears it so described by other men he is (in a way) sincerely shocked and surprised. Those others 'don't understand.' If they knew what it had really been like for him, they would not use those crude 'stock' names. With a wink or a titter, or a cloud of muddy emotion, the thing has slipped into his will as something not very extraordinary, something of which, rightly understood in all of his peculiar circumstances, he may even feel proud.[5]

I fully realize that there are times when those who have the noble duty to tend the sick and the dying are deeply moved by the sufferings of their patients, especially of the very young and the very old, and desperately wish they could do more than comfort and companion them. Then, perhaps, it seems that universal moral principles are mere abstractions having little to do with the agony of the

dying. But of course we do not see best when our eyes are filled with tears.

NOTES

1. *New England Journal of Medicine,* 292: 78-80, Jan. 9, 1975.
2. *Ibid.,* pp. 78-79.
3. *Ibid.,* p. 79.
4. Paul Ramsey, *The Patient As Person* (New Haven and London: Yale University Press, 1970), p. 122. Ramsey abbreviates the definition first given by Gerald Kelly, S.J., *Medico-Moral Problems* (St. Louis, Missouri: The Catholic Hospital Association, 1958), p. 129.
5. C. S. Lewis, *A Preface to Paradise Lost* (London and New York: Oxford University Press, 1970), p. 126.

Abortion and Deception

Mark Lally

LET US IMAGINE a pair of Siamese twins (the brothers Roe). They go to dozens of surgeons in the hope that they may be separated, but are consistently told that only one of them could survive the operation. Finally one of them can bear the other no more, and kills him with blows to the head. Tried for murder, he pleads not guilty on grounds that his act was protected by "every man's inalienable right to privacy."

While most compassionate persons would pity the plight of the hypothetical brothers Roe, such pity might not extend to condoning Roe's act (and thus, in effect, declaring open season on fratricide among Siamese twins). Yet, similar compassion and the same "right of privacy" or "control of one's body" arguments are the principle moving forces behind the social and legal acceptability currently enjoyed by abortion.

An explanation of this difference in attitude toward two similar situations[1] might rest on the relative hardships accompanying each, but an examination of both would, if anything, provide more support for granting such a power to Siamese twins than abortion, for although pregnancy can adversely effect economic and educational opportunities, undermine emotional and physical well-being, and generally "deprive a woman of her preferred life style,"[2] the same is doubly true in the case of Siamese twins, since it applies to both of them. It is only when one examines the responses which these two situations are likely to elicit from other persons that their full impact comes into perspective; for the condition of pregnancy is a physically normal and generally accepted one, which would only create a social stigma in particular situations such as during early youth or while out of wedlock (and then only among persons who knew the woman to be single). The twins, on the other hand, could seldom meet another person without witnessing behavior patterns which served as a constant reminder of society's distaste for their abnormality. Moreover, not only is the reason for psychological agony as great or greater in the twin, but it is permanent, and, of course, the lack of consent present in the case of the twins could not be exceeded even by the most unwanted or coerced of pregnancies.

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This difference in attitude without a defensible difference in substance is the result of a classic pattern of thought and behavior on moral issues. Perhaps this can best be approached by suggesting that civilization can be viewed as a self-image, and that as a result, the limits of civilized behavior are often defined by a people's ability to conform their standards of behavior to the acts they desire to perform. Thus, in large measure the limits of civilized action can come to depend on that which people can ignore or the level of barbarism they can tolerate while maintaining the self-image they desire.

Once an action is established as unacceptable, the only means of maintaining that self-image and still performing the desired act is to perceive the act as being something other than it is. In our case, because of the great value which we have placed on human life and dignity, one of the chief determinants of our freedom of action is our ability to view potential victims as being not really human. To reinforce such distinctions between people and to conceal their arbitrary nature, emphasis is often placed on other values (e.g., freedom, independence, population control, etc.) which, while not logically supporting the distinction involved, are more in keeping with the desired self-image.[3] Even when employed with skill bordering on virtuosity, such efforts at misdirection often flounder when they lead to results whose visible aspects cannot long be reconciled with the desired self-image.

But in the abortion situation, there are no visible demonstrations of hatred or revenge accompanying the slaughter. No one need hear the victims scream, nor walk past mass graves amid the sounds of mourning; the deaths are clinical, impersonal, and wrapped in the accumulated awe which surrounds the medical profession.[4] Without such ameliorating emotional factors to break down artificial distinctions and emphasize the common bonds of humanity, the practice of abortion possesses a potential for resistence to "civilizing tendencies" unmatched by assaults on other groups. Indeed, in the prenatal child, we may have finally found the ideal victim — the social non-entity.[5]

But despite the absence of these counters to the emotional effect created by emphasis on the problems which abortion is supposed to alleviate, the intellectual constructs designed to support the pro-abortion view of the prenatal child remain vulnerable.

While other societies have often given manifestations of social approval to their slaughters (e.g., conditioning in the media and

educational institutions to make the acts more acceptable; status, power, and recognition for those accomplished in their practice; etc.), it is perhaps reflective of our society's peculiar need to moralize even its immoralities that we have gone one step further. In the hierarchy of secular thought, we have raised abortion to the level of the sacrosanct: we have made it a constitutional right. Thus, in examining the intellectual defenses for distinguishing the prenatal child from socially unacceptable victims, one might expect to find the definitive justifications expressed in the judical decision which conferred that status on abortion. But instead we find a desire to sidestep central questions (e.g., "We need not resolve the difficult question of when life begins"[6]) expressed in an overall argument which, by any standard of legal analysis, would be found unsatisfying.[7] So, in the absence of any definitive statement explaining the distinction, we must turn to those explanations which can be gleaned from the rhetoric and writings of abortion proponents.

The rank and file abortion advocate often argues that life begins at birth. But while equating the start of life with birth may be understandable in primitive societies, with their emphasis on the visual, in light of current scientific evidence on the nature of prenatal existence, continuing to base such a significant moral distinction on a mere change of environment[8] and stage of development would be the equivalent of the most perverse type of ethnocentricism.[9] Even the Supreme Court allowed some state intervention to protect the child after viability[10] (apparently the Court felt compelled to choose this as the point of a sufficient state interest in protecting what it called "potential life," because it wished to avoid being required to defend the position that a child who had the good fortune to escape the womb during the seventh month and survive was somehow more "human" than a more fully developed nine month prenatal child[11]). But the Court's emphasis on viability is itself based on the essentially ethnocentric theory that only those who currently have the ability to successfully adapt to our environment can be deemed to possess a "meaningful" existence,[12] a principle which should make the lives of many primitive tribesmen equally meaningless in the eyes of advanced society (and, indeed, a principle which would clearly be objectionable when employed in any other situation to justify killing any other member of our species). Although one might argue that the Court's decision rested on the child's physical dependence on the mother, rather than environmental arrogance, this is undercut by the fact that a physically dependent Siamese twin has always had legal "meaning" and protection.

From the legal point of view, the Court's reliance on viability is also somewhat anomalous, since it even denies the state the power to employ the same criteria for judging the presence of life which it would be justified in using at any other stage in that individual's existence. At the very least, one would think that if it is reasonable for the state to assert that a dying man is alive if a heartbeat is present, the same standard could be reasonably applied in deciding when that man's life had begun. But a heartbeat is detectable in the prenatal child within a month after conception[13] or about five to six months before viability. Furthermore, the child produces detectable brain activity about six weeks after conception.[14] As to the question of what rationale requires the state to operate under the assumption that it is possible for something which is not alive to independently[15] produce a brainwave and a heartbeat,[16] the answer seems to be that when the Court decides to foster a practice which it considers socially beneficial, it is not about to let little things like scientific fact or sound reasoning stand in its way.[17]

Even if the Court should answer that what it was really talking about was not "life" but "humanity," a similar example undermines its conclusion; for while many assert that the comatose or severely retarded person is a "vegetable" and not really "human," the state is not thereby compelled to regard him as such. (The same is, of course, true of its companion statement that the "vegetable" is not really "living," but merely "existing.") Thus, the Court's implication that government is limited in its power to define and protect "life" ("humanity"?) when there is disagreement on the issue[18] runs contrary to this and many other circumstances when the state can legislate regarding a term, concept, or interest about which there is not unanimity (or more accurately in the abortion situation, when a term can be employed in a sense different from the legal sense). Nor would the right of privacy's status as a "fundamental right" which required a "compelling state interest" to override it[19] mean that the state's power to regulate must bow before societal disagreements as to a word or concept, since a Siamese twin's "fundamental right" of privacy[20] does not deprive the state of the power to impose criminal penalties for killing his "vegetable" twin, and, indeed, this would be the case even if the "vegetable" was dying and could accurately be described as "non-viable."[21] In the absence of any such special limitation, it is difficult to see why the state should be forbidden to employ the ordinary legal standard that in applying sanctions for taking "human" life, it is the organism's biological heritage which is relevant and not some "poetic" sense of the word

based on "higher" capabilities or "meaningfulness." By employing such definitions of "human" and "life," the state would not be "adopting one theory of life" in order to "override the rights of the pregnant woman";[22] it would merely be employing the same standard which the law has used in similar situations. Indeed, it is the Supreme Court itself which has "adopted a (new) theory of life" in order to eliminate any protection for the previable child.

A further problem with using non-viability as a test for the permissability of abortion is that, although it is virtually impossible to successfuly argue that there is a significant moral difference between the viable child in and out of the womb and thus to justify a difference in treatment, it is difficult to defend viability as the *first* point at which the child is human, alive, etc. One indication of this is that the viability point is subject to change with medical developments,[23] and if one is unwilling to accept the premise that the meaning of human life is totally relative to the current state of scientific advancement, it is hard to see how an infant at a particular stage of development suddenly becomes human, alive, or meaningful when some researcher discovers a new life support refinement. Thus, as long as we acknowledge the need to respect the life of the child at birth even if he is premature and as long as we aren't willing to say that a researcher can "create" humanity or life by a breakthrough, the existence of a viability point and its changeable nature must force us to recognize that the child is human, alive, etc. at some point *before* viability. This fact should give us pause in drawing a line which permitted abortions at any time near the current viability point and, indeed, in drawing such a line at all.

Among those abortion advocates who do not emphasize birth or viability, many argue that abortion is justified as long as the child does not "look human."[24] But if similarity to some visual concept is necessary to create human status, why can't a bottle of acid destroy it? While appearance may be one more piece of evidence supporting the conclusion that the child is "human" well before birth or viability, to make it a necessary condition for humanity could deprive the deformed of the protection and dignity enjoyed by the rest of us and put us all at the mercy of the myopia of any currently definitive beholder.

Other abortion proponents claim that the prenatal child is not entitled to protection because he is not a being "with will and conscience."[25] The most obvious defect with this approach is its inconsistency with the respect which we show for the lives of children during the early years after birth. Similarly, when some find moral

significance in the fact that the prenatal child, unlike the mother, has never imagined a future,[26] they overlook that the same is true of a postnatal infant and should thus, in their scheme of things, make him equally expendable to the mother's desire for a particular future.

This flaw is expanded in the argument of those who assert that one does not become human until he has been "humanized" by the socialization process,[27] for not only would this justify abortion and infanticide but also the slaughter of individuals of any age whom we have kept out of this process. Thus, if we accept abortion as the elimination of a non-socialized non-human when it serves our needs, why, in this age of transplants, should we object to placing newborn children in individual cages and raising them solely as a source of spare parts for those whom we have decided to make "really human" through socialization?

A somewhat different defect undermines the argument of those who, in effect, define a child's humanity in terms of his value to the definer. Under such an approach, it is argued that the prenatal child cannot be considered "human," since there is a very limited range of relationships and interactions which we can share with him.[28] Logically, this should also make fair game of the severely retarded and of those persons who are psychologically unfit for any life style except that of a hermit; but if this result is accepted, then the same limited opportunities for relationships should, from the point of view of the retarded or the recluse, serve as an equally valid moral justification for exterminating the rest of us. (Fortunately for us, of course, the retarded, like the unborn, don't do the defining.) However, unlike the case of the retarded, when employed against the unborn, this emphasis on relationships is really just another way of elevating to definitive status the same differences of environment which are so crucial in the "birth as the start of life" argument. (For those not averse to somewhat more fanciful hypotheticals, consider the case of persons known to be like ourselves but existing in another dimension, so that we were incapable of relationships, although each possessed the power to destroy the other. Would we be free of moral blame if we chose to exercise that power? Would they?)

Another line of argument which bears some similarity to this value-to-the-definer approach emphasizes the need to avoid "bringing an unwanted child into the world" (again an environmentally arrogant assumption that the prenatal child isn't "in the world" already). The benefits to be derived from this elimination of the "unwanted child" are often described in visionary terms:

> When nations are ready to assume their ultimate responsibility, this age,

> once characterized as the Century of the Common Man, must become the Century of the Wanted Child. For too long our only concern has been with the rights of the embryo and the endless creation of rivers of humanity. . . . The right to abortion is the foundation of Society's long struggle to guarantee that every child comes into this world wanted, loved, and cared for. The right to abortion, along with all birth-control measures, must establish the Century of the Wanted Child.[29]

(One would think that, henceforward, abortion advocates would avoid using such sanctimonious language, lest they risk lowering abortion's constitutional protection to that of a mere religion, with Fourteenth Amendment arguments for the requirement of governmental funding replaced by First Amendment prohibition of it.) The litany of ills attributed to unwantedness ranges from the battered child[30] to mental illness.[31] But since this argument ignores the question of the child's humanity,[32] there seems to be little reason why the same rationale should not also apply after birth. Thus, if the possibility that a person *might* become maladjusted is reason to eliminate him, why not the certainty that he *has* developed emotional problems? Or perhaps this extension is exactly what is intended, since the most tantalizing aspect of this argument is one it shares with euthanasia proposals — that of turning killing into an act of love.

The mind fairly boggles at the historic implications of this new variation on the homicidal theme. If we built monuments for warriors, who acted from hatred and a desire for revenge (only more recently have they been "killing for peace"), what wonderous glory must await those who slaughter for love, mercy, and the quality of life? In battling society's ills, no longer need we foolishly persist in the wasteful effort to educate people about the evils of intolerance or child beating; instead, we can go to the root and eliminate the real cause of the problems — their potential victims.

But when arousing someone's pity can prove as fatal as arousing his hatred, it might be understandable if the unwanted or deformed found a little benign indifference preferable to a compassion which seems to translate into "we're going to 'love you to death,' because if we don't, we're going to treat you like dirt."[33] And, of course, the supreme arrogance underlying this decision that another would be better off dead does not change simply because the victim inhabits a different environment.[34]

While most who espouse abortion for the unwanted emphasize concern for the mother or child, there are those who argue its merits because of the social costs of such children.[35] Since virtually every

child poses a potential danger to society, this concern must rest on the grounds that these children are more likely to burden society than the "average" child. The more ominous features of this approach become apparent when one considers the entirely plausible possibility that children of lower socio-economic strata parents and those belonging to some racial and ethnic groups could be shown to be more likely to become criminals, maladjusted, etc. and just as easily become the targets of social policies designed to encourage the extermination of "undesirables" through abortion.[36] Indeed, with public funding acting as an inducement for the abortion of hundreds of thousands of children of poor parents (a disproportionately large number of whom belong to racial and ethnic minorities) in the past few years, such policies for "eliminating our problems" have already been practiced in substance if not in rhetoric.

Related arguments that abortion is justified because it is a useful tool for population control[37] can be dismissed fairly quickly. If that were sufficient, we should just as readily embrace proposals to turn loose psychopaths with machetes in our nursery schools, or honor the Nazis for their tireless efforts to limit population. Indeed, the ultimate moral test of our time may well be whether we can deal with the enormous problems which face us without sacrificing our most fundamental values.

Sometimes all such arguments are simply by-passed in favor of appeals to concern for the plight of pregnant women. The limitations on their freedom and opportunities; their fears, anxieties, and hardships — all these weigh so heavily on the hearts of abortion advocates that even the thought of restricting abortion strikes them as outrageously inhumane. The flaw here is that it misses the point that the existence of other people has always been a limitation on freedom; they often cause distress, frequently are an economic burden, and occasionally even drive someone insane. Indeed, the physical elimination of another would often seem to be the most obvious and complete solution to a number of difficult and distressing problems, many of which should arouse the sympathy and compassion of any decent person. But despite these facts, we have found moral justification for killing only in the most restricted situations (e.g., self-defense),[38] thus making a choice for life even if other approaches to solving these problems are more difficult and less likely to succeed.[39]

Some of the most sophisticated abortion advocates would challenge many of the assumptions on which this discussion has been

based. Judith Jarvis Thomson, for instance,[40] admits that the child is "human" during much of pregnancy,[41] but argues that the right to kill is broader than generally thought and extends to many abortions. To illustrate her point, she imagines a person unwillingly plugged into a comatose famous violinist so that the person's kidneys could enable the violinist to survive for nine months (there being no other way to save his life). Since most persons would consider it permissible to "pull the plug" in this situation, she concludes that directly killing an innocent human is not absolutely proscribed and is often permissible in the case of pregnancy.[42]

The flaw in this approach can be seen from arguments suggested (but not fully expounded) by John Finnis.[43] Suppose you and another person were kidnapped, taken to a house in a remote area, and tied together. The kidnapper offers to release you if you will stab the other person in the region of the heart; otherwise he will keep the two of you tied together, but unharmed, for nine months, after which he will release you. If you stabbed the other person, we should reject the notion that you were justified in doing so by your right to freedom.

But suppose the kidnapper left the two of you alone with the warning that if either of you tried to escape he would kill both of you or, failing that, whichever one he managed to capture. In that case most of us would agree that even if you did try to escape, you would not be criminally liable for the consequences to the other kidnap victim — not even if you knew that he was crippled and incapable of escaping. Indeed, such is the general view that even if you could carry him to safety without risk to yourself, many would say that you were not absolutely required to do so.

The trouble with Thomson's violinist example is that she fails to distinguish appropriately between the two kinds of acts involved in Finnis' examples. In terms of consequences and even motives, there may be little difference between stabbing and merely fleeing; but this does not mean that we should approve the former because we approve the latter. Thomson herself admits that it would be seriously wrong, in a similar situation, to kill the other captive even if one were threatened with death.[44]

The key point is not simply that her violinist has no right to "use" your body.[45] For our purposes here, it is sufficient to assert that if any successful justification for a distinction permitting you to unplug the violinist can be made, at least part of that justification must be that the unplugging itself is an act of freeing yourself from a situation which is the result of injustice *merely* by requiring another (whom

you owe no special duty)[46] to fend for himself, without directly harming his natural ability to do so.[47]

Another of our assumptions is even more boldly attacked by Michael Tooley.[48] Many anti-abortion arguments seek to show the evil of abortion by showing that the justifications adduced for it apply equally to children already born. Tooley says this is irrelevant because our objections to infanticide are unjustified. He reasons as follows:

> 1. If the possessor of a right asks that the thing to which he has a right be destroyed, its destruction does not violate his right.
> 2. Therefore, for one to have a right to something, he must desire that thing.
> 3. In order to desire something, one must be able to conceptualize it.

In applying this general theory to the specific right to life, Tooley reasons:

> a. If a person were completely "reprogrammed" with another personality, new beliefs and memories, etc.; we would say that "an individual had been destroyed" and his right to life violated.
> b. Thus, the right to life is not a right to continued physical existence but a right of a "subject of experiences and other mental states" to exist.
> c. From 2,3, and b, it follows that to possess a right to life, one must possess a concept of the self as a subject of experiences and other mental states, believe himself to be such a self, and desire to continue to exist as such a self.
> d. Neither prenatal nor newborn children possess such a concept of themselves.
> e. Therefore, neither prenatal nor newborn children possess a right to life, and both abortion and infanticide are permissable until such a right exists.[49]

Many objections might be raised here. We may question whether objections to abortion depend solely on rights theory (especially this particular rights theory); whether the right can be waived;[50] whether the content of the right to life is adequately described as a right merely to keep a continuity of mental states, memories, experiences, and the like. But more fundamentally, Tooley argues weakly that since the destruction of a thing to which one has a right does not violate the right if the possessor himself requests the destruction, then one must desire a thing in order to possess a right to it. Actually, however, all one could justifiably conclude from that premise is that a person could be released from his obligation to respect another's right by an *expression* of that other's *desire to waive* the right.

Thus, from the point of view of the person bearing the obligation to respect the right, it is irrelevant as a guide to action whether the possessor of a right desires it, or is even capable of desiring it. So Tooley has reversed the proper inference: namely, that unless a person is capable of waiving his rights, another person obliged to

respect his rights cannot be released from that obligation. After all, when we say that someone has a right to life, we do not do so *because* he is capable of waiving it.[51] Tooley himself admits several exceptions to his "must desire" rule, thereby acknowledging tacitly that persons should be protected from extermination when (for instance) a temporary condition impairs the capacity to desire to waive a right. It would be simpler to acknowledge a presumption in favor of life; for a similar bias in favor of the value protected is inherent in all such rights. It should be the person who desires to waive his right to live, rather than the person who desires to live, who should be regarded as exceptional. To put it another way, the burden of proof should be on the person obligated to respect rights, not on the person who putatively possesses them.

If Tooley strikes us as having gone too far in eliminating emotional considerations from moral judgments, Roger Wertheimer may have gone too far in the other direction. While he rejects a rigid linguistic definition of "human life,"[52] he, in effect, replaces it with a behavioral definition built on the "natural response" or "relationship."[53] Although he realizes that the response of many civilized men of the past has often been to regard others as non-human (e.g., a slaveholder perceiving a slave as a subhuman piece of property), Wertheimer argues that such a result can be avoided by recognizing that it is the product of an "accident of history" (the historical, social, and psychological forces which conditioned the individual and brought him to such a warped conclusion) and by examining each application of the definition for such forces.[54] However, in applying this test to the prenatal child, he fails to explain how this is substantially different from the "accident of biologic history" which places humans in a different environment during their first months and thus assists the development of an arrogant environmental chauvinism, which permits the child to be regarded as subhuman when it seems socially or economically expedient to do so. Wertheimer's argument seems to be another application of the "meaningful existence" principle we considered earlier.

Other persons have pointed to the theoretical possibility of implanting an aborted child in another natural or artificial womb as somehow negating the relevance of discussing abortion in terms of the child's death.[55] Even if it were possible to provide substitute wombs for every child, one reflection of the necessity of discussing abortion as killing is that many of the arguments used by abortion proponents to show its legitimacy (e.g., the need for population control, the "humane" concern for the deformed child, etc.) are

arguments for the desirability of the child's death, not his relocation into another environment. Further, although some arguments which do not initially appear to require the child's death such as the disruption of family relationships another child can cause or a particular couple's deficiencies as potential child raisers might be seen as compatible with a mechanism designed to avoid these problems and also save lives, throughout the current abortion controversy the state *has* provided such a mechanism in adoption.[56] Thus, when used to support abortion, these arguments are essentially a smoke-screen or mere argumentative frills designed to support one of the objectives which required the child's death. Only those arguments which deal with the hardships of the pregnancy as such (e.g., the right to control one's body, possible dangers to the woman's mental or physical well-being from the pregnancy itself as distinguished from the continued existence of the child, etc.) would be logically compatible with maintaining the prenatal child's existence in another environment, rather than securing the child's death.[57]

In addition to these arguments which deal with abortion as such, legal restrictions on abortion have been criticized for a number of reasons. A representative example of the most common of these attacks is presented by Senator Birch Bayh,[58] who asserts that anti-abortion laws discriminate against the poor because "if one were middle class or affluent and the cost of an airplane ticket from State X to State Y, from here to Sweden or someplace else, was not prohibitive, then that person" has "an opportunity to get an abortion" *(sic)*. The point that seems to have escaped the Senator is that this is not so much an argument against abortion laws as an argument against a federal system of government or in favor of world government, for it is equally true that any time an action is prohibited by some but not all jurisdictions, the wealthy can travel somewhere else and engage in that activity with legal immunity, while the poor cannot. Since inequities in wealth and travel opportunities would not lead us to discard other criminal laws merely because another jurisdiction had not adopted them, they present no compelling argument for selectively eliminating an interest as important as the protection of human life.

In pursuing Senator Bayh's basic premise a bit further, John D. Rockefeller 3rd[59] falls back on three old reliables in the abortion advocates arsenal:

1. Outlawing abortions does not eliminate them.
2. The wealthy will procure safe abortions anyway.

3. The poor will procure unsafe abortions.

If this is supposed to lead us to reject restrictive abortion laws, then it might prove enlightening for Mr. Rockefeller to turn his powers of reasoning to our homicide statutes, since:

1. Outlawing murder does not eliminate it.
2. The wealthy can procure the services of a top quality contract killer, who will bear the physical risks and whose competence will help protect his client from liability.
3. The poor who commit murders must thus run higher risks of physical injury and arrest, and cannot afford the quality legal counsel of the rich to lower their chances of conviction.
4. As in the case of abortion, with the deterrent effect of such laws eliminated, one would expect that competent professional services in this area would become more readily available to all at a more reasonable price.

While these parallels may be dismissed by some, one would hope that these persons would at least recognize that it is rather novel to argue that because persons who willfully participate in the commission of a felony are exposed to some danger in doing so, we should therefore grant societal approval to the permissive slaughter of those who are innocent of any transgression (except, of course, for the high crime of being unwanted). Obviously, such an argument could be accepted only if one viewed the child's existence as totally insignificant in the first place. Since there is no moral justification for accepting such a view, it is sufficient to note that all indications from countries which have legalized abortion point toward more abortions after legalization than before and thus show that laws against abortion do save some children's lives.[60] As long as the criminal law remains the imperfect instrument which it is, this is the most we can expect from any criminal restriction and more than enough to justify the existence of the laws. In addition such laws serve to indicate that society's respect for life does not terminate merely because some regard a particular life as undesirable or irrelevant.[61]

In light of these facts and the choice we have made for life in our society, a more acceptable program for eliminating the "unsafe"[62] abortion would involve vigorous enforcement of strong anti-abortion laws in order to put the illegal abortionist out of business, combined with better counseling and support services for women with problem pregnancies. In addition, effort should be made to eliminate social attitudes which make abortion seem desirable such as the warped scheme of values which places a greater social stigma on bearing a child out of wedlock than on exterminating that child through abortion.

The second of these arguments against legal action to protect the child is championed by the U.S. Civil Rights Commission, which argues that passing an anti-abortion constitutional amendment would amount to establishing a religion.[63] This leads one to wonder whether, with the rise of a number of religions which accepted as an article of faith that blacks are not really human, the Commission would inform us that because other denominations support equal application of homicide statutes and the Due Process Clause, such protections tend to establish religion. While it is probably accurate to say that by enforcing these measures we would be "imposing our moral beliefs" on members of these racist sects, it is likely that the Commissioners would join in affirming that this is exactly what we should do; and if this moment of reason lasted long enough, they might also admit that a large part of our criminal law consists of "imposing our moral beliefs" on others, concerning acceptable and unacceptable ways of treating other members of our species and even members of other species (e.g., laws against cruelty to animals).

The Commissioners would undoubtedly point out that their assertion is limited to occasions when there are no "wholly secular" reasons supporting one view;[64] but if scientific fact (e.g., the presence of the genetic code, a heartbeat, a brainwave, and a functioning central nervous system — all long before viability) is not "wholly secular," then it seems safe to assume that nothing is, and that two religions taking opposing viewpoints on the whole spectrum of political issues can effectively immobilize any government concerned about "establishing religion" in the Commission's sense.

If basing criminal statutes on any of the scientific indications mentioned above is "establishing a religion" or "imposing our moral beliefs," then so is the Supreme Court's apparent reliance on the scientific standard of viability, since many persons deny the moral significance of the viable prenatal child, and, indeed, so is our denial of immunity to those who act on their religious and moral beliefs that some life outside the womb is inferior or would be better off dead.[65] The mere presence of such disagreements as to the moral and ethical propriety of an act does not and should not require a hands-off approach.

Similarly, individuals and churches are often led by their religious beliefs to take a stance on a number of political issues ranging from capital punishment or poverty to euthanasia and civil rights, but this does not transform these issues into purely religious matters or mean that a government adopting either side is "establishing a religion." For instance, early northern abolitionists were a small

group of often religiously-inspired activists attempting to "impose their moral views" on those who did not share them, yet we would surely not accept an argument that the Thirteenth Amendment should not have been adopted as part of the Constitution because of the religious motivations of many of its supporters.

In assessing any establishment of religion argument, it is crucial to remember that other grounds for a governmental action do not disappear merely because religious grounds also exist. In the present case, since the Supreme Court's standards of viability and birth run counter to the legal protection given even to non-viable, unconscious and physically-dependent members of our species regardless of size, environment, appearance, physical development, etc., the Court's decision enshrines a blatant discrimination against the child as part of the supreme law of the land. If no religion had ever addressed the abortion issue, the desire to eliminate this discrimination would have been a legitimate basis on which to seek a constitutional amendment and it should lose none of its validity simply because some churches have.

The third and final of the principle lines of attack against anti-abortion laws emphasizes that they are an instance of men telling women what to do with their bodies.[66] While this argument might be dismissed by simply pointing to the fact that the morality or wisdom of an action does not change with the gender of the thinker, I feel I cannot stop at that. I feel this way because, as a product of the democratic tradition, I object to the suggestion that the validity of representative democracy terminates whenever a "women's issue" is under consideration. While it is certainly true that a majority of our legislators are not women, it is equally true that a majority of them are not juveniles, senior citizens, or drug addicts either. Yet this fact is not seen as impairing the legitimacy of legislation which especially effects the interests of these groups. And while an argument based on such a premise would merely be unpersuasive if made by one of these minorities, when made on behalf of a group which constitutes a majority of the electorate which selects those representatives, it borders on the absurd.[67]

But this objection sometimes goes beyond the makeup of the legislature and seems to assert the moral inadmissibility of any expression of opinion by a person who cannot be directly affected. (Since this disability should apply equally to men and those women who are past child bearing age, it is at least comforting to know that not only persons like myself but also the Margaret Sangers of the world are supposed to have no right to speak on the subject.)

One might point out that such a principle would have invalidated the efforts of northern abolitionists, who had no economic or personal stake in slavery, to "impose their moral views" on those who did, and that none of us non-Siamese twins will ever face their particular hardships and should therefore raise no objection if one twin decides to murder the other as a means of solving his problems. But even putting all this aside, if it has come to the point that one must justify the expression of an opinion on social policy in this country, the anti-abortion advocate is in a better position than many, for he speaks with the same right as every human being who has ever been concerned with the plight of another. While his ardent defense of the child may strike some as showing callousness toward the pleas of women, it is not that he is unmoved by them, but that he asks himself: "Who speaks with the same first person outrage for the child? Whose voice trembles with indignation at the suggestion that *his* body be dismembered? Whose eyes flash with rage at the assertion that *his* life is meaningless?" The cause of the "pro-lifer's" fervor is that he asks himself such questions, and he simply refuses to accept that the outcome of a great moral issue should turn on the fact that the victims happen to be mutes.

Conclusion

To the abortion proponent, the arguments about the moral indistinguishability of the prenatal child and other humans expressed here undoubtedly seem extremely academic and out of touch with common sense. But one can only wonder how many universally abhorred atrocities were the result of distinctions which were equally as clear and axiomatic in the minds of their perpetrators as the perceived differences of "fetus" and "human" are to today's abortion advocate. Indeed, contrary to the implications of the conventional presentations urging us to "never let it happen again" (whose graphic depictions of the enormity of the evil generally have us on the lookout only for "monsters"), the even more terrifying lesson to be learned from these horrors is that they are most likely to arise when we are least likely to perceive them for what they are. It is the "age-old and deep-seated human feeling"[68] that some groups are inferior which permits us to ignore that which we would prefer not to recognize; it is the casual, almost unconscious assumption that someone else is "obviously" not like ourselves which leads finally to Buchenwald, Wounded Knee, and the incinerator at the local abortion clinic.

We must recognize that this is not a question of when we should graciously condescend to admit the child into our august fellowship

(and thus grant him some measure of immunity from our enlightened disposition of his existence), but rather the recognition of a moral imperative by persons whose thinking can often be self-conditioned to achieve certain goals. Therefore, in light of our history of self-deception concerning human beings and faced with the *prima facie* fact of the prenatal child's human origin, the moral burden of proving their case and justifying a difference in treatment must rest upon those who seek the killing. If they cannot provide an acceptable justification, which is consonant with our moral attitudes in other situations, the relevant question is why we should be spared from a measure of the same moral scorn which we so piously visit on others.

Although abortion is a subject which often bogs down into a debate over competing definitions of the human being, in closing it may be useful to recall one such definition, the validity of which stems from a sense far different from that originally intended, for Sartre tells us that "Man is fundamentally the desire to be God" and seldom is this more convincingly demonstrated in the moral sphere than in our desire to mentally recreate the world. Although given the restrictions our impulse to be civilized imposes on us, such a world might be easier to live in, the inescapable fact remains that it simply doesn't happen to be the one we have.

NOTES

1. The relevance of the situation of Siamese twins as an analogy to pregnancy was mentioned but not explored in Michael Tooley, "Abortion and Infanticide," *Philosophy & Public Affairs*, v. 2 n. 1 (Fall 1972), pp. 37-51 (hereinafter Tooley).
2. *Doe v. Bolton*, 410 U.S. 179,214 (1973) (Douglas, J., concurring).
3. For an excellent description of this entire process, see Charles Carroll, "Abortion Without Ethics," in Thomas W. Hilgers and Dennis J. Horan, eds., *Abortion and Social Justice* (New York: Sheed & Ward, 1972), pp. 249-266 esp. at 250-251 (hereinafter Hilgers and Horan).
4. See Baruch Brody, "The Morality of Abortion," *The Human Life Review*, Fall 1975, pp. 42-64.
5. Borrowing from the tools of linguistic analysis common in other types of consciousness raising, it is significant that even after the advent of prenatal sex detection we persist in employing the term "fetus" with its accompanying neuter pronoun, thus facilitating thought about the child in dehumanized terms. Since many abortion proponents respond to such considerations in other contexts, I will employ the term "prenatal child." Perhaps its very awkwardness in some situations will serve as a reminder of the significance which unconscious attitudes can have on moral decisions.
6. *Roe v. Wade*, 410 U.S. 113,159 (1973).
7. Consider, for instance, the complete absence of any attention to values other than maternal health and potential life in determining not only the state's power to control the decision to abort but also its power to control the method of abortion. As a result of this narrow view of the values involved, the Court concluded that during the second trimester the state may regulate procedures only "in ways reasonably related to maternal health," while during the first trimester "the abortion decision and its effectuation must be left to the medical judgment of the pregnant women's attending physician" (410 U.S. 113,164). Thus, despite the development of the child's central nervous system which necessitates the use of a fetal anesthetic in many intrauterine operations during this period and even though similar legislative action to protect animals from unnecessary suffering is considered legitimate, the state is powerless prior to viability to require the use of such an anesthetic or of the most "humane" method available. Note also that this is true even if the two methods in question are medically equally safe and

thus could in no way infringe on the Court's postulated "fundamental right" to a safe termination of the pregnancy.

This total elimination of an obviously legitimate governmental interest (I assume that even the Court would not conclude that a dog's pain was more significant than that of a prenatal child) without any justification from the argumental framework employed demonstrates the extent of the Court's blind rush to reach what it deemed to be the enlightened result. Of course, it is possible that the Court's "oversight" was actually intentional, since it requires rather unique mental gymnastics to recognize that something can feel pain and still hold that "it" may not be alive.

8. See Roger Wertheimer, "Understanding the Abortion Argument," *Philosophy & Public Affairs,* v. 1 n. 1 (Fall 1971), 67 at 82 (hereinafter Wertheimer).

9. I employ this term in its alternate sense of viewing the world in terms of the centrality of one's own social or environmental group, rather than race.

10. *Roe v. Wade,* 410 U.S. 113, 163-164 (1973).

11. Although both the logic of this argument and the initial impact of the Court's words would seem to indicate that a significant protection is to be granted to the viable child, a closer inspection indicates that while the form of the Court's argument has spared it the necessity of defending the rather indefensible position that the viable child is not "alive," the substance of what it has done should have required it to do just that; for the Court holds that the abortion of the viable and "meaningful" child is not only a right when necessary to protect the women's life but also her health (410 U.S. at 163-164). One might at first assume that the Court meant to announce a rough equivalent of the self-defense doctrine as a constitutional requirement, and that by "health" it meant the threat of "great bodily harm" which justifies employing fatal force in self-defense (Rollin M. Perkins, *Criminal Law,* Brooklyn: The Foundation Press, 1957, p. 883); but in *Doe v. Bolton,* the Court, in effect, defines "health" as it relates to the need for an abortion to include "all factors — physical, emotional, psychological, familial, and the women's age —relevant to the well-being of the patient," 410 U.S. 179, 192 (1973). Such a sweeping definition eliminates the relevance of the self-defense analogy in justifying the Court's action; for the difference in standards cannot depend on the fact that the prenatal child, unlike others killed in self-defense, is not a due process person, since the same self-defense standard existed even before the passage of the Due Process Clause. (The Court's recognition that the state may impose penalties for failing to protect a "liveborn infant" resulting from a post-viability abortion [*Planned Parenthood of Central Missouri v. Danforth,* 44 U.S.L.W. 5197, 5206 — U.S., July 1, 1976] does not alter this, since it is analogous to imposing criminal penalties for killing or failing to aid an injured aggressor who is no longer a threat.) Thus, the only possible relevant difference is that in the Court's eyes, the viable child possesses only "potential life," so that the Court has made its equivocation definitive and for one very broad set of circumstances has decided that "real" life starts at birth, despite its assertion that "the judiciary. . .is not in a position" to decide such a question if the public disagrees on the term's meaning (410 U.S. at 150).

And if there was any doubt as to the Court's evasive manipulation of the viability standard to give the mere illusion of concern for the child's life, it was dispelled in *Danforth* when the Court explicitly told us that the viability point is not to be placed by the state, but is a medical judgment to be left to the abortionist (p. 5201). It takes no great legal mind to realize that when the potential criminal is given the definitive determination in whether the law applies to him, any claim of significantly protecting the child's life is absurd.

In addition, by focusing on the physician's medical judgment of a particular child's viability point, the Court has left a degree of ambiguity as to whether viability is to be judged in a totally situational context, including the actual availability of life-support devices, or whether the judgment is to be based on the child's potential if the best possible support mechanisms and techniques were available. Even assuming that physicians will understand that such hypothetical considerations are to be part of their "medical judgment," there is still a substantial likelihood that even a physician who was attempting to make a good faith judgment would underestimate the potential of expensive new life-saving devices with which he had no firsthand familiarity. Thus, as a direct result of the Court's refusal to permit the state to set a minimum viability point reflective of the latest medical advances, there is a significant possibility that one child will be judged to be human and "meaningful" because his parents are affluent, white Anglo-Saxons, while an otherwise identical child will not be "meaningful" simply because his parents are poor Chicanos and thus attended by a less well-equipped physician. (Such a point where all children would be assumed viable could be supplemented by the so-called "medical judgment" standard to protect any younger child with superior survival capabilities who happened to have the good fortune to be judged by an ethical physician.) Of course, anyone who valued life (clearly not the Supreme Court) would set a standard which avoided the possibility of misjudgment, by protecting all when any could conceivably survive.

12. *Roe v. Wade,* 410 U.S. 113, 163 (1973).
13. Bart T. Heffernan, "The Early Biography of Everyman," in Hilgers and Horan, note 3, p. 6 (hereinafter Heffernan). This does not necessarily mean that the state cannot rationally assert that life is present prior to the presence of a heartbeat, since from the moment of conception on, the child engages in the lifelong process of development and change guided by his genetic code and requires little to exist which is not analogous to the needs common to all human life (sustenance, shelter, etc.). But even if this argument is not completely accepted, it may still provide some support for pre-heartbeat protection, since the heartbeat should establish *life* and the Court's approach has acknowledged the possibility of *potential* life as a sufficient interest for state regulation.

Further, the relevance of the heartbeat (or brainwave) standard is not eliminated because many of the child's organs are not fully developed, since it would apply even if some of a dying person's organs were in a state of decay, including the heart (or brain) itself.

14. Heffernan, *op. cit.,* p. 7. To the extent that the standard of "brain death" is regarded as relevant, it may be argued that the early detectable brain activity in the child is a "flat" brainwave, but it should be remembered that the primary proponents of "brain death" found in the flat EEG to be only of confirmatory value ("A Definition of Irreversible Coma: Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death," *Journal of the American Medical Association,* v. 205 (1968), 337 at 338) and was relevant only when there was 1. a "total unawareness of externally applied stimuli" and "even the most intensely painful stimuli evoke no. . .response, not even. . . withdrawal of a limb" (p. 337), 2. "no spontaneous muscular movements" (p. 337), and 3. "no reflexes" (p.338). Thus, a flat brainwave pattern in conjunction with responsiveness to physical stimuli indicates that an individual is alive under this standard and the child exhibits such responsiveness during this period (Heffernan, p. 7).

Further, even if the absence of these responses overlapped with the flat brainwave pattern, the key to this standard is a permanent pattern with no reason to expect other patterns in the future, which is, of course, not the case with the child.

15. Since it is clearly the child and not the mother who is responsible for this activity, the mother's role can no more be relied on to argue that the child is not alive than can anyone else's need for a favorable environment, nourishment, etc. (for instance, an astronaut in outer space is clearly alive despite dependence on a special life-support suit).
16. When the Court denies the state the power to define such children as alive and instead engages in its evasive discussion of "potential life," there is an implicit assumption that it is at least possible to possess the properties possessed by those children and still not be alive.
17. In light of this willingness of the Court to embrace any myth or absurdity to achieve its desired end, even an individual who was totally unmoved by pleas for the child's life might find himself compelled to support some type of abortion amendment as the sole means of restoring a measure of intellectual integrity to this area of constitutional law. While many may be unconcerned about whether or not standards of constitutional interpretation are so malleable as to make a mockery of the document's status as a rational instrument, there are also power aspects implicit in this situation, since in the absence of a constitutional amendment, a decision based on such total disregard for basic standards of law and reasoning, in effect, establishes an oligarchical control over one area of public policy.
18. *Roe v. Wade,* 410 U.S. at 159-162 (1973).
19. *Ibid.,* p. 155.
20. Not only does the Siamese twin have the same bodily-integrity-type interests as the pregnant woman but also, bearing the burden of his sibling can tax his mental and physical health, cause "a distressful life and future" and create a social stigma greater than unwed motherhood —which are precisely the type of interests which the Court emphasized in *Roe* (410 U.S. at 153). Although the Court in *Roe* attempted to de-emphasize the "control of one's body" argument as a component of the right to privacy (410 U.S. at 154) and instead emphasized the interests mentioned above and the *Eisenstadt-Griswold* line of cases, when the state is faced with the situation of a woman desiring an abortion and a father opposing it, the Court said that preference must go to the woman because she "physically bears the child" and "is more directly and immediately affected by the pregnancy" *(Planned Parenthood of Central Missouri v. Danforth,* 44 U.S.L.W. 5197, 5203 — U.S., July 1, 1976). It might be argued that this was merely intended to reflect the fact that she bore the hardships and physical dangers of pregnancy and should not have to run them simply because someone else wanted her to. But if the situation were reversed and the woman wanted the child while the father wanted an abortion, this explanation will not suffice. Any state which read the Court's derogation of bodily integrity as an interest underlying this right to personal privacy might grant the power to demand an abortion to the father, since he often bears the heavy burden of support for the child, which can lead to stress on his physical and mental health as he tries to meet added responsibilities, and, of course, it would be the constitutionalization of a sexist mentality if

the law were to assume that child rearing (another of the burdens expressly mentioned by the Court in *Roe*) was a purely maternal function which could not impose hardships on a father. Furthermore, because the Court itself has endorsed the notion that early abortions are safer than continuing pregnancy to term (410 U.S. at 149, 163), the state could justifiably conclude that granting such a power to the father in early pregnancy would further the type of interests central in *Roe* while *increasing* the physical safety of the woman. And, of course, as the Court recognized (410 U.S. at 154), there is precedent for such forced medical procedures in *Buck v. Bell*, 274 U.S. 200 (1927) and *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

But (thank God) the entire tenor of the Court's discussion of abortion as a medical decision between the woman and her doctor indicates that it would not accept such legislation. Thus, it is indeed the physical connection and resultant hardships which are central in this right to abort and not the existence of *Eisenstadt-Griswold*-type interests. So such a right of privacy should extend to the twin even if his peculiar "family situation" did not precisely fit into the framework of that line of cases.

21. While one might argue that this "vegetable" twin can be distinguished from the prenatal child on the grounds that the former is a due process person, it should be remembered that even First Amendment rights to "symbolic speech" do not prevent the imposition of criminal penalties for destroying a draft card, even though it is not a due process person and many individuals would question its value or significance in comparison to the exercise of the right involved (see John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Journal*, v. 82 (April 1973), 920 at 926) (hereinafter Ely; also reprinted in *The Human Life Review*, Winter 1975, pps. 44-73). The Court itself recognized this fact in its discussion of "potential life" as a value which might override the right of privacy (410 U.S. 150, 162-164).

Most importantly, such protection would have been given to the "vegetable" prior to the passage of the Due Process Clause, and it stretches the bounds of credulity to assume that by adopting the Fourteenth Amendment its proponents intended to transform the interest protected by homicide statutes (even in their "fringe" applications) from "human life" to due process personhood. And if it were due process personhood rather than "human life" which was relevant in protecting a "vegetable," then the state would face equal protection problems if it failed to apply similar penalties to one who destroyed a corporation and thus ended the existence of a due process person.

It is, of course, one of the grotesque ironies of the current legal situation regarding abortion that the passage of the Fourteenth Amendment should be used as a justification for the extermination of any human life, since it was perceived by its sponsors as an absolutely egalitarian protection for all. See Robert M. Byrn, "Confronting Objections to An Anti-Abortion Amendment," *America*, v. 134 n. 34 (July 19, 1976), pp. 529-530. Also reprinted in *The Human Life Review*, Fall 1976, pp. 119-130.

22. *Roe v. Wade*, 410 U.S. at 162 (1973). This statement also overlooks the state's power to make a totally arbitrary determination of the start of "corporate life," thus creating a due process person and affecting the rights of persons dealing with it. (That is, in State A, a group performing actions 1, 2 and 3 becomes a corporation, and creditors dealing with that group can, in most situations, only satisfy claims against the group from corporate funds; while in State B, a group which performs actions 1, 2 and 3 is not a corporation, and creditors can still rely on full personal liability in satisfying their claims.) For further comment on the inconsistencies of the Court's arguments for denying due process personhood to the prenatal child with corporate possession of that status see Joseph O'Meara, "Abortion: The Court Decides a Non-Case," *The Human Life Review*, v. 1 n. 4, (Fall 1975), 17 at 27.

23. Wertheimer, *op. cit.*, p. 82.

24. *Ibid.*, p. 80.

25. Marya Mannes, *Last Rights* (New York: William Morrow, 1974), p. 105.

26. Ely, *op. cit.*, p. 927.

27. See, for instance, Letter to the Editor from Ashley Montagu, *New York Times*, March 9, 1967.

28. Wertheimer, *op. cit.*, pp. 87-88.

29. Lawrence Lader, *Abortion* (Indianapolis: Bobbs-Merrill, 1966), pp. 155,166.

30. One might be forgiven if he finds fairly exotic the logic which perceives nobility in a parent's decision to kill a child with a corrosive, convulsion producing solution a few months before birth in order to avoid the possibility that the same parent might beat the child a few months later. From this it would seem to follow that we should also lessen the penalties for child abuse in those cases in which the child dies, since the parent would thus have spared him from any future psychological scars from the incident.

Indeed, our casual acceptance of saline-injection abortion with its scorched and poisoned bodies writhing for periods of up to an hour brings into question nothing less than the kind of people we are. If anyone employed a method so brutal in killing a dog, a cat or a horse with a broken leg, we could and would demand that the state outlaw it, but similar concern for the suffering of an infant of human origin is denied us by the Supreme Court decisions (See note 7, and *Planned Parenthood of Central Missouri v.*

Danforth, 44 U.S.L.W. 5197, 5204-5205 — U.S., July 1976 in which the Court struck down a statute prohibiting saline injection without even making reference to its effects on the child). If anyone had done anything half this brutal to a child outside the womb, we would consider it a grotesque form of child abuse. Yet while the emotional benefit derived from abusing a child is regarded with contempt, the emotional benefit derived from aborting one is heralded as an absolute justification for the act. Upon contemplating this pattern of selective outrage, one may wonder whether the real basis of our objections to inhumane actions is purely cosmetic. But however that may be, the too little recognized fact remains that the current abortion on demand situation grants not only a right to exterminate the child but a right to virtually torture him to death.

31. R. Bruce Sloane, M.D. and Diana Frank Horvitz, *A General Guide to Abortion* (Chicago: Nelson Hall, 1973), p. 89.

32. And thus this can be classed as an example of the previously mentioned misdirection toward other values more in keeping with the civilized self-image.

33. Elements of this line of argument would probably be classified by abortion advocates as belonging to what they prefer to call the "wedge" approach. While they generally heap rather lavish scorn on this device (Granville Williams, *The Sanctity of Life and the Criminal Law*, New York: Alfred A. Knopf, 1957, pp. 315-316), they apparently suspend their objections when employing it themselves. See, for instance, the U.S. Civil Rights Commission's argument that no pro-life amendment should be passed, since it might set a precedent for other "efforts to compromise or take away other rights" (a rather bizarre characterization for proposals aimed at reaffirming the most fundamental of all human rights, the right to live). U.S. Civil Rights Commission, *Constitutional Aspects of the Right to Limit Childbearing* (April 1975), p. 77. For further proof that the "wedge" is not totally anathema to abortion proponents see Philip Devine's reminder that it is often used in First Amendment arguments, "The Principle of Double Effect," *The American Journal of Jurisprudence*, v. 19 (1974), 44 at 60 fn. 48.

34. The full scope of "unwantedness" in practice becomes clearer when one finds that some people are taking the old "do you want a boy or a girl" discussion a bit further. They are obtaining prenatal sex detection tests and then aborting the child if he or she does not meet their preferences. See remarks of Dr. Park S. Gerald before a March of Dimes Conference reported in *The Catholic Times* (Columbus, Ohio) August 27, 1976, p. 8.

There are at least two observations which this immediately brings to mind. First, that it is one of the supreme ironies of the abortion controversy that the position generally held by feminists has granted legal acceptability to a practice of killing children simply because they happen to be female; and second, that in the face of this trial and error approach to producing a child who "meets specifications," one can only shudder at the prospect of prenatal detection of the color of a child's hair and eyes. Indeed, nothing could more emphatically demonstrate the baseness of the abortion mentality than the development of this view of children as disposable made-to-order consumer items.

35. See Daniel Callahan, *Abortion: Law, Choice and Morality* (New York: Macmillan, 1970), p. 454 (hereinafter Callahan).

36. When considered in this context, it is not surprising that some blacks view the pro-abortion movement as bearing the seeds of racial genocide. See Erma Clardy Craven, "Abortion, Poverty and Black Genocide," in Hilgers and Horan, note 3, pp. 231-243.

37. See, for instance, Kingsley Davis, "Population Policy: Will Current Programs Succeed?" *Science*, v. 158 (Nov. 1967), pp. 730-739.

38. Thus, if, as has been charged (Callahan, *op. cit.*, p. 409), the pro-life movement is one-dimensional, it is no more so than the overriding respect for the dignity of each human life, which is at the heart of most western moral thought; for one is merely an adjunct of the other.

39. It should perhaps be emphasized that what is necessary is a morally defensible distinction, rather than a merely linguistically defensible one. Too often abortion advocates engage in word games which amount to little more than a sophisticated method of the misdirection mentioned earlier, since the nature of this process of defining the child to death helps create an aura of rationality which accords with the desired self-image.

One fairly elaborate example of such a definitional exercise is Lawrence Becker's "Human Being: The Boundaries of the Concept," *Philosophy & Public Affairs*, v. 4 n.4 (Summer 1975), p. 334. Becker equates membership in the species homo sapiens with the applicability of the term "human being." A human being, he tells us, comes into existence at the stage of completed metamorphosis, when the "basic structure" is present. By focusing on the basic structure, he seeks to get around the problem of the generative developments that go on throughout life (pp. 342-343). As to what constitutes the "basic structure" (much of which isn't very basic), he employs an analogy to the distinction between a pupa and a butterfly. (The problem of using two terms developed without the slightest reference to any standard of moral relevance as determinitive of key distinctions concerning human life is eliminated

by informing us that moral relevance is irrelevant, p. 335.) Although this reference to the pupa-butterfly distinction gives some argumentative substance to the "basic structure" line, Becker passes rather quickly over the problem it creates for his implied definition of "species," since both the butterfly and the caterpillar it develops from are "insects of the same species" (pp. 337, 339), while he uses the completion of metamorphosis as the beginning of species membership in the human.

The question of mutation and arrested development is dealt with by defining the child as a human being at the end of *his* generative development, even if it is not normal (pp. 346-347). But this requires acceptance of the possibility that one of two otherwise identical prenatal children is a "human being" while the other is not, simply because the second has not yet fully developed an organ which the first never will develop. Similarly, it requires acceptance of the notion that one can make a child a "human being" by injecting him with a chemical which terminates his generative development.

In rejecting conception as a relevant point, Becker emphasizes that twinning can take place as late as 14 days after conception (pp. 339-340). Whatever relevance this may have semantically (not "*a* human being"), in dealing with an issue such as abortion, it is difficult to find any moral justification because one may be destroying two lives instead of one. (Consider also the hypothetical of two minds in one body. Would we be justified in treating these persons as though they were not human?)

But perhaps the most crucial problem with this article is the importance given to the term "human being," combined with the rejection of the need for moral relevance in drawing the "being/becoming" line. If a society generally employed a term which translated to "human entity" (a term which Becker admits extends to the prenatal child, p. 340) in speaking of its duties, a Becker-type analysis would yield different moral and legal conclusions regarding abortion. (The same would, of course, be true if "human life" or "human organism" were used.) Similarly, a Cheyenne philosopher could have just as confidently relied on the fact that in his language "human being" was only used when referring to Indians and conclude that only when one developed reddish bronze skin, etc. could he merit the protection and rights which belonged to the "human being." In each of these cases, the philosopher would be defining the limits of his concept in a manner which would seem "neutral" and objective to him, but in each case, a refusal to examine the moral relevance of the concept used could lead to moral conclusions which had a largely ethnocentric basis.

40. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy & Public Affairs*, v. 1 n. 1 (Fall 1971), pp. 47-66 (hereinafter Thomson).

41. *Ibid.*, p. 47.

42. *Ibid.*, pp. 48-49, 55-56.

43. John Finnis, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson," *Philosophy & Public Affairs*, v. 2 n. 2 (Winter 1973), 117 at 124.

44. Thomson, *op. cit.*, p. 53.

45. *Ibid.*, p. 56.

46. For instance, the morality of unplugging the violinist would be considerably different if your act put him in the situation in which he needed your help. Consider our response to one who asserted: "Yes, I injured this man's kidney so that he required my physical assistance but I did not intend to do so. I merely intended to go out on a crowded corner and kick at kidney height, because I derive emotional satisfaction from doing so. Why, I even wore soft-sole shoes to lessen the likelihood of injury. Therefore, I should owe no special duty or responsibility to him because of my action." If this person cannot morally require the other to fend for himself when it would likely prove fatal to do so, then neither can those who voluntarily engage in intercourse, even though they did not intend to create a child who would be physically dependent on them for a period of time, and this would not change even if they had taken steps to lessen the likelihood of its occurrence. (As an alternate hypothetical, consider a situation where our astronaut, note 15, had been sent into space without his consent in a privately developed spacecraft and one of the persons responsible then shut off the life-support equipment because it would be economically advantageous and, in any case, the equipment was "his.")

Note that the proper question is not, as Thomson thinks, whether one "consents" to the situation (Thomson, *op. cit.*, p. 65), since the kicker may not have "consented" to the injury; it is not even whether one anticipated that it might result; the proper question is merely whether the situation did result from the action.

Once again it should be emphasized that this entire distinction can only have possible relevance if the action which one is seeking to justify can be considered freeing oneself from the effects of an injustice by merely requiring another to fend for himself. Significant interference with his body or natural capacity to fend would be impermissable even in the absence of any voluntary act. Thus, for example, if the only "safe" way to end the situation is to inflict an injury which will itself directly cause the other's death, it is no more justified than killing the other captive during your escape attempt because you have discussed your escape route with him and if you merely cut the rope he will be captured and could

be tortured into disclosing that route before dying. (Note also that the entire discussion assumes a situation where concepts of self-defense do not apply.)

Of course, the law can impose special duties based on relationship even in the absence of any action on the obligor's part. For instance, few "consent" to having a brother, but the law may nevertheless impose responsibilities because of his existence. See Cal. Health and Safety Code § 7100 (1970) (duty to inter).

47. Thus, while you would not be morally required to abstain from cutting the rope in the situation presented, you would be required to abstain if the kidnapper had used the tension of the rope (or the connection of the grafted arms) as the triggering mechanism of a gun pointed at the other captive's head. Prof. Thomson's interpretation of similar points in Finnis's critique seems completely erroneous ("Rights and Deaths," *Philosophy & Public Affairs*, v. 2 n. 2 (Winter 1973) pp. 146-151.). It is not merely a question of laying hands on someone or of one method being "too messy," since we would equally object to complying with the kidnapper's demand to secretly administer a lethal dose of a painless drug which induced a state of euphoria in the victim.

While this explanation may provide some support for Thomson's analogy between unplugging the violinist and refusing to be a Good Samaritan to one in need of assistance, tearing another limb from limb with a suction device or enveloping him in a lethal solution can no more be considered merely a refusal to be a Good Samaritan than can stabbing him in the chest (see note 46).

It might also be worth noting that the "merely fend for himself" approach would be subject to several limitations, one of which is that the actor needs some significant and justifiable interest before he would be privileged to act in a circumstance where death would result. So in the violinist hypothetical, while you might be justified in unplugging yourself to assert your freedom from a situation brought about by injustice, the same privilege would not extend to a janitor desiring to dust the apparatus or to a contract killer.

Further, if one might be permitted a very loose analogy merely to give a sense of what is involved in this argument, it is certainly true that some situations in which we might consider an individual's acts to be heroic; while in many other situations where the same individual was exposed to the same degree of risk and even acted from the same motives (e.g., patriotism), we would merely consider his acts to be the fulfillment of the ordinary obligations of one in his situation and, indeed, might even brand him a coward and punish him if he acted differently. (For instance, it is often as dangerous for a soldier to "hold his ground" or go forward ten feet when ordered as to do some more spectacular thing.) The fact that we might consider not stabbing the other captive to be an ordinary obligation of one in that situation, while we might lionize one who would save him does not necessarily mean that we must make the normal obligations optional, but perhaps that we make the "heroic" seem too special. But see Thomson, "Rights and Deaths," p. 156.

48. Tooley, *op. cit.*, pp. 37-65.

49. *Ibid.*, pp. 44-50.

50. As one indication that we might not consider the obligation to refrain from killing to be waivable by the victim, consider the possibility of a wealthy sadist contracting to pay a year in advance for the privilege of torturing the offeree to death.

51. Thus, Tooley's attempt to draw support for his "must desire" rule from the fact that a machine or a rock lacks consciousness and thus cannot "desire" and have rights (p. 45) is rather weak. One might think it sufficient to say that they are also not alive, a factor which might have some significance in determining why we, to date at least, have perceived no obligations toward them. But Tooley might complain that there are some non-living things which he says can have rights such as dead persons and future generations. Unfortunately, he seems to have overlooked that these persons also lack consciousness.

If Prof. Tooley finds it necessary to abstract the qualities of a thing to which morality applies, he would do well to change his question from what is necessary for a thing to "possess" a right to what is necessary to inspire a sense of obligation in us, for it is the obligation which defines the borders of morality and that is not necessarily dependent on a thing's capacity to "possess."

52. Wertheimer, *op. cit.*, p. 78.

53. *Ibid.*, pp. 83-93. Although Wertheimer asserts that the assumptions underlying these arguments are "not philosophical theses to be refuted" and that the arguments merely show "the indeterminateness of the fetus' humanity" (*Ibid.*, p. 88), in light of his arguments concerning the requirements for legal restrictions (*Ibid.*, p. 94), those assumptions are all he needs to justify treating the child as though he was not human, and thus they should not be unquestioningly accepted.

54. *Ibid.*, pp. 86-88.

55. Raymond N. Herbenich, "Remarks on Abortion, Abandonment and Adoption," *Philosophy & Public Affairs*, v. 5 n. 1 (Fall 1975), p. 98.

56. This fact is another which was overlooked by the Supreme Court, since it relied heavily on such post-pregnancy hardships (410 U.S. at 153), while ignoring their lack of applicability in any state which permitted easy placement for adoption.
57. In judging the implications which such a non-fatal method of ending pregnancy would have on legal restrictions on abortion, it should be recognized that this would merely support an argument that the state should not punish a non-fatal act because of a concern for protecting life, not an argument that it may not punish those abortions that do kill unless it pays for the non-fatal method itself. For instance, if our Siamese twins always were or, alternatively, became separable through a non-fatal medical procedure, this would not mean that the state must finance the exercise of a right to privacy which does not kill (i.e., the operation) in order to make the less expensive but fatal method of exercising it (killing the other twin and then hacking oneself free) a crime.
58. 122 Cong. Rec. S6127 (daily ed. April 28, 1976).
59. "No Retreat on Abortion," *Newsweek* (June 21, 1976), p. 11.
60. John Finnis, "Three Schemes of Regulation," in John T. Noonan, Jr., ed., *The Morality of Abortion* (Cambridge, Mass.: Harvard Univ. Press, 1970), p. 172, 182-184.
61. See *Ibid.,* pp. 184-185.
62. There is some reason to question the accuracy of reserving the term "unsafe" for illegal abortions. For instance, the risk of death as a result of legal saline injection abortions has increased as they have become more widespread after *Roe,* and Great Britain's experience with legal abortions has indicated higher instances of sterility, miscarriage and prematurity among women who have had legal abortions (C. Everett Koop, "The Right to Live," *The Human Life Review,* v. 1 n. 4 (Fall 1975), 65-77.).
63. U.S. Civil Rights Commission, *Constitutional Aspects of the Right to Limit Childbearing* (April 1975), pp. 27-44. (The Commission fails to deal with the question of why, if abortions are imbued with such complete religious significance, the "establishing religion" characterization shouldn't also apply to governmental expenditures to procure them.) It should, of course, be made explicit that one cannot violate the Constitution by amending it, so that this amendment is not a "violation" of the First Amendment, even if it was in some way inconsistent with the Establishment Clause.
64. *Ibid.,* pp. 27, 30.
65. Survey data indicate that many people believe that "human life" does not begin until some point *after* birth. Andie L. Knutson, "When Does a Human Life Begin? Viewpoints of Public Health Professionals," *American Journal of Public Health,* v. 57 (Dec. 1967), pp. 2163 at 2167-2168.
66. While the motivations of past legislators place no logical limitations on the scope of action available to us, it is interesting to ask why, if the intent of restrictive abortion laws was to "keep women in their place" (Betty Sarvis and Hyman Rodman, *The Abortion Controversy,* New York: Columbia Univ. Press, 2d ed., 1974, p. 20), so many of them applied criminal penalties only to the abortionist. See, for instance, Minn. Stat. Anno. § 617.18 (1970). If the legislature was out to get the woman who "stepped out of line," why did it discriminate in her favor in applying its sanctions?

Also related to this argument are objections that abortion laws deny freedom of choice. While one might answer this by asking in what other situations we permit "freedom of choice" in taking human life, another approach is suggested by the current permissive abortion situation itself, for when the woman considering abortion receives her counseling chiefly from 1) persons openly advocating the merits of widespread abortion as a tool for achieving social goals, and 2) those intent on turning killing into a large-scale profit-making activity, sanctimonious references to the woman's "freedom of choice" are almost contemptible.
67. Since this male legislature vs. women's rights ploy can be employed in dealing with issues other than abortion, this same line of reasoning indicates that if feminists expect to change our treatment of women (and certainly much of it needs changing), they will have to do so by arguing the merits of their case, not by attempting to create a sense of moral illegitimacy about the democratic process merely because males are involved in it.
68. American Friends Service Committee, *Who Shall Live? Man's Control over Birth and Death* (New York: Hill and Wang, 1970), p. 23. The particular "age-old and deep-seated" prejudice endorsed here is that the "fetus is not fully a human being before it moves and can live outside its mother."

Abortion in the Soviet Union

Germain Grisez

THE STATUTE LAWS of Europe and America had rejected abortion without exception, or had explicitly included only the otherwise presumed exception in favor of therapeutic abortion. These laws certainly reflected the Judeo-Christian tradition of respect for the right of life, a right considered to belong to each person absolutely and unalienably. Since this right was thought to come from God, not from society, the beginning of the right to life was coincident with the beginning of life itself. Law had wavered in regard to the question when life began: it had hesitated before the conflict between the life of the mother and that of the child. But the intent of law had been clear; to safeguard life as soon as it was surely present and to permit the destruction of the child's life only when that was necessary to safeguard its mother.

Then the Russian revolution came, and everything changed.

> No book on abortion written today can be complete without special consideration of the movement in Soviet Russia to legalize abortion. The true significance of this unique experiment must be left for future generations to decide. Certainly the present opinion of the majority in other countries is that this movement is in many ways detrimental to the human race. In all fairness, however, a brief review of the measures originally adopted and their modification in subsequent years should be given, with an analysis of the results thus far obtained. In any problem into which social doctrines and religious and anti-religious bias enter so largely it will be difficult to separate truth from exaggeration.[1]

Thus Dr. Frederick Taussig opened his chapter on legalized abortion in the Soviet Union in his 1936 treatise on abortion. Writing under sponsorship of the National Committee on Maternal Health, which represented the more venturesome wing of the American birth control movement, Taussig was fascinated by the Soviet Union's "unique experiment." Guarding against the influence of "religious and anti-religious bias," Taussig had gone to

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Russia in 1930 "to see things at first hand."[2] Now Taussig was making sure that the benefit of Russia's example would not be lost to his readers.

Prior to the Communist revolution, abortion was legally forbidden, with no explicit exception even for therapeutic abortion. In the first years after 1917, social turmoil was general. Probably abortion became more widespread in this period. On November 18, 1920 a decree was issued by the Commissariats of Health and Justice legalizing abortion.[3]

The decree begins with a prologue that makes the following points:

> —Abortion has been increasing for ten years in western Europe as well as in the Soviet Union. (The Commissars did not want to put their own people in an unfavorable light, and were seeking support in the argument: "Everyone has the problem.")
> —Legislation punishes the woman and the physician, but this is ineffective, for it drives abortion into the basement and puts women at the mercy of greedy and unskilled abortionists. (This is the public health argument for abortion, with an appeal to sympathy for the woman's plight.)
> —Nearly 50 percent of aborted women suffer infection, and about 4 percent die. (These figures obviously could not be proved.)
> —By propaganda and welfare measures the government fights this evil. "But, since the moral survivals of the past and the difficult economic conditions of the present still compel many women to resort to this operation," the government decided to legalize it. (The "moral survivals" must refer to the reluctance of some women to bear illegitimate children. "Difficult economic conditions" is a very brief way of expressing an official, restrictive population policy. The government could not provide the required welfare programs. Industrialization was more urgent, and a limited increase of population would assist economic transformation.)

The decree itself was simple. Abortions were permitted without charge in Soviet hospitals. Only physicians might induce abortion. Others, and physicians inducing abortion in private practice, were subject to trial by a People's Court.

To understand fully the sense of this decree concerning abortion, it is important to know that the Soviet revolution also "emancipated women." Sex differences were so far as possible disregarded for social and economic purposes. The rule was equal pay for equal work, and women worked in occupations such as mining and seafaring hitherto reserved to men.

Women also received equal education and equality of status in marriage itself. Divorce and marriage were made into easy formalities, and either partner had equal rights to determine place of residence and to hold and dispose of property. Sexual inhibitions

were eliminated and sex lost much of its romance. One observer noted: "Chastity is admirable; but a girl who 'slips,' and still more a boy, is regarded as merely foolish."[4]

Abortion legalization thus filled three functions. First, as a public health measure, it aimed at eliminating illegal abortion. Second, as a matter of economic policy, it was aimed at population control. Third, as a legal matter, removal of criminal penalties contributed to the "emancipation" of women.[5]

The legalization of abortion naturally led to a very rapid increase in the numbers of such operations in hospitals. In 1922 in Moscow there were 35,520 births and 7,769 abortions; by 1929 there were about eleven times as many abortions, 82,017, while births increased only to 51,059. Thus there were far more abortions than births, though the number of births actually increased.[6]

The rapid increase in abortions caused problems with hospital administration. Some efforts to curb abortion administratively were made as early as 1924; later, charges were levied on those who could afford to pay. Special units — abortoria — were set up to perform the operations on a mass production basis; Taussig reported fifty-seven abortions performed by four abortionists in two and one-half hours.[7] Government sources claimed that the experiment was very successful, that the death-rate was very near to zero and the morbidity-rate quite low. In Moscow in 1925 it was claimed there were no fatalities in 11,000 abortions; only about 4 percent of over 50,000 cases showed bad effects. Twelve years after legalization the government statistician claimed that the lives of 300,000 women had been saved by the legalizing of abortion.[8]

One of the authors of the legalization decree, Commissar of Health N. A. Semashenko, argued in a 1934 book that the Soviet way was far preferable to the German. In Germany post-partum deaths were far higher and, he claimed, the rate of abortions was twice as high. Thus the Soviet way meant *fewer* abortions and these done upstairs, not in the "basement" of illegality. The abortions he said were mainly done because of housing shortage, poverty, illness, and large families.[9]

The Soviet statistician Genss pointed out to Dr. Taussig that the birth rate had been maintained, and argued from this that the rapid increase in hospital abortion only indicated that hitherto criminal operations were now entering hospitals. As Taussig observes, Genss' own figures do not bear out the claim that the birth-rate had been maintained, although it had not fallen sharply and the population continued to grow during the first decade of legalized abortion.[10]

Taussig, who was not unsympathetic to the Soviet experiment, observed:

> Even so, the evidence from various sources leads to the conclusion that there are still a considerable number of abortions being done outside the law. It would seem that the very legalization of abortion has led some women to regard more lightly the moral and religious scruples that in the past had restrained them from undertaking such measures.[11]

Beginning in the late twenties, Stalin's austerity program dislocated many segments of the population and made living conditions in general harder. One authority has speculated that in the early thirties the abortion-rate must have shot up even beyond that of the twenties, to the point where the population curve became alarming.[12]

Some restrictive efforts were made. In 1927 one Soviet authority called attention to the spread of abortion among the country people and to the danger of depopulation on the farms. He wanted the government to stimulate motherhood. Efforts were made to discourage women from having their first pregnancy aborted. Physicians and social workers tried to dissuade women who could afford a baby from having it aborted. Almost none of the women being aborted were allowed any anesthesia.[13] On the walls of *abortoria* signs were put up with slogans such as: "Let this abortion be the last one." And specimens of early embryos were displayed in glass jars so that women obtaining abortions would see how quickly development progresses in the early months of pregnancy.[14]

Already in 1927 a meeting of Ukrainian gynecologists reflected hostility toward abortion among the medical profession; one observer regarded this meeting as a demonstration against legal abortion.[15] In the early 1930s Russian medical sources began to report a multitude of serious side-effects — for example, sterility, loss of sexual desire, "pelvic disturbances," ectopic pregnancies, and "hormone imbalance."[16]

In 1936 a draft decree was formulated forbidding abortion and "combating light-hearted attitudes toward the family and family obligations." In an extraordinary procedure, this decree was submitted to the people for discussion before it was officially promulgated; some changes were made on the basis of the discussion and the decree appeared June 27, 1936, as a "Decision of the Central Executive Committee of the U.S.S.R. and of the Council of People's Commissars of the U.S.S.R." over the signatures of Kalinin, Molotov, and Unschlicht.

The decree began with a prologue which neatly balanced refer-

ences to Soviet woman's "emancipation" with references to her "great and responsible duty of giving birth to and bringing up citizens." A significant paragraph stated:

> Back in 1913, Lenin wrote that class-conscious workers are "unquestionable enemies of neo-Malthusianism, this tendency for the philistine couple, pigeon-brained and selfish, who murmur fearfully: 'May God help us to keep our own bodies and souls together; as for children, it is best to be without them.' "

Yet pragmatically abortion had to be legalized to avoid worse evils while the last vestiges of exploitation and its consequences were being overcome. Now, the prologue continues, socialism has succeeded so well that welfare measures and provisions for

> combating a light-minded attitude toward family and family obligations — such are the roads which must be followed in order to solve this important problem affecting the entire population. In this respect, the Soviet Government responds to numerous statements made by toiling women.

Thus by popular consent and feminine demand, the law went on to lay out its program. Abortion was forbidden unless the pregnancy threatened the life or seriously threatened the health of the pregnant woman, or when a serious disease of the parents could be inherited. The permitted abortions had to be performed in hospitals or maternity homes by physicians. In other circumstances, both the abortionist and the woman herself were subject to criminal penalty; also anyone compelling a woman to undergo an abortion was to be penalized.

The decree increased state aid to mothers and provided special allowances for large families. Pregnant working women were given special job and income security (an exception to the equal-pay-for-equal-work rule). The network of maternity homes, nurseries, and kindergartens was extended. Authority over kindergartens was somewhat decentralized; they became adjuncts to factories or other places where the mothers would be employed.

Stricter administrative provisions were set down concerning divorce; how restrictive they would be in practice clearly would depend on administrative policy. The father of the children was held to contribute for their support from one-fourth (for one child) up to one-half (for three or more children) of his wages.

An official directive also was published listing medical indications and contra-indications for therapeutic abortion.[17]

The decree prohibiting abortion introduced the prohibition proper with the phrase: "In view of the proven harm of abortions..." This suggests that the medical arguments had been a decisive factor.

However, the Ukrainian gynecologists in 1927 had urged the substitution of contraception for abortion, and such a step would have solved many of the medical objections.[18] However, when Margaret Sanger visited Russia in 1934, though she was pleased to see the emancipation of women, she was disappointed to discover that the paper plans for contraception were not resulting in practical programs. Mrs. Sanger asked the Secretary of the Commissariat of Public Health, "Has Russia a population policy, Dr. Kaminsky?" She felt that a country with five-year plans for agriculture and manufacturing should certainly have a birth control program. But the official rejected the idea: "There is no policy as to the question of biological restriction. For six years, we have had a great shortage, not only of skilled workers but of labor in general. Now the only question is the increase of population."[19]

Thus we see the explanation of the 1936 decree's reference to Lenin's remark about neo-Malthusianism. The Soviet policy was not aimed at feminine emancipation nearly so much as at the national interest. The birth control movement took an essentially individualistic and libertarian approach. The Soviet policy was more in the nature of controlling the production of an important economic factor — workers. Legalized abortion in 1920 turned off the population stream to aid industrialization. The prohibition of abortion in 1936, together with the other measures in that decree, turned the stream of population on again.

There are several confirmations that this, in fact, is what happened. As the Kinsey study observes, several sympathetic non-Russian observers suggested "that economic and political motives demanded a cut in abortions so that a higher birth rate could produce a larger labor force and more manpower for a future possible war."[20] A Russian refugee physician explained that "the government's intention to increase the birth rate backfired." Provisions had been made for handling more maternity cases, but many women had illegal abortions instead.[21]

Most important, in 1939 the Soviet ambassador to the United Kingdom answered inquiries from the British medical profession with an official memorandum explaining the Soviet Union's 1936 decree prohibiting abortions. Most of the memorandum summarizes the explanation given in the decree itself. But two added points concern population. The first notes that the birth-rate has increased since July 27, 1936, but asserts this was mainly due to prosperity and improved health. The final point in the memorandum is this sentence:

> Subsidiary reasons for the abolition of the law of 1920 on abortion were to inculcate in the young a greater sense of responsibility both in regard to marriage, the bearing of children, etc., and to raise the birth-rate.[22]

It is difficult to say how effective the 1936 decree was. We have noticed already the refugee testimony that it "backfired" and the ambassador's observation that the birth-rate had increased — not, of course, mainly because of the prohibition of abortion. Certainly at the time the draft decree was under public discussion, many who wrote letters published in *Izvestia* showed that they had adopted the view that abortion was one of an emancipated woman's rights.

A girl who was a medical student complained of the housing situation and added: "In five years' time when I am a doctor and have a job and a room I shall have children. But at present I do not want and cannot undertake such a responsibility." A group of women on a collective farm wrote that conditions under which abortion was permitted should be stated so that physicians could not refuse a patient.

An engineer wrote:

> The prohibition of abortion means the compulsory birth of a child to a woman who does not want children... Where the parents produce a child of their own free will, all is well. But where a child comes into the family against the will of the parents, a grim personal drama will be enacted which will undoubtedly lower the social value of the parents and leave its mark on the child.... To my mind any prohibition of abortion is bound to mutilate many a young life.

A research worker wrote: "[W]e all want to be 'working women.' The tribe of 'housewives' is dying out and should, I think, become extinct."[23]

Despite these attitudes, the 1936 decree was passed and criminal prosecutions of abortionists were carried on under its terms. The continuance of abortion was explained as a residue among the unenlightened of bourgeois consciousness. The Soviet Encyclopedia held that in other countries the poor had abortions through misery, the rich through selfishness. Governments outside the Soviet Union could not fight abortion by improving social conditions, and greedy physicians practicing non-socialized medicine performed abortions as a lucrative part of their practices.[24]

However successful the 1936 decree may have been, a new decree was required. It was issued July 8, 1944, and began as follows:

> The Praesidium of the Supreme Soviet of the U.S.S.R. has issued an edict on increasing state aid to expectant mothers, mothers of large families and unmarried mothers; the protection of motherhood and childhood; and institution of the honorary title of Mother Heroine, the Order of Glory of

> Motherhood and the Motherhood Medal. The welfare of children and mothers and the consolidation of the family has always been one of the major tasks of the Soviet State.

The decree explains that war conditions require the extension of state aid. A "Mother Heroine" title goes to women who have had and *raised* ten or more children; the other honors can be earned in various grades by mothers of somewhat fewer children. The decree also ends the parity between legitimate marriage and *de facto* unions, makes divorce more difficult, taxes single persons and couples with small families, and orders that certain existing laws — including that prohibiting abortions — be enforced.[25]

In effect, this decree was a measure to step-up population growth in order to make up for war losses and to provide the population input needed for postwar expansion.

But another decisive shift was made November 23, 1955, when the Praesidium of the Supreme Soviet passed another decree: "The Repeal of the Prohibition of Abortions." The prologue to the decree argues that social and economic progress is so great that a law prohibiting abortion is no longer necessary; the encouragement of motherhood and educational measures are sufficient. Also, the repeal of the law will limit the harm done to women by abortions done outside hospitals. The final reason given was "in order to give women the possibility of deciding by themselves the question of motherhood."[26]

Thus, as the population input was to be slowed, the old appeal to individual freedom was used as a reason for a shift in public policy. Very little publicity was permitted for the new order, but reports indicated that in many cities abortions outnumbered live births. Some experts estimated that by 1959 the total annual rate of abortions in the U.S.S.R. ran over 5,000,000. In addition, one survey showed 21 percent of all abortions taking place outside hospitals. Many of these were illegal.[27] A report indicated that 40 percent of women students at Moscow University had undergone abortions; a co-ed told an American visitor the true figure was nearer 80 percent. Promiscuity was officially frowned upon — but economically desirable for female students, who supplemented small stipends. Abortions at the University clinic cost five rubles — one dollar at the U.S. rate of exchange.[28]

In the population at large, lack of housing, inadequate care facilities, and too many or too close births were the chief reasons given by a sample of 26,000 women having abortions; about one-third of this group, however, simply did not want to have a baby.[29]

We have considered the history of the Soviet Union's legal provisions concerning abortion at some length. This history is significant because the 1920 law was unique in its time and as we shall see the Soviet experience was a model and inspiration for other efforts to relax the old laws against abortion. The old laws had been based on the inviolability of the life of the unborn child. The Soviet decrees were based on the requirements of society, although individual liberty and medical considerations also were given as reasons, and the latter undoubtedly played some role.[30] The Soviet government's style of policy-making in disregard of the right of the unborn to life has been perfectly consistent with its style of policy making in disregard of other human rights, including the right to life of persons already born.

NOTES

1. Frederick J. Taussig, *Abortion Spontaneous and Induced: Medical and Social Aspects* (St. Louis: C.V. Mosby Co., 1936), 405.
2. *Ibid.*, 415.
3. Mark G. Field, "The Re-Legalization of Abortion in Soviet Russia," *New England Journal of Medicine*, 255 (1956) 421.
4. Arthur Newsholme and John Adams Kingsbury, *Red Medicine: Socialized Health in Soviet Russia* (New York: Doubleday, Doran and Co., 1934), 156; Rudolf Schlesinger, *Changing Attitudes in Soviet Russia*, vol. 1, *The Family in the U.S.S.R.* (London: Routledge & Kegan Paul, Ltd., 1949), 25-79, provides relevant Soviet documents.
5. Paul H. Gebhard, Wardell B. Pomeroy, Clyde E. Martin, and Cornelia V. Christenson, *Pregnancy, Birth and Abortion* (New York: John Wiley & Sons, Inc., 1966), 215-16.
6. *Ibid.*, 184.
7. Taussig, *op. cit.*, 406-18.
8. Newsholme and Kingsbury, *op. cit.*, 182.
9. N.A. Semashenko, *Health Protection in the U.S.S.R.* (London: Victor Gollancz, Ltd., 1934), 86.
10. Taussig, *op. cit.*, 410.
11. *Ibid.*, 407, 410-11.
12. Field, *op. cit.*, 422-23.
13. Taussig, *op. cit.*, 417-20; Henry E. Sigerist, *Medicine and Health in the Soviet Union* (New York: Citadel Press, 1947), 213.
14. Taussig, *op. cit.*, 408.
15. Schlesinger, *op. cit.*, 174-87.
16. *Ibid.*, 216; Taussig, *op. cit.*, 414-15; F.W. Stella Browne, A.M. Ludovici and Harry Roberts, *Abortion* (London: George Allen & Unwin, Ltd., 1935), 75-85.
17. Sigerist, *op. cit.*, 322-33, has a translation both of the 1936 decree and of the medical directive.
18. Schlesinger, *op. cit.*, 187.
19. Lawrence Lader, *The Margaret Sanger Story* (New York: Doubleday and Company, 1955), 280-83.
20. Gebhard *et al.*, *op. cit.*, 218.
21. Field, *op. cit.*, 425.
22. J. Maisky, "The Prohibition of Abortion," *Journal of Obstetrics and Gynaecology of the British Empire*, 46 (1939) 90.
23. Schlesinger, *op. cit.*, 254-66.
24. *Ibid.*, 425-26.
25. Sigerist, *op. cit.*, 334-42, provides the full text.
26. Field, *op. cit.*, 426.
27. David M. Heer, "Abortion, Contraception, and Population Policy in the Soviet Union," *Demography*, 2 (1965) 536.
28. David Robert, "Moscow State University," *Survey*, 51 (April 1964) 28.
29. Heer, *op. cit.*, 534-35.
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Nothing to Look At: Perversity and Public Amusements

M.J. Sobran

FOR SOME CENTURIES England was notorious for the cruelty of its entertainments. Two of the most popular amusements were cock-fighting and bear-baiting. In the former, two or more cocks were placed on a large table with sharpened beaks and spurs attached to their legs; in the latter, a blinded bear was typically tied to a stake and fierce dogs were set on him, until he had torn them, or they him, to death. There were variants: in *The Age of Voltaire,* Will Durant quotes an eighteenth-century advertisement promising "a mad bull to be dressed up with fireworks" in a ring, "a dog to be dressed up with fireworks over him, a bear to be let loose at the same time, and a cat to be tied to the bull's tail." Durant also writes of "a game called 'cock throwing' [in which] a cock was tied to a stake and sticks were thrown at it from a distance until it died."

Public executions too were festive occasions. One diarist, a physician named John Knyveton, recounts an excursion to Tyburn for "some diversion," the hanging of a woman who had stolen three loaves of bread. In his entry for November 4, 1751, Knyveton wrote in part:

> On taking our seats [we] found a crowd already gathered, such occasions being quite a holiday for the poor people who live in Oxford Street, and also for those in the village of Paddington and the hamlets along the road leading to Edgeware. A number of the gentry [were] present, standing on the roofs of their coaches, both the gentlemen and the ladies very fine, the bucks dressed as for a route and the ladies all powdered and patched, monstrous pretty with their scarves and great hats and flowered pannier skirts.
>
> The gallows a big one, to take four at once; but this day only the woman [is] to be hanged, and with her a boy who is to be half hanged and then cut down and whipped through the town as a warning to him against begging. [My friend] George Blumenfield [is] very merry and quizzing the ladies on the coaches, and Mr. Pope kindly sends out to a drawer for cans of liquor for us all, which puts us quite happy to watch the Turning Off. The woman arrives after we had waited some twenty minutes — a young wench, not ill-favored, driven in a cart tied on to a board so that she might not leap over the side; the hangman greeting her with much cheer and she answering him in kind, so that the crowd and the gentry were Highly Diverted (one buck

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near me with a vast wig I thought would swoon with mirth), and so she to the Tree and the hangman makes her mount upon a bucket, she being a Vagabond and of no importance, and then fastens the rope about her neck, and she blowing him a kiss, his assistant pulls away the bucket and she fell with a force that must instantly have deprived her of Her Higher Faculties. Was intrigued to see how the body did jerk so that I thought the rope would break.

Then the boy aforesaid, who had been brought there very early so that the execution might prove of instruction to him, was taken up, he squalling in a fashion that made the gentry cry Shame upon his Cowardice and proving near frantic, the hangman did not trouble to tie him to the tree but threw him to the ground and, encouraged by the shouts from the crowd, did kneel upon his chest and strangle him with a cord, removing same before the boy was dead. Then the rogue was pulled to his feet and a bucket of water splashed over him, and so he was taken to the cart in which the woman came and tied to its tail, two gentlemen nigh our window shouting themselves hoarse with admiration; and the hangman's assistant takes up his whip and the cart moves on, the assistant wielding the rope right shrewdly. The woman was cut down and delivered to her father who had been waiting for her corpse with a barrow; and so the crowd disperses and the gentry drive off, one lady laying her whip about the ears of the father with his barrow for not being out of the reach of her coach. And so to dine with my friends and a very pleasant hour of music and talk afterwards on divers topics. Did learn that the woman hanged was the mother of the boy aforesaid, which I trust will be a lesson to him on the Penalties of An Evil Life.*

"The puritan objected to bear-baiting," wrote Macaulay, "not because it gave pain to the bear, but because it gave pleasure to the spectator." Reading Knyveton's diary entry, one feels the maligned puritan had a point. The severity of the law that killed a young woman for petty theft and tortured her son for begging is bad enough. What is really shocking, I submit, is that it should be made a sensational entertainment. "Severity" somehow seems to be the wrong word: it is not the severity but the mad jollity of the proceedings that offends — the smug insensibility that can relish such a spectacle and sum it up as "the Penalties of An Evil Life." The *kind* of pleasure it affords is, or ought to be, beneath humanity.

This would be so even if the poor wretches fully deserved the treatment they received, or even if their suffering was merely simulated. We do not, after all, regard the routine butchering of animals for our food as immoral, but we would hardly consider it proper fare for public viewing either. A few people — mostly philosophers, of course — have inferred from this that we are hypocrites who are ashamed of our treatment of animals; so Jeremy Bentham thought, and he looked forward to the day when men would be civilized

*Quoted from Michael Brander, *The Georgian Gentleman* (New York: Saxon, 1974). I have taken minor liberties with the punctuation — M.J.S.

enough to acknowledge that animals have rights. "The question," he said, "is not, Can they *reason?* nor Can they *talk?* but, *Can they suffer?*"

For Bentham, the relevant criteria of ethical behavior were pleasure and pain, and he explicitly refused to make qualitative distinctions among *kinds* of pleasure and pain: pushpin was as good as poetry, he insisted. This position rules out any classification of pleasures as humane (that is, proper to human nature as such) or bestial. In its view pleasures are only more or less intense. It survives today in what we may call the orgasm ethic: whatever turns you on! And a surprising number of people seem unable to talk back to the argument that sexual practices or displays of all kinds are legitimate, so long as they occur between (or among) "consenting adults." This line of thought has considerable rhetorical authority: that is, it is deferred to; it represents a sentiment to which most people can't assent, but to which they are too inarticulate and too diffident to offer a serious rebuttal. It wins in public discussion as it were by default.

Let us consider an extreme case. Let us suppose that one man receives extreme pleasure from seeing another man in extreme pain. Perhaps, on some Benthamite scale, the two sensations cancel each other out; there is no preponderance of good over evil, or of evil over good. But suppose two men receive pleasure from seeing the one in pain; does that justify the infliction of torture? Perhaps the Benthamite will reply that no legitimate pleasure can be taken in another's pain: not in the sense that such a kind of pleasure is wrong, for if pleasure is itself the sole standard of good then it cannot be criticized by any other standard, but in the simple sense that we postulate (let us waive the question on what grounds) that no pleasure should be taken by means of anyone's pain. Still, the evil of inflicting pain would be mitigated, rather than aggravated, in proportion to the number of people who took pleasure in it. To put it another way, we might admit that torturing a child could never quite be justified; but as long as sheer pleasure and pain are our coordinates, we should have to say that the evil of doing it would be offset, to some extent, by the fact that a great number of spectators enjoyed seeing it. If through the miracle of television the whole world could enjoy it, so much the better.

Such reasoning is violently contrary to the ordinary sentiments of moral people. If the whole world could enjoy such a sight, we feel, the whole world would be degraded, and not worth living in. It would make little difference to our disgust if we learned that the

agony was simulated, or that the spectators had all witnessed it by accident, turning their sets on fortuitously just as the event occurred so that they were not complicit, as consumers, in producing it.

For we know that there are certain occurrences which are changed in their nature by the participation of observers; they don't merely "happen" to be seen. What is natural to be done alone becomes affectation under the pressure of self-consciousness before onlookers. To some extent, therefore, the spectator may be by his presence a determinant of what happens before him. The conventions of the theater are obviously based on this fact. All the utterances of characters in a play are intended to be overheard, even when a character is talking to himself. But the essence of a play involves the knowledge that it is mimetic, and we take pleasure not in supposing that it is "for real" but in the excellence of the imitation *as* an imitation. The pleasure of watching a hanging, on the other hand, is vitiated by the suspicion that it is not actually occurring.

Pornography, like displays of torture, depends for its effect on apparent authenticity and the absence of stylization. What it shows has to be real. Hence pornographic films are obliged to show males ejaculating, and the more respectable pornographic magazines try to show nude photos of celebrities — people whose identities are known. Hence too the affinity between pornography and cruelty, which appears increasingly in movies of sado-masochism (advertised, by the way, even in the New York *Times*). One can hardly feel respect or affection for people in a film or magazine to whom we are related only by our having a desire to see someone, anyone, stripped of privacy and hence of individuality. As children and adolescents we may have a certain curiosity to see what people look like undressed, but that is soon appeased, and can hardly be sustaining the multibillion-dollar porn industry. As the increasing tendency to feature women and even children in debased and deviant activities suggests, the appetite for pornography is in large part an appetite, and an insatiable one, for human indignity, for the tearing away of protective veils and manners, for the violation of personality. Human beings can't be fully or rightly known in their immediacy: they must be properly introduced by the multitudinous and complicated ceremonies of civilized societies, with all their attendant restraints. The more you see of someone at a glance, the less of him there is to see. Privacy is based on the presumption that there are recesses in our being to which a too-hasty exposure is an injustice. Obscenity wants to deny this; it is assertively reductive, and it is essential to the kind of pornography that we are flooded with that it have as

much verisimilitude as possible. Otherwise its destruction of properly human attributes is fake, too weak for the malignant appetite for dehumanization. Even the anonymous wretches who appear in the stuff must be really depraved, or the customer isn't getting what he paid for. But it does require a certain depravity even to perform an intimate act before strangers. Obscenity isn't simulated, though intercourse may be. Obscenity simply *is*. Its reality is identical with its seeming. It can only authenticate itself by means of generous detail, which means ever-increasing variations in perversity.

Acts, therefore, which might between lovers alone be expressive of mutual interest, are, as spectacle, inadequate. The "lovers" in a pornographic film aim to gratify not themselves or each other, but the spectator, with whom they are in fact performing an unnatural sex act. They must "prove their love" for him by retaining as little of their privacy, autonomy, and self-respect as possible. In a sense making a pornographic film is the ultimate act of altruism, though not of charity. It is the sacrifice of one's own personality to another's ego.

It might be thought that pornography might take a higher road and simply record an act of genuine love between a man and his wife. But again, the presence of an observer destroys the intimacy intrinsic to such an act and makes it, so to speak, three-cornered. It becomes, under the circumstances, a different act by virtue of occurring in a different medium: sight.

Decency for the most part has to do with what is seen. It is concerned with veiling things not because they are evil but because they do not belong to the eye. They must be known in a deeper context of significance. This applies, of course, to many non-sexual matters. One reason public executions would be undesirable is that most people, in a given instance, could not fully know the crime for which the criminal was paying with his life, and so could not apprehend his punishment *except* as a grisly spectacle, which must be either repulsive or, what is worse, morbidly attractive.

To say that nothing is obscene or indecent may sound like an affirmation of the goodness of all things. But it is really tantamount to saying that nothing is private; or, to put it a little differently, that there are no levels of significance beyond the surfaces of things. Ironically, the "new morality" began with claims based on the right to privacy; now it is hardly possible to pass a newsstand without having one's sense of privacy rudely assaulted. All this goes on in the name of freedom of expression; but although the gift of ex-

pression is among man's distinctive attributes, we should be suspicious when we hear it invoked as a slogan by those whose principal contribution to public discussion is to make it crude and gross. We know from personal experience that people express themselves most richly and subtly through their costumes, though of course most intensely in the buff; and it is refinement rather than intensity that we aim at in our civic life. Public nudity doesn't liberate us; it merely cheapens and trivializes us. And the pleasure it affords is a different kind of pleasure from that we take in the nakedness of a spouse — a low and promiscuous kind, unrelated to affection and devotion.

Thus there is a very simple reason why we should discourage pornography: its tendency is to lower the tone of society. It is cynical in itself and, we may fairly surmise, the cause of cynical behavior. The common objection, endlessly repeated by social scientists and official commissions, is that we cannot prove a connection between pornography and sexual crimes. That may be. But there are two clear answers to it, either of which is sufficient in itself.

In the first place, people who make this objection, as John Sparrow has recently pointed out, demand a kind of demonstration that can hardly be made in principle, and which is seldom required in other areas of life in which we nonetheless act on what we think probable. As Aristotle never tires of reminding us, the educated man does not demand a degree of certitude beyond what the subject matter admits of. We cannot prove that anyone ever acted more wisely or nobly for having read *King Lear,* but we don't on that account hesitate to prescribe it for college students. The general presumption is that people's behavior is influenced, one way or the other, however indirectly, by the things they read. That is why we have formal education. Nobody, not even a presidential commission, has called, on similar principles, for the abolition of the liberal arts curriculum. Pornography may even be thought of as an illiberal education.

This brings me to the second answer. We are concerned with something more than just sex crimes; we must also have regard to the general tone of our society. To make us love our country, Edmund Burke reminds us, our country ought to be lovely. He wasn't talking about beautification campaigns. He was referring to a habitual sense of the fitness of things that ought to infuse our minds and manners: "the unbought grace of life," he called it, in the absence of which we tend to look on each other with selfish contempt. This kind of thing has practical and tangible effects. It would

be simplistic to look at our soaring rates of divorce, promiscuity, abortion, rape, and general sexual anomie as the direct effect of allowing the sale of *Playboy* and *Hustler*. But it would be preposterous to suppose that our manners, including our tolerance of aggressive and doctrinaire boors, have no cumulative impact on our attitudes and, ultimately, on our behavior. Life imitates art, as Oscar Wilde quipped. First we put up with the mass-production of degraded images; then we become fatalistic and callous toward the view of women, and of the relation of men to women, which they represent; and finally, by degrees, we ourselves sink a little toward the level of the antisocial models and precedents we see on every side. Ceasing to hold our fellow citizens responsible, we find ourselves tempted, even if we possess unusual fortitude, to slacken in our own responsibilities. From the perception that pleasure may be taken anywhere with relative social impunity and with no great disgrace, we advance to the feeling that cheating on a wife is only a minor betrayal; and so a principal bond of social loyalty is weakened. Even if we do not proceed to violate it, there are secondary effects, including a subtle decrease in reverence for it that lets us become more restive and irritable with our spouses rather than invest the energy we should into sustaining the little household harmonies. Many a marriage is poisoned when one of the partners begins to think he owes himself an innocent fling. In such ways the prevalent circumambient levity sows petty discords even when the formalities are kept and no actual adultery is committed. These tensions simply can't be anticipated in detail. The only way to prevent them is to maintain good sexual manners in daily life. This is what is meant by tone, which society plays its part in supporting. The constant presence of good principle in the modes of esthetics and etiquette trains us to respond graciously in the immediate and unforeseen situation.

The influence of pornography is not of a sexual nature only, any more than is the love of a husband or wife. It extends to civic relations in general. Various levels of society have their own codes and manners — family, school, club, office, all suggest models of behavior, and tolerate only a certain range of deviations from it if they are to maintain their cohesion. The same is true of the larger social framework within which they exist. Citizens, strangers to each other, must be united by a kind of civic amity (to use John Courtney Murray's phrase); a mutuality of respect based on a somewhat elevated opinion of one another as co-participants in civil society. This requires for its sustenance many delicate conditions, not least among them a decorous code of public conduct carrying in

its ordinary gestures and restraints the sense of common human dignity. One word for it is civility. We still recognize as offensive the ultimate symbolic incivility of exposing one's genitals in public; in that area, at least, there seems no hesitation to apply and enforce the sanctions of law, even though the familiar abstractions could as easily justify that sort of thing as the rest of the smut that obtrudes on us. We still do, then, have a consensus, hard as it may be to remind ourselves of that fact. The law might fairly and prudently narrow the limits of tolerance in keeping with both the real consensus and the requirements of civic amity. What is most needed is not a huge crackdown, but an affirmation that there are in fact standards recognized by those who govern. While sufficient legislation already exists, the dithering of its putative enforcers demoralizes those who look to the state for some reflections of ethical norms.

The moment one proposes legal action in this area one meets several other objections. One is that it is not the proper business of the state to legislate morality. That is true enough. But neither is it proper for the state to ignore or militate against the common moral code of its citizens. Various levels of government have differing purviews, but all of them must have reference to right and wrong. In a republican system we do not have paternalistic government creating moral standards where none existed before. But where a standard of decency has traditionally prevailed, the law should support the public code of its citizens. Of course those citizens themselves, in their capacities as parents, teachers, neighbors, and so on, do most to set the tone. Their political rulers should not be eager to make the community much different from what it collectively makes itself. The state exists to back up society, not to transform it against its grain.

It is further objected that anti-pornography legislation is unconstitutional. The Supreme Court has never said so, and has frequently held the contrary; but its tendency has been such that people on both sides of the issue regard a totally libertarian ruling as something like the fall of the other shoe. Of course we are always at the mercy of the Court's unpredictable juridical impulses. But the First Amendment has historically co-existed with many inhibitions on absolute free expression: libel laws, truth-in-advertising laws, citations for contempt of court for insolent witnesses, and so forth. As a matter of fact, the intention of the Framers of the First Amendment was very (one might say shockingly) narrow, especially by our present standards. According to Leonard Levy, it was more nearly

to preserve a parliamentary privilege than to confer a civil right. In any case, that provision was passed in a world without photographs, let alone motion pictures. If we are entitled to any confident surmises about the intent of the men who passed it, it is that they would have objected violently to the application of their words to protect the fare of our "adult" cinemas and bookstores.

But perhaps the most fundamental objection of all is simply that freedom of expression is the most precious of our freedoms, and that no avoidable restriction should be placed on it. The answer to this, if there is one, is that speech, like anything else, is subject to realistic limits, and that displays, especially commercial displays of nude human bodies, are at several removes from speech.

But I think there is a larger principle to be affirmed here. The discussion of pornography has tended too much, in my judgment, to shuttle between the poles of license and suppression, reflecting a merely negative concern with what may be permitted or tolerated. Surely a civilized society's first concern is not how much uncivilized expression it can put up with, but what kind of expression it should actively favor. The good society, as I think most of us conceive it, consists of men and women who address each other with attention and respect, treasuring the conventions of civility because they treasure each other and the public life they share. And a healthy public life depends on the maintenance of private standards; public life, in fact, is rooted in private life and private morals. The notion that these two can be divorced, that sexual levity is no more serious than tickling, is given the lie by the violence and sadism against women and even children that is now becoming prominent in pornography. When sex is cheapened, life is cheapened; when civility is flouted, humanity is flouted. To suppose that these affronts to manners, manners in the deepest sense of the morality of appearances, can have no great effect on behavior, is merely doctrinaire. Common sense says otherwise. The argument that we can't *prove* a correlation between crime and what a less barbarous age would have called barbarous manners is irrelevant, and rings as hollow as the tobacco producers' argument that we can't *prove* a causal nexus between smoking and cancer. The correlation is there; we have a reasonable certainty of that. No more can be expected.

Society, after all, is based on love. The family can't survive without the intense loves necessary and proper to family life. The larger society not only cannot survive, it cannot be said truly to exist, without certain more general, though less passionate, loves among its members — particularly that "civic amity" we have mentioned.

There is no simple way to keep this alive. But the toleration of gross forms of prurient and violent exploitation — in pornography, bear-baiting, public executions, and what Tom Wolfe has called "pornoviolence" — should never be confused with the humane tolerance of people who care enough about each other to accept, among themselves, conscientious differences. A merely negative permissiveness is no kin to patience rooted in charity, and can signify only a weak and indifferent contempt for those who are insulted, abused, and brutalized by gross indecency. We must not be too dogmatic about drawing lines that can only be charted by prudent judgment. But to shirk altogether the duty of carefully approximating standards is an abdication of civility, and a betrayal, at the civic level, of humanity.

The Heart of the Matter

Henry J. Hyde, M.C.

[*The following is a reply to an inquiry we made in mid-June, when the U.S. Congress was once again in the midst of debating federal funding of abortions; Mr. Hyde was the obvious man to ask, and we think his unexpectedly (we didn't know* what *to expect) generous reply deserves attention, if only because most of us rarely have the opportunity to see such a "living history" example of what actually happens in the Congress. Accordingly we reprint it, with permission, in its entirety.* — Ed.]

I AM FREQUENTLY asked how and why I got into the abortion issue. The truthful answer is, it was not my intention to do so. In January 1975, when I first came to the Congress, my interests and intentions were by no means narrow, and they aren't narrow today. Although a freshman Congressman, I was not new to politics, having spent some eight years in the Illinois state legislature. There, the issues I concerned myself with were broad, by almost any standard.

As a matter of fact, a recent story in the Chicago *Tribune* (June 19) confirms this, quoting a former legislative colleague of mine as saying that, while even then involved in the abortion issue (of course, the *Tribune* would not have written the story if abortion were not front-page news today), I was also known for my stands on such subjects as criminal, matrimonial, and municipal law, investment controls, and what the story describes as "non-money issues." That indeed is true. I am more interested in the things that affect people's personal lives than in budgetary issues, mainly because I believe that most people care more deeply about these things than they do about strictly monetary concerns. Therefore it is ironic that I entered into the abortion fight in Congress (which was going on long before I got there) on an appropriations bill.

As noted, I was not new to the legislative process. In some cases, the only way you can bring an issue to a vote is by tacking it on to a money bill. Put simply, these *have* to be passed, and so what is in them must be debated; whereas strictly "single issue" bills not only can get sidetracked, but often *never* reach the floor. And it seemed to me that the abortion question deserved a vote — certainly the mail from my own constituents indicated that it was a prime issue

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with many of them — and that nobody was doing anything about getting one.

So in June of last year I decided to offer what has since become known as the "Hyde Amendment," which in effect said that no *federal* monies (under Medicaid) should be used to pay for abortions. My reasoning was simple: first, I don't believe that the majority of Americans favor abortion-on-demand; second, I'm *sure* that most people cannot see why, whether or *not* abortions should be legal, the taxpayer should be required to pay for them. Thus it seemed to me appropriate (if you'll pardon the terrible pun) that tax-paid abortions should be voted on as part of the appropriations bill for the federal welfare budget.

The next step was to gain support from fellow members (if nobody else agrees with you, it is a waste of the Congress' time to bring up an issue at all). I was frankly surprised at how many other members *did* agree with what I proposed. This encouraged me to plunge ahead and, in due course, I entered my amendment on the House floor. It passed, not easily by any means (it was quite a debate), but by a substantial margin, even though it provided for a flat-out prohibition, without exceptions, of federal funding of abortion under the existing welfare laws. The reasons why I could not include, at that time, an "exception clause" to protect women whose lives might be in danger are more technical than interesting, so I won't go into them here — but the Senate *did* include such a "life of the mother" clause, after which the entire Congress approved the amendment by a hefty majority.

As is well known, pro-abortionists immediately got an injunction to stay the application of the Hyde Amendment, so it still had not gone into effect as of the time the current appropriations bill (for the departments of Labor and Health, Education and Welfare) was to be voted on. But there was a big difference: this year, my amendment was included in the wording of the bill itself, and the question was whether the pro-abortion forces could remove it. On June 10, I sent the following "Dear Colleague" letter to every member:

> The Labor-HEW appropriation bill will soon reach the Floor and we will each be faced with a difficult but important vote: whether to retain the so-called Hyde Amendment prohibiting the use of federal funds to pay for abortions (except to save the life of the mother.).
>
> This vote is difficult because, unlike many issues, there is no compromise position. I hope you will carefully read this letter as one explanation of why I hope you will support our effort to retain this prohibition in the bill.
>
> First and foremost, it is essential to focus on just what an abortion is: the

killing of human life. If I believed that the unborn were less than human, that the fetus was some sort of tumor — a collection of randomly multiplying cells — then all the reasons for killing it would make some sense. But medical science tells us indeed the unborn is human life! Please read the enclosed editorial from CALIFORNIA MEDICINE, the official journal of the California Medical Association, especially the paragraph which says:

> Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intro- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices.

If abortion is a good, or even a neutral act, then some rational argument can be made on its behalf. On the other hand, if it is the killing of an innocent (although possibly inconvenient) human life, then have we really moved very far from Dachau?

That an unborn is a human life is a *medical* fact, not a theological one. Dr. Bernard Nathanson, former Director of the Center for Reproductive and Sexual Health in New York, which is described as "the first — and largest — abortion clinic in the Western World," has had an interesting change of heart and his comments are worth pondering:

> We must courageously face the fact — finally — that human life of a special order is being taken. And since the vast majority of pregnancies are carried successfully to term, abortion must be seen as the interruption of a process that would otherwise have produced a citizen of the world. Denial of this reality is the crassest kind of moral evasiveness.

The argument is often made that the Hyde Amendment denies to poor women the ability to obtain an abortion readily available to the middle-class and wealthy women. The ability of wealthy women to pay for their abortions doesn't make the killing of their pre-born children any more proper. The real question is, shall the taxpayers pay for the killing?

There are many operations wealthy women can afford — cosmetic surgery for example — but ought the taxpayers pay for it? We all have the right of free speech, but must the taxpayers purchase a printing press for everyone who can't afford one? The real issue isn't whether some women can afford an abortion or not. The issue is whether the killing of innocent pre-born human life is the sort of activity the federal government ought to pay for.

Abortion is violence. There ought to be human answers to the human problems of unwanted pregnancies. The women's "right to choose" ought to remain fully valid *until* she conceives. . .and then there is a victim whose "right to life" deserves consideration.

Thank you for reading this letter. At least when you vote you will understand the main thrust of my argument: the humanity of the unborn.

Let me close by sharing with you the views expressed nearly 40 years ago during World War II by Dr. Joseph D. DeLee, a leader in modern obstetrical practice, which was printed in the 1940 edition of the YEARBOOK OF OBSTETRICS AND GYNECOLOGY. Dr. DeLee said:

> At the present time, when rivers of blood and tears of innocent men, women and children are flowing in most parts of the world, it seems almost silly to be contending over the right to life of an unknowable atom of human flesh in the uterus of a woman.
>
> No, it is not silly. On the contrary, it is of transcendent importance that there be in this chaotic world one high spot, however small, which is safe against the deluge of immorality and savagery that is sweeping over us. That we, the medical profession, hold to the principle of the sacredness of human life and the rights of the individual, even though unborn, is proof that humanity is not yet lost. . .

Respectfully,
Henry J. Hyde

The first vote took place June 17 and, while opponents were successful in removing the "life of the mother" exception, the basic amendment was approved (by a 201-155 vote). It was a revelation to me that the pro-abortion spokesmen would admit they were willing to sacrifice both the child *and* the mother to get federally-subsidized abortions, but, as I said in my Floor speech, so be it — in any case, I hope and expect that the Senate will put this life-saving clause back in, and that, when the whole fight is over, we will have the same language we had last year. Meanwhile, as you know, the Supreme Court (June 20) has ruled on several other abortion cases, and as I write this we expect that, as a result of these new rulings, the original Hyde Amendment will go into effect.

I appreciate your interest in all this, and I hope I have supplied the information you want.

[*The full text of the editorial from* California Medicine *from which Mr. Hyde quotes may be found in Appendix B of the Winter 1975 issue of this journal; we reprint below the full text (as printed in the* Congressional Record *for Friday, June 17, 1977) of the "Floor speech" he refers to above; you will note that it includes several quotations from his "Dear Colleague" letter, but we thought it proper to print the entire speech as given.* — Ed.]

Mr. Chairman, I regret that I must abbreviate this amendment to exclude the therapeutic abortion qualification, the absence of which was raised as a great argument against this amendment when it was offered last session. So it went through with no exceptions whatsoever. And in the conference committee we were able to put in the therapeutic abortion exception where the claim for a life is equal to a claim for a life. But I am forced into this position today by points of order. So be it.

Yesterday, remarks were made that it is unfortunate to burden an appropriation bill with complex issues, such as busing, abortion and the like. I certainly agree that it is very unfortunate. The problem is that there is no other vehicle that reaches this floor in which these complex issues can be involved. Constitutional amendments which prohibit abortions stay languishing in subcommittee, much less committee, and so the only vehicle where the Members may work their will, unfortunately, is an appropriation bill. I regret that. I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the HEW medicaid bill. A life is a life. The life of a little ghetto kid is just as important as the life of a rich person. And so we proceed in this bill.

Lest anyone think it is aberrational that millions of people are concerned about our tax dollars paying for the slaughter of innocent, inconvenient, unborn children, I point out that this is no novel position. In most every session, there is a bill, H.R. 4897 this session, which provides that a taxpayer conscientiously opposed to participation in war may elect that his income, estate, or gift tax payments be spent for non-military purposes. This creates a trust fund, the world peace tax fund.

Many people, I am sure, who will speak today against my position, the prolife position, are vigorous supporters of H.R. 4897.

But if it is wrong to spend money for defense of this country, then may we not object to spending millions of tax dollars for the slaughter of innocent children?

I think it is important to clarify the constitutional issue that is involved in this question. In the first place, conceding that under Roe against Wade a woman has a constitutional right to seek an abortion, the question here is whether it is mandatory that the taxpayers pay for that abortion.

The Washington Star's editorial last Tuesday put this issue in perspective when it said:

> The glib argument that it is a denial of the 14th Amendment equal protection to deny medicaid subsidy to abortions strikes us as overingenious.

This Government, through the National Endowment for the Humanities subsidizes writers all over the country. Is it then a burden on our first amendment rights to free expression to deny a tax-paid printing press to everyone in the street who wants one? Clearly not.

The Solicitor General of the United States said this:

> There is no right to receive an abortion. The privacy right vindicated in Roe v. Wade and Doe v. Bolton is not the right affirmatively to obtain an abortion, but rather the lesser right to be free to seek abortion services without governmental obstruction or interference. The Government has no constitutional obligation financially to facilitate the exercise of privacy rights. Its constitutional duty is merely to refrain from violating such rights.

We spend about $50 million a year to pay for about 300,000 abortions under medicaid. The contention has been made by respectable sources that it costs too much to bring these welfare kids into the world, it is much cheaper to abort them. This argument even the Washington Post said was terrible and inhumane.

One of the "Dear Colleague" letters that came from a distinguished Member of this body called the paying of the bill for the welfare kids "economic imprudence." Well, I cannot accept that argument.

We have heard both sides of the argument: If we deny medicaid abortions, the women are going to have kids anyway; therefore, let them have abortions in a safe place. The other side of the argument is: If we deny medicaid abortions, we are going to have an explosion of welfare children, and it is going to cost us a lot of money.

Which way is it? Are we going to have a lot of costly welfare kids or are women going to get their abortions anyway?

As far as I am concerned, every welfare study I have seen shows these children will be born and not slaughtered, and I am prepared to pay the price to see that they get an education, decent housing, and adequate clothing.

I have read every proabortion editorial I can lay my hands on and every article I could find, and they all emphasize that the decent and economic and compassionate thing to do is to let these welfare mothers abort their unborn children. Never do they discuss the essential question, the humanity of the unborn.

What is it that is being aborted? Is it a chicken? Is it a tumor? Is it animal? Is it vegetable? Is it mineral? Is it a bad tooth to be pulled out, or is it a diseased appendix to be cut out and thrown away? No; it is a human being.

Theology does not say it is a human being; biology says it is a human being. Theology does not say, "Thou shalt not kill a fetus"; it is biology that says, "Thou shalt not kill a fetus." That is a part of the tradition and criminal code subscribed to on the part of individuals in every civilized nation. This is what biology says. Let us quit kidding ourselves. This is human life.

Mr. Chairman, let me read a quotation from the California Medical Association Journal. This is not a religious publication, I assure the Members. In an editorial the California Medical Association said as follows:

> . . . It has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices.

So why do we not face up to the fact that abortion does not merely "terminate a pregnancy" nor remove the "products of conception" from a deactivated womb? It is the calculated killing of an innocent, inconvenient human being.

The old argument that we who oppose abortion are trying to impose our religious concepts on other people is totally absurd. Theology does not animate me; biology does. That is a human life; that is not a potential human life; it is a human life with potential.

When a pregnant woman, who should be the natural protector of her unborn child, becomes its deadly adversary, then it is the duty of this legislature to intervene on behalf of defenseless human life.

If that is not so, I do not know why we need this building or why we need law libraries.

By what right do the pro-abortionists seek to deny us access to the political process? That is what we are engaged in today. If they say we have no right to seek to get written into law protection for innocent life, if they say, "No" to us, they turn back 200 years of this country's history.

I used to think that abortionists had a world view of humanity as animalistic,

and that these people feel that the rules of animal husbandry are sufficient to cope with the problems of poverty and need in the ghetto. But I am wrong. I am absolutely wrong.

We think more of animals than we do of human beings. Do the Members realize that today is Whale Survival Day? Today, June 17, in Lafayette Park, there is going to be music, there will be celebrities and whale experts, and there will be whale art, and this is all done in the campaign to save the endangered whale.

There is some kind of schizophrenia that makes us want to protect the snail darter, the baby harp seal, the whale, and the dolphin, and not to be concerned about human life and our unborn children. In our wisdom and compassion we put a limit on the number of dolphins that can be eliminated; that number is 69,910. You kill one more, and you go to the slammer. But there is no limit on the number of unborn children that are slaughtered simply because they are inconvenient.

We know what a dolphin can do. It can jump through a hoop and eat a guppie. But somehow that is more important to this Congress and more important than human beings.

Under the Bald Eagle Protection Act of 1940 it is a crime to take possession of a bald eagle's egg. That seems to be more important than a human life.

Is it not sad that we give more concern to the protection of migratory birds and wild horses than we do to human beings?

I just want to make this comment, Mr. Chairman: We can tell the ghetto mother that she is going to have to fight for everything which the middle-class woman has, such as education, housing, clothing, and food; but then we can say, "We will give you one thing. We will give it to you and we will pay for it. We will let you kill your young."

The problem of the unwanted child is a human problem. The violent act of abortion is no solution. It is the failure to look for a solution.

I was in Jerusalem recently. I visited a building complex to memorialize the 6 million dead in the holocaust. It is called the Yad Vashem. There is a legend there from the Talmud. It says, "He who saves one soul saves humanity."

I ask the Members to think about that when they vote on my amendment.

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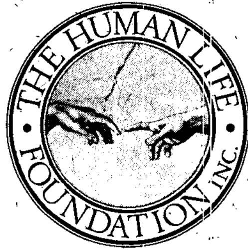
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