the HUMAN LIFE REVIEW

WINTER 1978

Featured in this issue:

Also in this issue:

Wm. F. Buckley Jr. • Prof. Paul Eidelberg • Rep. Henry J. Hyde
Michael Novak • Ms. Harriet Pilpel

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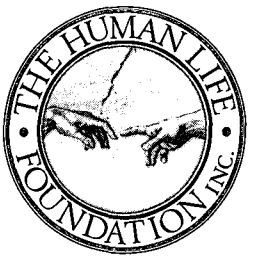

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. . . about THE HUMAN LIFE REVIEW

This issue launches our fourth year of publication. We have in past issues used this space to discuss various matters connected with our progress. This time, we are delighted to provide you with another opinion: we reproduce here a column by Mr. Jeffrey Hart (which was syndicated nationwide late last year). In the main, we tend to agree with Mr. Hart's analysis, and are much obliged to him for it.

JEFFREY HART

A Forum For Many Ideas

Most intellectually significant journals arise out of particular historical circumstances, and derive their energies from them. Thus *Partisan Review*, probably the most influential intellectual journal during the '30s and '40s paradoxically combined modernism in the arts (Eliot, Joyce, Gide, et al) with a Trotskyist brand of Marxism in politics. This combination, inherently unstable, proved to be very productive intellectually.

The *New Republic, National Review, Commentary*—all arose out of very particular, though of course, different circumstances, giving each a particular identity and energy.

Ordinarily in this column I do not call attention to current journals, but when something genuinely distinctive or even extraordinary comes along I feel justified in breaking my rule. For several years, a quarterly magazine called The *Human Life Review* has been publishing a wide range of articles of exceptionally high quality, and it has attracted to its pages both established writers and rising younger ones.

Take the current issue, for fall, 1977. It leads off with an article by Malcolm Muggeridge, the superb British prose stylist and combative Christian convert. Muggeridge must be one of the most articulate individuals alive, and whatever he writes is always worth reading. Here he argues that a "slippery slope" could lead from abortion to euthanasia.

The particular circumstance out of which *The Human Life Review* arose was the anti-abortion movement of the 1960s and 1970s, and it still derives much of its energies from that origin, but its range has been greatly extended.

Abortion, of course, raises all sorts of legal, philosophical and social issues, as well as religious ones, and it is therefore an issue that opens up many other issues.

It is not surprising that some of the most authoritative writing on the abortion issue appears in this journal. Thus, in the fall, 1977, issue referred to above, we have a lucid analysis of the evolving abortion position of the Supreme Court by John T. Noonan Jr., professor of law at Berkeley. But the range of *The Human Life Review* extends far beyond abortion, even in all its wider implications. Thus the facts on homosexuality by two younger but already brilliant writers M.J. Sobran and Ellen Wilson. You may be sure that both of them will be much heard from in the future.

As a sample of the range available here, contemplate the contents of the summer, 1977, issue: Gov. 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 Sullivan on "Euthanasia"; M.J. Sobran on "Pornography." I myself am pleased to be on the editorial board.

If this magazine seems to be your kind of thing, you can get it from The Human Life Foundation, 150 E. 35th St., New York City.

INTRODUCTION

"IF THEIR bishops told them to hush up about abortion tomorrow, most of them would keep right on piping up — in which case the [National Abortion Rights Action League] would call them fanatics for defying their church . . . The idea that anti-abortionism is a peculiarly 'Catholic' position is silly, to begin with. A few years ago it was the position of every state in the Union — and all the laws were passed before Catholicism was even quite respectable in this country."

Thus Mr. M. J. Sobran opens the current issue, once again making the abortion controversy his starting point. But from there he *soars,* in a manner that might well make Mr. J. L. Seagull green with envy, into the highest reaches of the moral dilemma abortion has become for many Americans, devastating along the way the "Catholic issue" argument and a good many more as well, or so it seems to us: Sobran is a most persuasive writer, and he employs here an ingenious device — he really did, he assures us, conceive this article as a letter, and had a real friend in mind — which we hope will fascinate our readers as much as it did us. Some may find his arguments about the liberals and liberalism as surprising as the strong defense of Catholic rights by one who admits only to a "teenage flirtation" with that faith (although, as he says, "I'm still respectful and rather affectionate toward Catholics. What would the word be — Catholophile?"). But then, Sobran's points of view always seem to be unusual, and we hope you will not fail to read them for yourself, for he has seldom if ever been sharper than he is here.

We turn next to the "Euthanasia Debate," which, say Professors Germain Grisez and Joseph Boyle, is following close on the heels of the abortion one (as predicted by not a few observers when the Supreme Court used the term "meaningful life" in legalizing abortion five years ago). The authors hope that this article will prove seminal: that by clearly outlining (as they certainly do) the current trend of "Death-with-Dignity" legislation, they will provoke the kind of public debate that will reverse that trend, and replace it with new formulas that would in fact satisfy *legitimate* concerns (and fears)

generated by modern capabilities to sustain life beyond "natural" limits, and/or in defiance of the human rights of individuals. They say: "We see two things wrong with the "death-with-dignity" legislation . . . First, it opens up possibilities of homicide by omission. Second, it is paving the way for active euthanasia." We think this article *will* attract considerable attention (if only because euthanasia, unlike abortion, is of more than abstract interest to the living), and certainly hope that Grisez and Boyle succeed in producing the serious debate which they consider both necessary and urgent. (Professor Boyle is new to our pages, but both he and his co-author possess impressive academic credentials; Professor Grisez's article on *Abortion in the Soviet Union* appeared in our Summer, '77 issue; it was taken from his widely-known book, *Abortion: the Myths, the Realities, and the Arguments,* which, although published in 1970 — three years before the Supreme Court's *Roe* and *Doe* decisions — remains a standard reference for anyone seriously interested in the abortion/ euthanasia issues.) In any case we hope to have a great deal more on the question ourselves in coming issues.

In fact, we have more in this one. James F. Csank, Esq. (a frequent contributor to this review) follows with an article that not only deals with many of the problems already raised, but also with what is undoubtedly the most famous of recent "death-with-dignity" cases, that of Karen Ann Quinlan, the young New Jersey woman who lives on still, comatose, unaware of the agonizing controversy her name now symbolizes. Csank argues that, in her case, the state courts acted pretty much the way he would want them to in all such cases, leaving "this delicate question where it belongs: with the family of the stricken Karen, to be made after consultation with the medical experts, after consultation each with his own heart." We suspect that Mr. Csank may stir up some controversy himself here, for, given what has happened *in re* abortion, there are those who have concluded that the quality of mercy in both the legal and medical professions has been strained.

From the human rights of the dying we move back to the human rights of the unborn, and how *they* fit in with President Carter's well-known position on human rights for everybody, everywhere. Mr. Edward C. Smith (another newcomer to our pages, and another writer from whom we hope to have more in the future) cautions us that what he says here represents his own personal point of view. And, as he is currently a member of the White House staff, he is in a position to know, from close-up, something about Mr. Carter's personal views too. He makes some telling points, e.g., ". . . the

argument that the Hyde Amendment discriminates against poor women . . . is clearly a camouflage device to cover up something else. The something else being that 'poor women' is a popularly understood euphemism for *poor minority women* — Blacks, Hispanics, Indians, etc. . . ." and ". . . the medical profession . . . represents a very influential lobby in favor of continued fiscal support of abortion." Provocative stuff, presented with considerable and obvious feeling. Don't miss this one.

Next we have what is really a two-part section, with the commentary preceding the main article. For some years now, Professor Judith Blake has been closely following public opinion on the abortion question — both before and after the Supreme Court's 1973 legalization of virtual abortion-on-demand; she has published several articles reporting her findings, most recently a major one in the *Population and Development Review* (March and June, 1977), which we reprint here. The careful reader will, we think, easily ascertain Prof. Blake's own views on the abortion question, which seem to us to make her article all the more interesting. *We* were so interested that we asked Professor John T. Noonan (who, like Professor Blake, currently teaches at the University of California) to provide a commentary. He has done so in his accustomed style, i.e., it was so good that we have, in effect, made it into a separate article.

The reader may choose to read Professor Blake *before* reading Noonan's comments but, either way, the two articles are impressive, and as good an analysis of the available evidence as one is likely to find anywhere. Noonan calls Blake's study a "careful, frank, and complete canvass of opinion," and considers a number of her conclusions as "beyond dispute." (He may be right, but what strikes *us* forcibly is how greatly the answers change along with the wording of the question, which raises some doubt about the art of polling itself!) Once again we hope the interested reader will give both articles careful attention, if only to test Noonan's conclusion that there *is* a national consensus on abortion, and that " . . . the American consensus has not accepted the Court on abortion."

(Our apologies, by the way, for any difficulty in reading the several charts and tables in Professor Blake's article: we have tried as best we could to faithfully reproduce the originals — but *all* such graphic matter confuses *us,* and we may well have passed on our own confusion to you.)

So much for the "main" articles in this issue. We have frequently added appendices before, but seldom if ever have we had such meaty stuff as we have in this issue. *Appendix A* is a short item we received

(via Mrs. Clare Boothe Luce) from Professor Paul Eidelberg, who is currently teaching in Israel. He writes here about abortion and capital punishment, and what he has to say is not only interesting, but immediately relevant to what Mr. Sobran argues in our lead article.

Appendix B is the complete text of a speech given by Mr. Noonan to a "right to life" group in California last fall; he spoke in the place of Professor David Louisell, Noonan's colleague (see the *RIP* in our Fall, '77 issue), who passed away shortly before. Thus Noonan begins with a moving tribute to his (and our) friend before delivering one of the finest summaries we've read to date of the whole abortion controversy, and how it fits into the American historical context. Only the fact that we already *had* an article from Professor Noonan in this issue stopped us from making his speech *another* major article: it deserves special attention, and we hope that you will not fail to read it at *least* once yourself (each time *we* read it, it seems to get better — the Lincoln quote alone is worth a dozen ponderings, for those few words startlingly illuminate what really divides Americans on abortion).

Appendix C is also something special, being the transcript (with only minor deletions) of an hour-long television debate on abortion in general and the Hyde Amendment in particular. Why reprint here the script of a "live" performance that uncounted thousands saw for themselves? Well, because TV allows little time for reflection (some years back, when a noted authority divined that electronic media had replaced the printed message, he wrote a *book* about it), and this debate is worth reflecting on. One of the regular "Firing Line" series hosted by Wm. F. Buckley Jr. (and telecast on the Public Broadcasting System in early November last year), it features Mr. Henry Hyde himself, and Ms. Harriet Pilpel, an official of both Planned Parenthood and The American Civil Liberties Union (and thus well qualified to defend the pro-abortion position) plus Professor Michael Novak (philosopher, author, columnist, etc., who adopts here the "neutral" position of the "examiner"). It turned out to be a memorable evening, with Buckley as hotly involved in the debate as his guests (and Mr. Novak hardly having time to examine anybody!). Yet, despite the extemporaneous nature of the rapid-fire give-and-take, the arguments make impressive reading. You will discover, for instance, that Mr. Hyde really knows what he's talking about on the abortion question (and that he cares deeply about what's involved); that Ms. Pilpel makes as plain a case for the pro-abortionist side as you're likely to find anywhere, and that Mr. Buckley had some very strong views of his own on the abortion issue.

During the debate, Mr. Hyde refers briefly to an editorial that

appeared in *California Medicine* in 1970. He is not alone — the editorial achieved considerable notoriety when first published, and continues to be quoted with great frequency in the continuing abortion debate. That was why we reprinted it in full in our first (Winter, '75) issue. But we continue to get repeated queries about it, and Mr. Hyde's citation makes us think that we should again reprint it, which we have done, as *Appendix D.*

One further note: those who *are* stimulated by the arguments of Professors Grisez and Boyle (i.e., *all* of you, we hope) may want to go even deeper into the questions raised by "death-with-dignity" legislation. We recommend two additional articles: 1) *Compulsory Lifesaving Treatment for the Competent Adult,* by Professor Robert M. Byrn (which appeared in *Fordham Law Review,* October, 1975), and 2) *The Court as Forum for Life and Death Decisions,* by Professor Charles P. Kindregan (in the *Suffolk University Law Review,* Spring, 1977). Both authors, as it happens, have contributed articles to this review.

There you have it, for now: the casual reader may well wonder at this point where we *get* all this stuff — how subjects as distasteful as abortion, euthanasia, etc., can inspire so many people to say and write so much. "Yours must surely be the heaviest journal published in America," a reader writes us, "and I have to screw up my courage to get through each issue . . . but I do, and I thank you for the challenge you provide." Surely he exaggerates. *Sobran* heavy? *Buckley* not amusing? We try our best to make it, if not fun, then worth your while, as good writing *cum* impassioned views should be. We'll try again next issue.

J. P. McFADDEN
Editor

Letter to a Friend

M. J. Sobran

Dear Bob,

I can't tell you how great it was to hear from you the other night; it would sound fulsome to try. I've been so delinquent about keeping in touch, as always. There's something about the distance between us that has made me almost despair of communication; phone and mail alike seem so ersatz compared with the real presence, and looking you in the eye, and drinking and laughing, and slapping my thigh. My mistake. I guess the word for the effect your call had on me is *restorative.* It was just what I needed, at that moment, to remind me of the sustaining continuities of life.

I do hate to think of your phone bill, though. The next call will be on me! But I hope we'll see each other in person before then.

Well, if I was wrong about the value of a phone call, I hope I was equally wrong about a letter: so I write you for once. This is in the nature of an afterthought to our conversation, because I've mulled over your point about us abortion foes and some odd considerations have occurred to me — things I've never heard brought into the controversy before; things not necessarily pertinent in the strictest sense, but perhaps illuminating for all that. I hope they're collected enough to set down.

Ah, how reassuring to know you're still an awful liberal! And still as eloquent and ingenious as ever in defending your perverse positions. Better yet, still as *generous* as ever. I wax mawkish here; but I really have to mention my gratitude not only for the intellectual breadth you always bring to our arguments, but also for the utter lack of spite with which you approach those who differ with you. Your formulations are always instructive, however erroneous I think them (about 100 percent, to be precise); and your manners are always ennobling.

For all that, our discussions of the abortion issue do grow predictable. It's a lot like tic-tac-toe: the possibilities get exhausted pretty quickly. No surprises, no new perspectives. Each of us knows what the other is going to answer to each point made. I find you perfectly capable of following my logic, but strangely unmoved by what seems to me the *force* of what I say. Sometimes you grant me a point;

M. J. Sobran, now a Senior Editor of *National Review,* is also a regular contributor to this review.

but even when you can't refute me, you don't change your mind. You seem to feel that there's an answer somewhere, and that you just haven't hit on it yet. The truth is (of course) on your side, even when you can't muster up reasons to bear witness to it, so to speak.

It just hit me — which is why I'm writing — that there is no reason for me to despise your obduracy. I share it. Everyone does, on things that matter to them. We don't change our minds just because, on a given occasion, we can't come up with a crisp retort. That's the nature of a conviction: when a man really believes something in his heart, as we say, he seldom knows *all* the reasons for it. Yet he senses that reasons exist. They "exist" even before they have been formulated. Formulating them is less a matter of inventing reasons than of discovering them. I remember your quoting an interesting remark of Einstein's to me: he said he preferred Mozart to Beethoven because he felt that, great as Beethoven is, his music seems to be forged out of a tremendous personal will; whereas Mozart's pure and serene strains seem to be a reverent transcription of the harmonies of the universe. That's the nature of a really persuasive argument: it impresses us by its inherent balance rather than by its cleverness. The more clever it seems, the more likely we are to distrust the guy who makes it. Like a shyster lawyer or a glib salesman, he seems to be manipulating reality instead of deferring to truth. Or he may strike us as genuinely brilliant and sincere — but wrong. Real logic is almost unconscious.

You asked me — I think these are your words — "How come you people who are so exercised about what you call the 'right to life' aren't opposed to capital punishment?" I said something about the obvious difference between an innocent life and a man who had forfeited his usual rights by violating another's; you raised the question when life can be said to begin; and we were off, once more, to our usual forensic dead end. The more I pondered your question the more I thought I'd given it the wrong *kind* of answer. First I thought I should have said: "Well, some of us oppose capital punishment, and some of us don't; but abortion is the present issue." Then I got annoyed with the question and wanted to retort: "If you mean to suggest that *we* are inconsistent (or maybe hypocritical), kindly explain to me why *you* people, who are so eager to give the most brutal murderer the benefit of the doubt, aren't willing to do as much for the fetus, whose humanity, though you doubt it, you don't positively deny?"

Technically I guess your question is a kind of *argumentum ad hominem*; and so is my inversion of it. But what these questions really express is bafflement. Both sides in this controversy look at each other with incomprehension. The other side always looks so

irrational, its position so anomalous. They favor one kind of killing (or more accurately, they favor *tolerating* one kind) but are adamantly opposed to the other.

What the question, from either side, means is something like this: "What kind of people are you? What is it that prevents you from seeing things our way? What impels you? What does it take to convince or move you? What makes you tick?"

We aren't always delicate about answering our own questions. God knows how Jeanne and I got on their mailing list, but the other day the National Abortion Rights Action League sent us a form letter requesting money, which solicitation was stimulated by dark warnings about anti-abortion forces seeking to "impose the religious views of a minority" on the whole country. Included was a list of all the Catholic dioceses that had contributed large sums to the nefarious campaign of abolishing "choice." The form letter spoke of the "fanatical zeal" with which these forces were carrying out their campaign. No proof of fanaticism was offered, though — unless they count as fanatical giving time, effort, and cash to causes they oppose. A day or two later I saw a NARAL ad in the *New York Times* — a full page to alert the nation that the "conservative Catholic hierarchy" was bent on destroying the "basic human right" of aborting.

Both efforts reeked with hate. You know me, Bob: I get steamed up every time the Catholic bishops issue one of their calls for huge federal outlays to defeat all those evils they think, in their beatific innocence, huge federal outlays *can* defeat. Yet it wouldn't even occur to me to insinuate that such liberal causes were therefore a popish plot, or to let on that those causes were in any way discredited by Catholic support. The old civil rights movement met with a lot of resistance, high and low, but I don't remember any reputable person taking out ads in the *Times* to point out, in tones of indignation, that the proposed legislation was favored by organized Negro and Jewish groups. Why does this sort of thing have to be directed against those groups for liberals to see how contemptible — how illiberal — it is? And to think this pitch is made in the name of tolerance and pluralism!

Of course I'm glad to have the Catholics on my side on this or any issue. On the other hand, the anti-Catholic sentiment makes me feel as if, every time I open my mouth on abortion, I'd gain in credibility if I swore up and down that I-am-not-now-and-never-have-been an agent of the RCC. The bigots know their business; they spread their slurs without even incurring disgrace; but that's not why I'm writing you, Bob, so I won't dwell on it. I hardly hold you responsible for all that anyway — you're unfailingly lofty!

But anti-Catholicism aside — and I am, if anything, pro-Catholic — it's still an interesting question how Catholicism affects the viewpoints of its members. Minorities always have distinctive slants on things; sometimes they are narrow, sometimes more perceptive than the majority, sometimes both. Ralph Ellison's being black obviously helped him show us that racial problems went far deeper than separate schools and drinking fountains. Several people have argued that Freud's insights sprang out of his special situation as a Jew. I think the same has been said of Einstein, believe it or not. Obviously the point isn't that psychoanalysis or relativity is "Jewish" science, positively or negatively, but that the unconventional situation of the minority group may give them unconventional perspectives, which may, valuably, supplement the received version of truth.

I think the Catholics too have a lot to tell us about ourselves. For that matter, I think I can tell *them* a lot about themselves. Did I ever tell you I was once Catholic? I had what you liberals call a "youthful flirtation" back in my teens. (Don't let this get back to NARAL.) Unlike a lot of people who are raised Catholic and quit, I left the Church on good terms, and I'm still respectful and rather affectionate toward Catholics. What would the word be — Catholophile?

The liberal anti-Catholic view (there's an oxymoron for you) fails to account for two facts. One is that many Catholics disregard the Church on abortion, as on birth control and other matters. As far as abortion goes, I wish they were as submissive as they're supposed to be! The other fact is the obverse of this: the ones who oppose abortion, as they're taught to do, oppose it, in many if not most cases, much more strenuously than they're required to. The bishops can tell them what stand to take — but not how to take it. The bishops don't order them to put bumper stickers on their cars — let alone to go out and march, or drive across the country to Washington to demonstrate. The countervailing influences of a pluralistic country affect them along with everyone else, and they're not even under any obligation to get inflamed about anything in particular. So how come they're inflamed? For the same reasons (I assume) that I and many other non-Catholics are inflamed. If their bishops told them to hush up about abortion tomorrow, most of them would keep right on piping up — in which case, the NARAL would doubtless call them fanatics for defying their church.

The reason I'm still pro-Catholic, far more so than most ex-Catholics, is that the Catholic instincts seem to me so very sound. Time after time the church has come down, historically, on the sane side of its own internal controversies. Like the American Constitution, in that its organization is highly resistant to fads sweeping over it.

How else could it have lasted? Most people *are* sane, and nothing that defies their common sense can last long. If you and I had lived ten centuries ago, we'd have been Catholics as a matter of course. The larger and more comprehensive the Church was spatially and numerically, the less likely it was to be eccentric. And what is true of extent and numbers is true of time: the more centuries it has satisfied large numbers, the likelier that it is either true or at least not incompatible with good sense. I know very few "enlightened" people who couldn't profitably take thinking lessons from Thomas Aquinas.

The disputes about heresy within the Church have often involved a question of principle: whether the specifically Christian doctrines should be prescinded from the context of ordinary ethics. Instances: Does the injunction to turn the other cheek require one to abjure self-defense? Does the idealization of virginity mean that the flesh is in itself evil? Does the doctrine that salvific grace is utterly unmerited mean that good works are unnecessary — or that the believer may sin with impunity? Does the obligation of universal charity supersede special duties to one's own kin?

I, for one, am grateful, for the sake of our civilization, that the Catholic Church has always said No to such questions. The heretics have for the most part been men who wanted to take some particular Christian virtue and drive it into the ground. It isn't for me to say that the orthodox were better Catholics than the heretics; but they were the wiser men — and precisely because they held that being a Christian didn't require you to stop being a rational animal.

The idea that anti-abortionism is a peculiarly "Catholic" position is silly, to begin with. A few years ago it was the position of every state in the Union — and all the laws were passed before Catholicism was even quite respectable in this country. (I don't think it ever really has been, though it came pretty close by the early Sixties. And some Catholics think it's a scandal that it got so far "tamed." But let that pass.)

The idea that one can only come by anti-abortionism at the feet of the Pope is worse than silly: it is offensive. My own views were formed otherwise. They spring from feelings so simple it's almost embarrassing to discuss them. My mamma taught me! Not that she ever said anything about it directly. When she was carrying one of my younger brothers — I must have been eight or nine — she used to let me put my hand on her stomach (she wouldn't have said "tummy"; she was a pretty no-nonsense woman) and "feel the baby moving." There was no thought, of course, that what was moving was part of *her*. She couldn't control it; it had a will of its own, and by the most redundant inference in the world a life of its own. It was somebody

else, but also a member of us. To say that abortion was wrong would have been gratuitous. A bit like saying that murder, or theft, or arson, was wrong. You learn these things gradually, organically, implicitly, before they even have names. By the time I found out what abortion was I knew it was wrong. The notion that you learn moral principles by rote, in express lessons (let alone by papal brainwashing), is fatuous to begin with. All you learn didactically are a few refinements, extensions, applications, which are plausible only so far as they're congruent with a more generalized sense of right and wrong.

In fact the pro-abortion side is the one that has to do all the preaching, and whose didacticism is heavily reliant on rigid slogans and semantic evasions. I keep mentioning the fastidious euphemism "terminate." That's Latin (so to speak) for kill. Just as "fetus" is Latin for unborn child. Nobody would mind if you were to speak of having your appendix cut out. But they'd flinch if you spoke of having your fetus cut out. The locution would offend both reason and moral sense: your fetus isn't yours in the same sense that your appendix is yours. That's why it's the pro-abortionists who are so eager to turn attention away from the sheer physical facts of the "procedure"; they always sound so bureaucratic when they talk about it.

I mean, isn't it really more plausible to think that we, now, are in the grip of a sudden massive departure from common sense, than that the consensus of our civilization has been all wrong? Of *course* it's more *likely*. Why not admit that? Yet the liberal side of this argument refuses to entertain that even as a possibility. All their opposition is "fanatical," and there's an end on't. That there was thought to be another side of the question for hundreds of years counts for less than nothing with them.

You see, my dear friend, something very large and important and strange is going on. Abortion is just a part of it. I'm not writing to persuade you about that issue, but to try to share my glimmer with you. Abortion is only one (albeit a typical) point of difference between two types of men. Let me call your attention to a few parallel cases.

A few years ago, before the Supreme Court ruled that abortion was virtually a constitutional right, the liberal argument was very different. In those days we heard about the necessity to legalize it in cases of "rape and incest." So help me, you'd have thought the nation were in the throes of a rape and incest wave. *Everybody* was talking rape and incest.

Then the Court spoke, and a funny thing happened — namely, nothing happened. You'd have thought at least a few voices would

rise to say, "Whoa! We were talking *only* about rape and incest. Under normal circumstances there's no reason why a woman should just get an abortion because she feels like it." No, now we heard all about other hard cases — poor, single, black women, and so forth. Then, before you knew it, *every* unwanted pregnancy was a hard case. To be subsidized, if necessary, by the government. A "basic human right." A matter of "private conscience." Few of these partisans of pluralism were overcome with solicitude for the consciences of those who didn't want their money used for this exalted purpose. An odd notion of "conscience," to be sure; the liberal propaganda was heavy with insinuations that the women who wanted to abort their children were far more altruistic than those who wanted to prevent them, or at least to refuse to co-operate. Private hospitals — including Catholic ones, of course — were sued to force them to permit abortions within walls consecrated to the view that life is sacred.

Meanwhile, have you ever heard any pro-abortionist qualify his position? Naturally they object to this designation: "We're not pro-abortion. Abortion should never be forced on anyone. We're pro-choice." But when did any of them ever concede publicly that there are limits to this "basic human right"? I've yet to come on one of them acknowledging that there are circumstances when it might actually be *wrong* to abort. I notice that some young couples, upon determining that the child they're expecting isn't the boy they wanted, aborting her and trying again: the child as consumer item. We've come a long way from rape and incest.

Well, take capital punishment. Once again the liberal side mustered plausibly rational arguments: capital punishment was arbitrarily enforced, it was barbaric, it wouldn't deter, the offender might be rehabilitated, etc., etc. Criminologists, philosophers, legislators answered each of these objections and constructed tight laws and models for legislation. No dice. It turned out (surprise) that the liberals just didn't like capital punishment, and nothing was going to persuade them that it might, in some cases, be called for. They never came right out and said that nobody could ever *deserve* the death penalty; as in abortion, they tend to shrink from the central issue, preferring to accuse their opponents of barbarity rather than refute the tough arguments. And of course there are cruel and unfeeling people on every side of every issue, so they were on safe ground for public controversy. They gain and hold ground largely by flaunting their "compassion"; I remember seeing Tom Wicker, in one of his columns, refer to the men on Death Row as "victims."

Another case: freedom of expression. It's treated as an absolute

by people who in other areas (abortion, say) profess to disdain the very idea of absolutes. Now I grant you it's hard, in a world of competing claims and plural values, to make out unqualified claims for any right. So the case for free expression *a outrance* has leaned heavily on what I call the bogus prophecy. You know — if you ban *Hustler* you'll wind up banning *Hamlet*. I'd expect this from the editor of *Hustler* (it doesn't seem to have occurred to the author of *Hamlet*); but from professors of law! It's a little like saying that if you lower the speed limit to 55 you'll wind up banning automobile travel.

Still, the case against censorship, framed this way, at least acknowledges a scale of values: it implies that *Hamlet* is really better than pornography, and that the point of tolerating porn is to protect *Hamlet*. That's being morbidly prudent, but it shows a heart in the right place. (I think the toleration of porn may actually work to the detriment of Shakespeare, on the principle of Gresham's Law, but never mind.)

Unfortunately, this line of argument too turns out to be a pretext. It conceals a really transcendent impulse to abolish-censorship-no-matter-what. I give you Alan Dershowitz — Harvard Law School, American Civil Liberties Union, and all that. He recently stuck up for Alan Goldstein, renowned publisher of *Screw* and *Smut*. (Talk about truth in labelling.) Here is what Dershowitz said: "*Screw* is a despicable publication, but that's what the First Amendment was designed to protect." *Nota bene*, my friend! Filth is not the sadly unavoidable by-product of liberty, but its very *raison d'être*.

You see the structure of liberal argument? At first we get the hard cases: the masterpieces that some old prude of a censor might consign to the flames; the deformed child; the executed innocent. Once the law has been pried open with these wedges, the original qualifications fall away, like the burnt-out stages of a rocket that have ceased to advance the trajectory. And we get *Screw*, abortion on demand, and murderers back on the streets.

I don't accuse *your* side (let alone you yourself) of simple hypocrisy in all this; far from it. I doubt that most of you even understand the impulses that drive you. You're all good Americans, Bob. *Too* damn good. I'm echoing my beloved Chesterton:

> "The modern world is not evil; in some ways the modern world is far too good. It is full of wild and wasted virtues. When a religious scheme is shattered (as Christianity was shattered at the Reformation), it is not merely the vices that are let loose. The vices are, indeed, let loose, and they wander and do damage. But the virtues are let loose also; and the virtues wander more wildly, and the virtues do more terrible damage. The modern world is full of the old Christian virtues gone mad. Thus some scientists care for truth; and

> their truth is pitiless. Thus some humanitarians only care for pity; and their pity (I am sorry to say) is often untruthful. For example, Mr. Blatchford attacks Christianity because he is mad on one Christian virtue: the merely mystical and almost irrational virtue of charity. He has a strange idea that he will make it easier to forgive sins by saying that there are no sins to forgive. Mr. Blatchford is not only an early Christian, he is the only early Christian who ought really to have been eaten by lions. For in his case the pagan accusation is really true: his mercy would mean mere anarchy. He really is the enemy of the human race — because he is so human."

Couldn't have said it better myself.

Chesterton was writing against the liberalism of his day, the early 1900's. And what was true then in England is even truer here and now. Liberalism is the child of Protestantism. But England at least had a semi-Catholic tradition and establishment. America was born of dissent — it was founded largely by Dissenters, after all, for whom Romanism and Anglicanism were both hated memories. The Protestant tradition bifurcated early: into a set of orthodoxies for whom the Reformation confessions were permanently sufficient and definitive; and into a set of more liberal sects, for whom reform was less a *fait accompli* than a perpetual motion of further refined dissents. We hear much about our horrible puritan heritage. But I think we have another heritage that's equally important.

Think for a minute of the rhetoric of educated people in this country. By educated I mean no particular compliment, nor for that matter derision. But education isn't so much the training of the intellect as what educationalists themselves are in the habit of calling "socialization." It's largely a matter of initiation into a certain literate culture. Its devil words include *medieval, Dark Ages, inquisition, dogma, crusade, infallible,* and so forth, spoken with disapproval or irony; collectively they show that we are trained to look on the period of Catholic ascendancy as a black and benighted one for civilization. But it's not limited to Catholicism: the same habit of condescension applies to any *orthodoxy* or *establishment*; to call someone a *heretic* is even a kind of compliment, implying not that he's mistaken but that he's bold enough to make up his own mind. Even the phrase *witch-hunt* derogates our own puritan heritage, as in fact does *puritan* itself. *Pious* and *taboo* make fun of the whole idea of reverence; to call a book *irreverent* is to provide fetching copy for the cover of the paperback edition. Anything even *conventional* is suspect. All these locutions, invoked so easily, so automatically, with no thought of their implications, show how liberalism is in our cultural bones. It, and not all the rival traditions it implicitly deplores, is presently the dominant tradition in America. It's ab-

sorbed so thoughtlessly by people who fancy themselves pensive and independent-minded.

I don't know what to call this heritage except liberalism. But let's remember its genesis. It began as an attempt to purify puritanism. You have to remember that Calvinism didn't reign unchallenged as America's orthodoxy; there were other, more optimistic sects: Unitarianism, Universalism, the Society of Friends, who made tolerance, private conscience, the Inner Light, and individualism supreme principles — not all at once, perhaps, but with a momentum that was obvious from the start. Other varieties of American religion have partaken of them and tried to follow them; and even Catholicism, not only here but in other countries with strong Protestant traditions, seems to be adapting to the model.

Credally, the process has been one of streamlining. Articles of faith have been successfully dropped: the visible church, the grace-conferring sacraments, the Virgin Birth, the divinity of Christ, hell, a personal God. Their principle being dissent, their implicit (and sometimes open) standard of progress is the divergence they manage to achieve from the Catholic model. A Catholic friend of mine likes to talk about "the great religion of modernity, non-Catholicism."

You've probably heard puritanism spoken of as a "cruel" faith. That's an odd notion, logically speaking: the point is whether it's true. You don't call a man cruel for believing that all of us are going to die someday. C.S. Lewis speaks somewhere about the way everyone talks as if St. Augustine, who believed in infant damnation, must have somehow *favored* infant damnation.

Well, if the Calvinist doctrines were "cruel," Universalism — the reaction — was eminently "kind." It taught that all men would be saved. This was obviously inverted Calvinism, predestination in reverse: mercy run amok, fanatical forgiveness, grace inflation. Do your damnedest — you *still* won't be damned. How American! Others might say that God is all-merciful (Calvin himself might say it, in a sense). Leave it to us to say that God is nice.

Given the Christian texts, this notion obviously belongs less to theology than to pathology. It flouts common sense.

Let me backtrack. I hope you see why I think of Catholicism as a *sensible* religion. It goes between the extremes of Calvinism and Universalism without becoming a vapid Deism. It respects the arbitrariness of things, and the decisiveness of life. But we'd be guilty of a certain lack of empathy and imagination if we failed to understand the original reformers. Catholicism claimed apostolic authority, the keys to the kingdom of Heaven. It represented the "Communion of Saints," the body of the faithful who assisted each

other to salvation by fortifying each other in the sharing of the grace corporately bestowed on the Church. The sacraments were the material channels of grace, the priests were the ministers of the sacraments, the bishops were the lords of the priests, and so on. So if believers could help each other to Heaven, they depended on each other; and it followed that they could impede each other. In short, they could help damn each other. A corrupt church structure was for that reason a horrible thing to contemplate.

So the reformers abolished the visible church. Haunted by damnation, they referred the matter straight to God, who was above corruption. If you think the early Protestant predestinarians were cruel men (and they concededly weren't what you'd call "nice"), you'd have to remember that the idea of God blessing and damning people in advance seemed far more bearable to them than the notion that one's salvation depended largely on one's fellow sinners. I suspect that individualism arose less from faith in the individual than from despair of society. The Reformers thought that, in making individual salvation directly reliant on God, they were eliminating the corrupt middle-men who presided over the church on earth. I imagine the appeal of Calvinism was much like the appeal of Communism in our day: the idea of it appeared severe but ultimately humane, at least until it was tried. (Calvinism has a much better record, I must in fairness add.)

Naturally the pope became the Antichrist. This was not mere polemical invective, but the ecclesiological expression of the idea that society — the visible church — actually imperiled salvation.

In secular terms, Catholicism corresponds to the notion that people can actually help each other, not only materially, but also morally and spiritually. The corollary, and a fearful one it is, is that people can also make each other worse — twist, deprave, seduce, corrupt, torment, and madden each other. Parents, brothers, friends, whole groups and societies often do it, to a greater or less extent. ("Cruel" facts, these, but facts.) The secular form of Calvinism is that the individual is utterly determined. The secular form of Unitarianism is that the individual is utterly self-reliant. The secular form of Universalism is that the individual is good, and that though social influences may make him misbehave, they can't essentially corrupt him.

You see what I'm driving at. Liberalism is secularized Universalism, a benignly hypertrophied individualism. It's a commonplace that liberals always blame society, bleeding-heart-wise. I'd like to put it a little differently — not much, but enough to make a difference. They are driven by an irresistible compulsion to affirm *indi-*

vidual man at the expense of *social* man. Each of us is both, so it's not just a matter of sticking up for the person against the group: it's a matter of encouraging one aspect of the person, the asocial part, against the community-forming aspect, the part that wants to form real psychological and moral bonds with others. The lonely dissenter, the deracinated criminal, the pornographer, the lesbian, the mother who doesn't want to be a mother — these are the natural objects of almost unqualified and measureless liberal sympathy. They are usually presumed "conscientious." Liberal "social justice" doesn't mean the sustenance of real social bonds of kinship and citizenship through individual moral discipline; it means pooling all the material assets, liquidating them, and divvying them up with rough (and impersonal) equality. Property, relatedness, tradition, language — these, to be liberal, are not bonds or matrices of personal meaning but "barriers." When the liberal favors censorship, it isn't because he fears moral corruption — he doesn't worry about obscenity, and he mocks those who do — but because he thinks it may stimulate implicitly innocent beings to bad (i.e., pain-inflicting) behavior; hence what he wants to censor is violence, and little else.

I said before, probably cryptically as far as you're concerned, that the Catholic Church respects both the arbitrariness and the decisiveness of life. I mean that it accepts what all normal people accept: the fact that some decisions are really fateful. Most of us even celebrate that fact. We have all sorts of ways of expressing this socially.

Let me put it this way. We (I mean my side in abortion and capital punishment, etc.) look on certain ties as very binding. We think of marriage as permanent; on sex as forming a kind of union that shouldn't be abandoned to levity; on privacy and decency as the public aspect of the sense of the sacredness of personality and its ties to special others; on infidelity as a violation of the primary community the individual belongs to.

I say "belongs to"; because we do feel that the individual belongs to society. Not to the state, and not (except in a very attenuated sense) to the whole human race. (Liberals are forever talking about "humanity," even while they undermine particular links between people.) He belongs to the people he is really related to; they have real and objective claims on him. He isn't their slave, of course; he has claims on *them* too; he doesn't belong to them as their property. We mean by such phrases that his membership can't be cancelled at will. He's always his parents' son. The vow he takes to his bride doesn't just express his sentiments; it creates a new relationship, almost a new society. He may even feel nothing; but that doesn't

make the vow less binding. Likewise, he may choose not to be a parent; but he may not choose to cease being a parent.

We have all kinds of rights to dramatize and celebrate the moment of commitment: the moment when the individual acquires or takes on a new social identity. Baptisms, circumcisions, confirmations, bar mitzvahs, initiations, graduations, ordinations, swearings in, coronations: we prefer not to do these things abstractly or perfunctorily, "on paper."

We give gifts and feasts on such occasions, and obviously the point isn't mere gain or nourishment. The value of these things is in the links they express: they make no sense unless we accept the *metaphysical* reality of society — the fact that some satisfactions, and some of the most human satisfactions, can't be enjoyed by a solitary individual. They are shared, or they don't exist. My favorite example, odd and out-of-the-way as it is, is telling jokes. A joke just doesn't fit into a Hobbesian scheme of atomized individuals. Wittgenstein says there can't be a private language, i.e. one meaningful only to a single person. I say there can't be a private joke!

We also believe in rules, objective codes that it's incumbent on members of society (who after all belong to each other in varying degrees) to observe. There may be more or less room for exceptions, but that doesn't invalidate the rules. There can't be a private rule either, I suppose — nor an ineffable "private conscience."

But we do have ceremonies for breaches of rules, if they're serious enough. Trials, excommunications, executions, etc. Why kill a murderer? Why punish him at all? (There is a book by a famous psychiatrist titled *The Crime of Punishment*!) Why not just lock him up, as comfortably as possible, until we're sure he won't do it again? Shouldn't we be satisfied with protecting ourselves from him? Maybe we should be satisfied with that, but the interesting fact is that we aren't. Call it vengeful, but there it is. The average man on my side will tell you that you have to make examples of people, but frankly I think that's too crude a way to put it — especially if it means that the point is to instill sheer physical fear into prospective offenders.

Put it the other way around, and my average man will be uneasy. Why bother to *try* a murderer? Unless there is real doubt that he did it, why not just take him out and kill him? I think the answer is that we, as social being, need the rituals. The old and customary rites of justice were ritualistic because they aimed at something beyond mere self-defense, even beyond justice itself. In "making an example" of the malefactor, the community was reaffirming its commitments to all its members. He was made an example of less in his punish-

ment than in his trial and sentencing. His crime had somehow desecrated the community he belonged to; and precisely because he himself was a member who had done violence against other members, he had to be formally cut off from the people he had done *implicit* violence against, not just his victim; it would seem odd, wouldn't it, to try a stranger who, however brutally and maliciously he had acted, didn't even know the precise laws he had broken or the language in which the trial was conducted? The accused must be a participant. That's almost the point of the trial. He couldn't be taken out and shot like a mad dog; he had to be "thrown out of the club," excommunicated, ceremonially disgraced, formally stripped of his rank in society, officially cursed, before the community could visit sheer physical retaliation on him. A trial is not a veridical necessity but a social one. It's witnessed; shared.

As I say, the liberalization of society is nothing new. It's been going on for a long time, getting more explicit, dropping the rational facade it had to maintain for a long time. I suppose there's no better illustration than marriage (my last illustration, I promise). At one time the rule was quite objective: regardless of the sentiments of the parties, marriage was indissoluble by virtue of the formality of the vow. There were parentally arranged marriages, marriages of state, whatnot. Then came the romantic bourgeois marriage, based directly on personal congeniality. It made sense, too: and the individual was directly responsible for his own choice.

Then a funny thing happened: divorce. Ah yes, at first the hard cases: adultery, desertion. Divorce was rigorously conditional. Then — naturally the hard cases multiplied. Alcoholism, cruelty, *mental* cruelty, incompatibility. . . no-fault divorce. In fact the very idea of marriage is in question. How can you promise or predict future impulses? It's like selling yourself into slavery, right? The past self, discarded and disowned, becomes an oppressor of the present spontaneous self. We hear of atomic individualism, but this was fission, the splitting of the atom. I dissent from myself. It makes sense in a way: if you're 40 and have been married for 20 years, your marriage was made by a 20-year-old kid you barely remember or resemble. That's worse than having had it arranged by your parents! At least they're old enough to have some sense! You've just got to be able to get out of this! Whether or not we believe in marriage, we believe in divorce; the exception has swallowed up the rule. And that's liberalism for you. It believes not in rules, but in exceptions. Everyone is quite unique, and any social prescription is an affront against that uniqueness. "Society," for the liberal, is not something layered, structured, or connected that the individual belongs to or

participates in, but a mere aggregate of other individuals, utterly external to him.

And to me, the most curious thing about it all is that this tradition regards conscience as something actually opposed to rules, laws, and social life. Conscience isn't thought to be an inward response to objective moral circumstance, but a kind of private voice, as in Shaw's *St. Joan*, that nobody else can hear — or criticize according to rational criteria. (That's partly true of some non-liberal species of Protestantism too — Pentecostalism and so forth.) In his preface to the play Shaw actually says that he wrote the thing in reply to Rome's canonization of her — in order to show that, far from a Catholic saint, she was actually a Protestant. And of course Shaw approves. The point of the play is that she is a *Protestant* saint. Of course we have to qualify that: she is a *liberal* Protestant saint, a saint of dissent.

You may remember Burke's remarks on the non-conforming Reverend Price:

> "His zeal is of a curious character. It is not for the propagation of his own opinions, but of any opinions. It is not for the diffusion of truth, but for the spreading of contradiction. Let the noble teachers but dissent, it is no matter from whom or from what."

That's the point. This Dissenting tradition, now called Liberalism, is really a religious tradition, despite its secular trappings. If it really were secular and earthly, it would be more concerned with the real content of dissent; instead it celebrates the mere *posture* of dissent, protest, witness, "conscience" in its peculiar sense of the term. A kind of content can be gathered from it, inevitably; but there is something disoriented about its rhetorical (and frequently practical) emphasis on individualism, its assumption that the moral sense is socially inscrutable and, *for that very reason*, entitled to the respect of society. It's almost the deification of the individual: Ronald Knox has even traced the religious pedigree of this tendency in a book called *Enthusiasm* ("enthusiasm" meaning, originally, the notion of a divinity within you). The dissenter is a sort of modern oracle. Dissent has sacramental status: it's regarded as the outward and visible sign of an inward grace.

Think how many of our modern saints are dissenters, and how, retrospectively, older figures like Socrates, Jesus, Galileo are cited with approval less for what they affirmed than for the mere fact that their affirmations put them at odds with the majority. "In the liberal's history book," Willmoore Kendall wrote, "it is always Socrates and the Assembly, always Socrates who is 'right' and the persecuting multitude that is wrong." The Assembly, the System, the Establish-

ment — poor things! Not only are they always wrong; they appear to have no rights or legitimate concerns *qua* majority. I remember, when I was in college, asking a hyper-liberal prof of mine what the purpose of education was. He paused and gazed at me with ineffable solemnity before replying: "To maximize differences among individuals."

It's obvious — isn't it? — that the whole point of morals and manners is to teach us not that everyone is absolutely unique, but rather that everyone is analogous to ourselves. That is the point, too, of capital punishment: it implies that taking another's life is so serious a crime that the only suitable earthly expiation is to forfeit your own. The point of forbidding abortion is to imply that you yourself were a fetus once, that the unborn child is already a member of the human community, and that it is wrong to interrupt a life in that helpless formative period that the rest of us were fortunate enough to survive. It's no derogation of individual differences, or of the genuine splendor of human variety, to insist that no differences can override the basic claims of fairness that connect us all.

Is this a "religious" position? It seems more compelling in purely common sense terms than the contrary assertion. In fact if any doctrine is "religious" in the sense of based on a purely non-rational intuition, it's the idea that our differences are so absolute, and all morality so subjective, that there can be no consensus, religious or secular, on whether a given act is moral or immoral. We assume the falsity of this position every time we discuss ethics.

I have to qualify what I said earlier. It's true that I have a strong affection for the kind of old-fashioned Catholics I grew up among. But maybe the key part of that is "old-fashioned," because I feel much the same way about the ordinary Protestants I knew, and about a lot of the Jews I meet in the East. They are people with a strong sense of fairness and decency, but by no means what you'd call idealists. On the contrary they are very earthy; they live by rules of thumb, and expect others to; they will admit exceptions to this or that rule, but only as the cases arise, without a doctrinaire anxiety to accommodate every conceivable eccentric. On the other hand I can't *stand* those Catholic types, those Unitarians *manqués*, who want to strip down the dogmatic content of their faith to a seemly minimum, and adapt its morality to the convenience of the trendy anomalies. I suppose every religion is divided between those who want to extract its essence and get drunk on the stuff, and those who accept their religion as a real, complex, and undefinable *thing*, like a child, that has to be taken sensibly, a little at a time. Life can't be resolved all at once, and neither can any important part of it. Ordi-

nary people accept life's pluralism. By "ordinary people" I'm not referring to fanciful shepherds and cobblers: I mean real people who don't get carried away by abstractions — including liberals, when they're not busy being liberal. My "party," so to speak, has its philosophers too: Aristotle, Aquinas, J.L. Austin, Johnson, Newman, Burke, Chesterton. To you I yield, with great alacrity, Sartre, Russell, Hobbes, Descartes, the great purists.

How silly it all gets, Bob! A few months ago, when Larry Flynt was indicted for peddling obscenity, a bunch of highbrows got together and signed a petition on behalf of "Larry Flynt — American Dissident." Even most liberals, whose taste is more reliable than their ideology, were appalled at the implication that you can't distinguish qualitatively between a pornographer and a Solzhenitsyn. As if every society didn't recognize the principle of decency in one form or another. The ironies: these liberals who proclaim the uniqueness of everyone, even while they themselves are so predictable, so sociologically uniform, so ethnocentric.

This last point fascinates me most of all. I've been trying to give you an idea of why the tradition of dissent seems to me so sterile. At least Christianity in its old dogmatic forms converted millions, and held the imaginations of various races tenaciously for centuries — still does. Liberalism, on the other hand, has converted almost nobody. It exists only where rational Christianity has putrefied; it appeals to very few outside Christendom; and to fewer and fewer within. It's really a Christian sect itself, trying to salvage certain details of Christian ethics while giving up on the doctrinal underpinning. If you want really liberated human reason, you have to detach yourself from liberalism. When I call it ethnocentric, I mean that its votaries are unconscious of the actual sources and the cultural peculiarity of their own views and reflexes; that's why so many of them think everyone who disagrees with them must be peculiar — fanatical Catholics, and the like. They really can't understand how any lucid being can fail to agree with them. They believe so earnestly in "education": they think every child is a little incipient liberal, and that the real mission of education is to free the young from ancestral and parental atavisms.

Ah, but they mean well. That's the touching, even moving, part. Liberalism wouldn't have its own vitality if it didn't speak to some real Christian impulses. In fact I almost hesitate to liberate *you* from liberalism: not that I think my chances of doing so are very good! But almost everything I love about you is related to your generosity, your charity for everyone you encounter, your concern — above and beyond the call — for the unfortunates of this world: all the

things that make you not only a professing but a practicing liberal. Of course you could have these virtues without that creed. But the fact is that in your case they go together, and I think we have to honor even errors we deplore for the genuine, if partial, good they do. I can say without mockery that some of *my* best friends are liberals. And how niggardly it would be not to admire similar virtues in many who aren't my friends.

Still, I know that your virtues finally do more to vindicate my creed than yours. They are, after all, the virtues of a friend, loyal, honest, witty, eloquent, good-humored; the kind of virtues that bear their real fruit in intimacy, enlarging the people around you. That's why it's so moving to me to see your children every time we manage to get together; they're so bright and sprightly, with so much more energy than their beleaguered and bedraggled father, but owing so much of their charm to that venerable fount. The things you have given them — and me, for that matter — can't be broadcast. They are social virtues, but the level of society they belong to is that of close and enduring unions; they can't be imparted to "society" as a whole. Such is the condition of life, as Dr. Johnson would say. Why not accept it? Why not rejoice in it? And having done so, why not draw the relevant conclusions for social and political life? The goods of the social level can't be translated into political benefits. Most people know these things implicitly. People far less brilliant and less interesting than you.

Well, let's keep in touch. I'll keep undertaking to deprogram you from your liberal pixilations, but it will be less difficult (and much more pleasant) when we're face to face. Meanwhile, just keep repeating to yourself: "Deficit spending is *not* a victimless crime." That will be a good beginning.

Warmest regards to you and your long-suffering wife.

An Alternative to "Death with Dignity"

Germain Grisez and Joseph M. Boyle, Jr.

THE EUTHANASIA DEBATE has begun. Opinion polls across the United States reveal increasing public acceptance of euthanasia. In 1976, California enacted the first "death-with-dignity" legislation.[1] In 1977, more or less similar bills were introduced in the legislatures of at least forty-one states. In seven of these states (Texas, Oregon, Idaho, Nevada, North Carolina, New Mexico, and Arkansas[2]) bills were enacted into law by mid-1977. Some of the 1977 statutes are objectionable in certain respects in which the California Natural Death Act is not. The Idaho, Nevada, and North Carolina laws are looser in their definitions of key terms. The New Mexico and Arkansas laws enact a "right to die" and extend the exercise of this right to minors by means of proxy consent. The Idaho statute uses "right to die" in its title. The California statute contains a section explicitly excluding mercy-killing; its avowed purpose is only to recognize the right of a competent adult to direct a physician to withhold or withdraw life-sustaining procedures in the event of a terminal illness so that nature can take its course.[3] The Idaho, New Mexico, and Arkansas laws do not authorize mercy-killing, but neither do they explicitly exclude it.

The "death-with-dignity" legislation has been widely criticized, mainly for intruding into the already delicate physician-family-dying-patient situation unnecessary legalisms which do little to facilitate exercise of the patient's rights. In fact, the new laws may have the effect of infringing on the patient's rights by reinforcing the already very great authority of the physician and by implying that patients who do not meet the formalities of the statute must be kept alive by all available means — must be treated to death.[4]

We see two things wrong with the "death-with-dignity" legislation which we consider even more serious. First, it opens up possibilities of homicide by omission. Second, it is paving the way for active euthanasia.

As to the first point: if these statutes authorize physicians to withhold or withdraw treatment in any case in which they would not be allowed to limit treatment without the new laws, then in some instances of that type of case mistakes will be made, treatment

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limited, and the death of patients hastened against their will. Moreover, some of the statutes are seriously weak both in their definitions and in their formal requirements for making and certifying a directive. Such statutes — notably those of New Mexico and Arkansas once more — lend themselves to abuse by one forger and two cooperative physicians, who can dispose of any noncompetent adult (who needs medical treatment to survive) simply by not administering that treatment. A case which, without the statute, obviously would have involved gross negligence thus becomes a case of "death with dignity." If there is an investigation, there is a natural cause of death and prosecution for negligence is excluded.

As to the second point: the old Euthanasia Society, founded in 1938, was going nowhere in 1967. Members organized a new unit, the Euthanasia Educational Fund, to disseminate information. At or about the time this was done, Dr. Luis Kutner suggested the "living will" — not what someone committed to euthanasia really wants but something in the neighborhood which has acceptability that mercy-killing lacks.[5] As anyone doing research on euthanasia and related topics discovers very rapidly, the literature on death and euthanasia-related questions quickly began to burgeon; since 1973 the rate of growth has been exponential not only in the popular media but also in medical, legal, and other journals. At the beginning of 1975, the old Euthanasia Society was reactivated as the Society for the Right to Die, an action-union to press for legislation.[6] The Euthanasia Educational Fund and the Society for the Right to Die have the same office, and fifteen of the seventeen members of the officers and board of the latter organization in 1976 were among the officers, board, or committees of the former organization in 1974.[7] In 1975-1976 the Karen Quinlan case was very much in the news. This was the event the pro-euthanasia movement needed to break the dam against legislation. The Society for the Right to Die vigorously promoted "death-with-dignity" legislation, advancing its own model bill.[8] The New Mexico statute is adapted from it.

But all the "death-with-dignity" legislation is full of euthanasia concepts and language, including the concepts that death is natural and good — not something to be prolonged by "artificial" means — and the language of "unnecessary pain" and "dignity." More important, the more tightly drawn bills, the California statute and those modeled on it, contain safeguards: the requirement that one's terminal condition be certified by two physicians for one to become a *qualified patient,* the prescription of a legal form for the *directive to physicians,* a fourteen-day *waiting period* after one is qualified before the directive becomes fully effective, and a *penalty for*

homicide specified for anyone forging a directive or concealing its revocation. Such safeguards are admirable from one point of view, but they also constitute exactly the sort of machinery required for active euthanasia. The Voluntary Euthanasia bill considered by the British Parliament in 1969 included precisely such safeguards; a comparison of this bill with the California statute makes clear that the latter was modeled on the former.[9]

What is going on has not altogether escaped the attention of persons and groups who are concerned about the right to life. The same mentality and interests which succeeded in bringing it about that unwanted babies, especially ones who would be costly in public welfare money, are much less often born alive, are fast moving toward success in bringing it about that unwanted defective children and unwanted inmates of public institutions will much less often be kept alive by undignified and unnatural means — in fact, that they soon will be spared the pain and suffering of lingering to an undignified, natural death which a little human art can easily forestall.[10]

But if those who are concerned about the right to life can see what is beginning with the "death-with-dignity" legislation, they have not yet developed a strategy to permanently block the passage of such legislation. We think it urgently necessary that legislative alternatives to the euthanasia-oriented bills be developed. Such alternatives can be promoted as substitutes or sources of right-to-life amendments for statutes already on the books, as right-to-life contenders against right-to-die bills when the latter are likely to pass, and even as potential legislation which would have its own inherent value. There is an old saying in politics: You can't beat somebody with nobody. Up to now, those concerned about the right to life have proposed no positive alternative to "death-with-dignity" bills.

The advocates of euthanasia are winning the initial battles. There are many reasons why this is so, among them a large carry-over of sympathy and opinion, techniques and forces, from the right-to-abort campaign into the right-to-die campaign. But there is another factor which should not be ignored. "Death-with-dignity" legislation has a great deal of public appeal. Many people are afraid of dying a prolonged and painful death. The "living will" and the new legislation appeals to this strong self-interest, just as the argument for abortion appealed to concern for the well-being of pregnant women "forced" to obtain illegal abortions.

Moreover, it is hard to argue with the avowed, initial purpose of the new legislation. It is based upon the right to refuse medical treatment. Even if critics of the new laws are correct in saying that they do nothing to facilitate the patient's rights, the right to refuse treat-

ment is a real and valuable one which many people might wish to exercise effectively. And people *think* that the new legislation will help them satisfy this legitimate wish.

It follows that an alternative to pro-euthanasia "death-with-dignity" bills must be a serious proposal, compatible with the right-to-life philosophy, for effectively articulating, protecting, and facilitating the liberty to give and to refuse consent to medical treatment.

Anglo-American law has long recognized the liberty of every person to refuse medical treatment. One need not have any good reason for refusing. In our present law, this liberty of the patient if conscious and adult is nearly absolute, although many persons do not realize this fact. What is the basis of this liberty? Certainly not any right to die, and not the new right of privacy by which the United States Supreme Court legalized abortion. The basis of the liberty to refuse treatment goes back much further, to common law which was rooted in Christian morality and Christian conceptions of personal dignity. Every person has a right to bodily integrity and intangibility. To cut a person, even to touch a person, is a personal offense unless the person cut or touched consents. Each person is regarded by law as the best judge of what contacts with his or her own body will be permissible, and personal choice in this matter is given the force of law. Hence, if medical treatment is imposed upon someone without consent, even without malice and with good results for the patient, the wrong of assault is committed. Therefore, with few exceptions any competent adult is at liberty to refuse medical treatment and no physician administers treatment without some sort of consent, although the consent usually is implicit in the fact that one goes to the doctor rather than the other way round.[11]

The liberty to refuse medical treatment is not absolute. Sometimes the public health demands that people receive unwanted treatment. On the reasonable assumption that they are not themselves, people attempting suicide and self-mutilation are treated despite their protests. In a few cases, courts have ordered treatment, especially treatment necessary to preserve life, to be administered to adults refusing it. Many of these cases involve Jehovah's Witnesses refusing blood transfusions. In several but not all the cases in which refused treatment has been ordered by a court, part of the ground for overriding the individual's liberty and religious convictions has been that without the treatment the patient would become incapable, by death or otherwise, of fulfilling responsibilities to dependent children.[12]

But there is another common and very familiar situation in which

an adult is given medical treatment without his or her own consent: in an emergency situation in which the person is unable either to give or to refuse consent. When the patient is unconscious or otherwise incompetent, the law presumes consent and the physician incurs no liability provided that he proceeds to do what is appropriate and meets the usual standard of good medical practice. The basis for assuming consent is obvious and reasonable: most people would want needed treatment and would consent if they could. In such cases, a family member often is asked to sign a form, but this is more a matter of protecting the physician and making sure someone will pay the bill than it is a requirement based on the patient's own right of bodily integrity and intangibility.[13]

The three crucial factors in an emergency situation — the presumption of consent by the patient, the essential irrelevance of the wishes of the family, and the legal obligation of the physician to meet the usual standard of good medical practice — can combine to create a situation in which treatment that most people would consider futile and unnecessary is continued upon a non-competent adult without any discussion with the family once the initial consent is given, and sometimes is continued even despite the family's protests. The Karen Quinlan case is an instance in point.[14]

While it is undoubtedly true that informal procedures, especially more discussion among physicians, could clarify the limits to which treatment ought to be carried, many people are concerned that they or members of their families will be over-treated. This concern has led to a great many proposals, only one of which the "death-with-dignity" legislation follows up, for clarifying and protecting the patient's liberty to refuse consent to medical treatment and for providing every competent adult with a way whose legal effectiveness is certain to make personal wishes about his or her own future treatment prevail despite noncompetence at the time to consent or refuse treatment. One appealing method of accomplishing the latter purpose is to provide by statute that anyone who wishes may designate a family member or trusted friend (or a group or ordered series of such persons) who will have legal authority to make necessary decisions if one becomes noncompetent. But a broader statute which would allow individuals the freedom to make their choices effective in whatever way they wish would in our opinion be even better.

Critics of "death-with-dignity" legislation may deny the need for any such statute, but they will have a hard time convincing Jehovah's Witnesses who have received unwanted blood transfusions, they will have a hard time convincing people who are afraid of being treated

to death by a physician more concerned about avoiding a malpractice suit than about the interests of a dying patient, and they will have a hard time convincing Mr. Quinlan.

We believe a good statute should do five things. First, it should make clear precisely what right is being protected and why: not the right to die or the new right of privacy, but the right of bodily intangibility and the liberty to decide for oneself which incursions upon oneself are acceptable. Second, it should facilitate the liberty to refuse treatment for the future to the whole extent to which a competent adult has it at present. Third, it should protect physicians and hospitals who do their best within the limits set by patients. Fourth, it should guarantee that patients who want treatment are not denied it by mistake or by malice. Fifth, it should provide a simple, flexible, and workable framework for individuals to act in.

We can think of no solution to the problem except to give legal authority, with only a few necessary limitations, to the choice of any competent adult to refuse consent to any unwanted medical treatment, whether at present or in the future. People must be allowed to express their wishes, which will differ a great deal, in any way they please, provided that they make clear exactly *what* they want and *that* they really do want it. As we have suggested, one simple way of doing this would be to make unmistakably clear that a certain person will have authority if one becomes noncompetent — for example, a young adult might name a parent, a married person a spouse, an older person a mature child, or anyone a trusted friend, a lawyer, or a pastor. If an individual personally made such a designation in writing, complying with the formalities required for a valid will, and personally left copies with a number of persons — physician, lawyer, clergyman, family members, and so on — then there would be no reasonable doubt as to who would have authority during a subsequent time of noncompetence. One could do this even without legislation, but there is no assurance that a court would abide by one's wishes or that one's wishes would solve the physician's problem of liability.

Even with a document such as we are describing, however, it would be unsafe to authorize physicians to withhold treatment they considered medically indicated on the strength of a person's agent's refusal without providing that the document be tested by a court and determined to be valid and effective. There are problems about revocation and codicils which inevitably come up, and physicians cannot be expected to adjudicate such problems. Moreover, if we are right in thinking that everyone should not be forced into making their wishes about future treatment effective by one and the same

method, then a Jehovah's Witness's refusal of blood transfusions and a proponent of natural death's refusal of anything which has to be plugged in also must be facilitated, and putting their desires into effect may involve problems of interpreting as well as testing evidence beyond the competence of anything but a probate court procedure and judge. The result of requiring each case to be given its hour in court may be some additional litigation, but this cost is light compared with the danger to everyone's life which could result from a loose procedure. Moreover, every will is probated, even no-fault divorces get some sort of hearing, and an argument over a small amount of money can be taken to court. And, of course, if people are satisfied with the way things are now, they need do nothing, and a well-drawn bill will leave the present situation unchanged so far as they are concerned.

We think a well-drawn bill would begin with an extensive statement of legislative findings, in order to provide a legislative history and context in which, hopefully, courts would interpret and apply the act. Such findings might well begin with a statement of the nature and true foundation of the right which is to be protected:

> The legislature finds that the liberty of competent adults to give and to refuse consent to medical treatment upon themselves has been recognized at common law from time immemorial and has in general been protected by the law of this State. This liberty is an aspect of the right of every person to bodily integrity and intangibility, a right closely related to the right to life. The administration to any person of medical treatment without informed consent is an assault upon that person. Such an assault is justified neither by the beneficent intentions of the one who commits it nor by any good result which might follow from it.
>
> The legislature also finds that the liberty of competent adults to give and to refuse consent to medical treatment upon themselves may be regarded as a right reserved to the people by the Ninth Amendment and as a liberty or immunity protected by the Fourteenth Amendment of the Constitution of the United States, as well as by _____ of the Constitution of this State.
>
> The legislature also finds that this liberty neither presupposes nor implies that any person has a right to die. Since every act which causes death or hastens it is a crime, no person can have a duty to do such an act, and so no person can have a right to die which would correspond to such a duty. There can be no right to die with dignity, although there certainly is a right to the protection of one's dignity from the very beginning of one's life until its end, including those times when one is sick, injured, and dying.
>
> Moreover, if anyone attempts to commit suicide, then his or her liberty to refuse treatment may be lawfully ignored.
>
> The legislature also finds that the liberty to give and to refuse consent to medical treatment is not an aspect of the right of personal privacy, which protects certain forms of behavior from criminal sanction. No criminal

sanction ever has been attached to the exercise of this liberty. Moreover, this liberty was recognized in our law long before the right of privacy was extended to the protection of abortion and other behavior previously held criminal by our law.

Having clarified the nature and true foundation of the right to be protected, the legislative finding might continue with a statement of the need and purpose for legislation. This might be phrased along the following lines:

The legislature further finds that although the liberty to give and to refuse consent to medical treatment is well established in our law, certain problems require that this liberty be clarified and further protected by statute. Judicial decisions in some jurisdictions have imposed medical treatment upon persons despite their refusal of it, even when the refusal has been on religious grounds. Also, some doubt exists about the liability of physicians and health-care facilities when persons refuse consent to treatment, yet do not altogether withdraw themselves from care. Moreover, there is a reasonable public demand that the liberty to refuse consent be facilitated, so that the personal decisions of individuals will continue to control treatment of them when they become noncompetent.

The legislature also finds that some people choose to refuse all or certain forms of medical treatment on religious and other deeply held conscientious grounds; that others choose to refuse or to limit treatment on grounds of cost, painfulness, or mutilating effect; that others choose to refuse treatment which might preserve life but which they consider to be futile; and that others choose to refuse treatment for other reasons.

The legislature finds that there are certain conditions under which the liberty of a competent person to give and to refuse consent to medical treatment may be justly overridden. Such conditions exist if the administration of treatment to a nonconsenting person is required by the public health, welfare, or safety; if it is required for self-inflicted injury, when the person must be considered temporarily unstable; and if refusal of treatment is likely to lead to incapacity to fulfill lawful responsibilities of a grave kind toward dependent children or others.

Apart from such exceptions, the legislature finds that all choices to refuse medical treatment upon oneself are lawful. The legislature considers itself bound as a matter of justice to protect and facilitate all lawful choices in a way which will afford equal protection of the law to all persons in this State. The legislature recognizes that some persons may abuse their liberty to refuse treatment by making foolish or immoral choices; nevertheless, the legislature finds that justice requires that this liberty be protected even if it is abused.

Having stated the purpose and need for legislation, a legislature might well make clear why the legislation it adopts is so different from that widely proposed and adopted by some other States:

The legislature also finds that no statute which would afford the equal protection of the law to all persons lawfully choosing to refuse medical treatment can limit itself to facilitating the wishes of those patients who happen to be terminally ill or who happen to especially dislike certain forms of treat-

ment. Likewise, the legislature finds that it would be unjust to demand that people refusing treatment do so with certain intentions, since the intentions of persons exercising a liberty can be of no legitimate interest to the government. The legislature finds that proposals including such restrictions are unacceptable because they arbitrarily limit rather than protect and facilitate the liberty which citizens have enjoyed until now.

Although the statute will apply to the refusal by competent adults of treatment at the time it is proposed, the new and more important aspect will be its provision for effectively determining one's treatment during a future time when one may be noncompetent. This aspect may be explained in the legislative findings:

The legislature further finds that in the absence of evidence to the contrary most noncompetent persons must be assumed to consent to treatment, provided that it is appropriate and rendered in accord with the usual standard of good medical practice for a condition of disease or injury from which they are suffering. Moreover, physicians and health-care facilities are required by law to proceed on this assumption.

The legislature therefore finds that if persons wish to refuse treatment which might be administered to them in accord with this assumption, then it is their responsibility both to provide evidence which will express and prove their choice beyond a reasonable doubt and to make sure that this evidence will come to the attention of physicians and health-care facilities which might provide unwanted treatment. The legislature finds and this act permits that persons might provide evidence of various chosen determinations about treatment in the event they become noncompetent: that regardless of their condition they refuse all or certain forms of treatment, that in certain circumstances they refuse all but palliative treatment, that they consent only to the treatment approved at the time of need by a certain designated person or persons, or that they limit the usual assumption of consent in some other lawful way. The legislature finds that it is the responsibility of persons who wish to make their choices legally effective under the provisions of this act to express their wishes in a sufficiently clear and definite form that there will be no doubt what their wishes are, and in a sufficiently certain and binding form that there will be no doubt that these are their wishes.

The legislature further finds that it would be unjust to ask physicians and the administrators of health-care facilities to assume a judicial role in cases in which a patient provides evidence that consent is refused to treatment otherwise necessary to meet the usual standard of good medical practice. The legislature also finds that it is not in the public interest to lessen the responsibility of physicians and health-care facilities to provide standard care on the untested evidence that the ordinary assumption of consent does not correspond to the desires of a particular patient.

Accordingly, the legislature finds that if there is evidence that a noncompetent adult patient may not consent to treatment otherwise medically indicated, and if there is any doubt about the legal duty of a physician or health-care facility toward such a patient, then the duty is to administer the treatment immediately and urgently required, and to seek promptly a judicial

> determination of the doubt. Only such a determination will settle whether medical treatment is to proceed on the usual assumption or is to be limited in accord with the proved limits of the noncompetent person's consent.

So much for legislative findings. We realize that so lengthy a rationale for a statute would be unusual, but it also could be very useful, for the statute might be badly misinterpreted without this rationale, which embodies many concepts which have not been given much publicity in the last few years.

The statute itself will require a number of definitions, which must be supplied in accord with the existing law of each State. For example, "medical treatment" must be defined as treatment provided by certain classes of persons and institutions acting professionally. One of the more important definitions will be that of "the usual standard of medical practice." A definition along the following lines would be appropriate:

> Treatment according to the usual standard of medical practice in this act means medical treatment appropriate for an existing condition of disease or injury carried out in all respects in the manner in which a person practicing with the average professional skill and carefulness would carry it out in any case in which all of the relevant circumstances were the same or similar. Any limitation imposed upon a practitioner or health-care facility by refusal of consent to treatment which otherwise would be medically indicated shall be considered a relevant circumstance.

By this definition, refusal of consent *changes* the usual standard of practice but does not release anyone from liability for failing to meet the standard. Physicians thus will be required to take the patient's decisions as determinative in deciding how to proceed, but will be held for doing well whatever process of treatment is undertaken.

The statute also must make clear that it applies only to persons of an age judged to be the appropriate age for competency in consenting to medical treatment. We are not going to discuss the large problem of the proper age of competency for this purpose, but it is worth noting that for many particular purposes the age of competency has been reduced in recent years. Perhaps it would be reasonable to consider young people able to make decisions regarding health-care in general at an age younger, maybe even much younger, than eighteen. Whatever the proper age for competency is judged to be, a clause along the following lines will be needed:

> The existing law of this State with respect to all the conditions for lawful medical treatment of persons under _____ years of age and persons who have been declared legally noncompetent is in no way modified by any provision of this act, except insofar as a person declared legally noncompetent has made known his or her wishes concerning medical treatment during some prior period of competency.

This phrasing also takes care of the problem of persons who have been committed; their situation is a special problem which requires other legislation if it needs to be altered from the way it stands at present.

The statute also should contain a section excluding several likely misconstructions. These include misconstructions of its purpose and of its intended effect upon the existing situation. Something along the following lines might do:

> Nothing in this act is to be construed
>
> (a) as introducing or recognizing any right to die; or
>
> (b) as authorizing any person to do or to refrain from doing anything in order to bring about the death of any person; or
>
> (c) as creating any new obligation that a physician administer treatment above and beyond that required by the usual standard of medical care; or
>
> (d) as causing any treatment to be required by the usual standard of medical care if such treatment prior to the enactment of this statute was commonly considered futile and useless by competent and careful physicians; or
>
> (e) as impairing or superceding any legal right or responsibility which any person would have prior to the enactment of this statute to bring about the withholding or withdrawal of medical treatment in any lawful manner; or
>
> (f) as requiring physicians or health-care facilities to seek judicial determination of their duties in cases in which there would have been no doubt as to their liability if they failed to respect a patient's wishes had such cases occurred prior to the enactment of this statute.

Our intention in proposing this phrasing is to keep the present situation as much as possible just as it is for people who are satisfied with it. The statute also must contain provisions regarding insurance. We doubt that the law can justly require that persons who limit or refuse consent be treated in all respects the same for insurance purposes as those who do not. This would unfairly impose voluntary risks on those who do not choose them. But the statute definitely must include a provision excluding as unlawful any attempt to make a person refuse or limit care as a condition for granting an application for health or disability insurance, and the like.

The statute also should contain severe penalties for forging or tampering with evidence as to any person's wishes in regard to his or her own medical care. In particular, the misrepresentation that a person refuses treatment on which life might depend should be classed as attempted first degree murder, and as first degree murder if the misrepresentation causes or hastens death.

The four main sections of a statute would be embedded in the middle of it, but for convenience we number them here as sections one to four. The first affirmatively states the liberty to refuse treatment and gives it all possible legal clarity:

> Section one. It is a violation of the bodily integrity and intangibility of a person, subject to criminal and civil liability established in existing law of this State, to administer to any person without his or her personal, informed consent any medical treatment, except in the cases specified in section two of this act, unless such person be a minor or noncompetent person excluded by section _____ from the provisions of this act.
>
> Whenever a physician-patient or other medical treatment relationship is initiated and whenever explicit consent to medical treatment is sought, the person initiating the relationship with or seeking consent of the patient must if the patient be competent clearly and explicitly state that the patient is at liberty to give or to refuse consent to treatment. Evidence of the failure to inform the patient of the right to refuse consent shall be evidence of negligence which if willful and deliberate shall also be criminal.

The liberty is not only affirmed in its whole breadth, but also defined and enforced by the requirement that patients be informed of it. The second section states and limits exceptions to the liberty to refuse treatment:

> Section two. Notwithstanding the liberty of every competent person ___ years of age or older to give and to refuse consent to medical treatment, no physician and no health-care facility shall be deemed to have administered medical treatment without consent if one or more of the following conditions is fulfilled:
>
> (a) the treatment is authorized by statute to be administered without the consent of the person treated for the protection of the public health or safety; or
>
> (b) the treatment is appropriate to remedy a condition of bodily injury or harm which the person treated has brought upon himself or herself in attempting suicide or self-mutilation; or
>
> (c) the treatment either is ordered to be given by a court of law or is consented to be a guardian appointed and authorized by a court to act in the matter; or
>
> (d) the treatment is administered to a person from whom consent cannot be obtained because of his or her inability either to give or to refuse consent to treatment, and the following three conditions are met: (i) the treatment is an appropriate remedy for an existing condition of disease or injury; and (ii) the treatment is carried out in accord with the usual standard of medical practice; and (iii) there is no evidence known to persons administering the treatment or to administrators of any health-care facility in which it is carried out which a reasonable person would take to be sufficient to call into question the ordinary assumption that the noncompetent patient would consent to treatment which is medically indicated; or
>
> (e) the treatment is administered to a person from whom consent cannot be obtained because of his or her inability either to give or to refuse consent to treatment, and the following two conditions also are met: (i) the treatment provided is urgently and immediately required to preserve the life or protect the health of the patient pending judicial determination of the case; and (ii) judicial determination is pending or is promptly sought.

Having limited the conditions in which consent can be overridden

and created a situation in which any evidence putting in question the usual assumption of the consent of the noncompetent person to indicated treatment will provide a strong incentive for taking the case to court for determination, the statute must go on to direct interested parties to a suitable court and to indicate to courts what is required of them:

> Section three. Upon a petition by a patient under medical care or by a representative of such a patient, by a relative of such a patient, by a physician or health-care facility responsible for such a patient, or by any other interested party, any court of _____ of this State shall promptly schedule a hearing and give notice of it to all interested parties. At the hearing the court shall receive and examine all evidence produced by any party concerning the nonconsent of the patient to proposed treatment or to treatment already in progress.
>
> Evidence considered may include but need not be limited to expert testimony concerning the probable utility and benefit of the treatment; anything which might show that the patient rejects all or certain kinds of medical treatment on the basis of religious or other deeply held conscientious convictions, that under specified conditions the patient refuses all but palliative care, or that the patient desires decisions to be made on his or her behalf by some designated person or persons.
>
> In assessing the evidence, the court shall consider the presumption of consent to be in possession and shall not alter this presumption unless a different conclusion is established by the evidence beyond reasonable doubt. The refusal by any person of consent to medical treatment shall not itself be considered evidence of the noncompetence of such person.
>
> If the court determines that one or both of the following conditions is met, then it shall direct that medical treatment be administered in accord with the usual standard of medical practice unrestricted by lack of consent:
>
> (a) if treatment of the patient is required by the compelling state interest of the public health, welfare, or safety; or
>
> (b) if the usual assumption that a noncompetent person does consent to treatment to which a reasonable and competent person usually would consent should stand in the present case, either because the eivdence presented does not establish beyond reasonable doubt that the patient when competent exercised the liberty to limit or refuse consent, or because the evidence presented does not sufficiently show what limitation, modification, or termination of treatment would give effect to the patient's wishes.
>
> In finding that treatment of a nonconsenting patient is required by the compelling state interest, the court must find that lack of treatment would be likely to result in substantial harm other than harm to the patient's own life or health. Such harm might include but is not limited to the probable resulting incapacity through death or otherwise of the patient to fulfill responsibilities to dependent children. If the patient's refusal of treatment is based on religious or other deeply held conscientious convictions, then the prospect of harm which grounds the state interest must be such as to constitute a clear and present danger.

> If the court finds that neither condition (a) nor condition (b) is met, then the court shall cause treatment of the patient to be limited, modified, or terminated in accord with the proved will of the patient. In giving effect to the will of the patient, the court may act by its own order or by appointing and authorizing a guardian to act on behalf of the patient or by both of these modes.

The court's assignment is to examine evidence about the patient's consent. This keeps the focus where it ought to be. Nevertheless, the usual assumption is that the patient consents to treatment in accord with the usual standard of medical practice, and such treatment is limited to that which is somehow of use and benefit to the patient. Hence, the court could consider expert testimony which would show that the treatment was not of use and benefit, and on this basis rule that nonconsent must be presumed. This is in fact what the Supreme Court of New Jersey did in the Quinlan case, although the Court's confusion about what it was doing tended to conceal this fact.[15]

The final section of the statute, as we have projected it, would be the one indispensable section — the limitation of liability:

> Section four. Whenever medical treatment is restricted and delayed in conformity with section 2(e) or is limited, modified, or terminated in accord with a judicial decision under section 3, the provisions of this act and what is done in accord with it shall be a material and relevant circumstance in determining the usual standard of medical practice. Neither physicians nor health-care facilities shall incur any civil or criminal liability for acting in accord with the usual standard of medical practice as determined with this circumstance taken into account.
>
> If a physician proposes a medical treatment which would be in accord with the usual standard of medical practice if the patient consented to it, and if the physician is prevented from proceeding with such treatment because of refusal of consent in accord with the provisions of this statute, then the physician shall not be deemed to have abandoned the patient if the physician withdraws from the case, provided that sufficient notice is given to the patient or to others concerned with the patient's interests to permit the obtaining of the services of another physician.

By this provision, nothing in the way of protection of the patient's rights is given up, yet the physician and the hospital are given the assurance they need to do the best they can for a patient within the limits set by the patient. If a physician, because of reasons of conscience or other concerns, objects to working under such limitations, the statute provides a way out.

As philosophers, we do not pretend to be legislative draftsmen. We have articulated our proposed alternative to "death-with-dignity" legislation in a formal mode, to give definite embodiment to our basic idea: an alternative to the statutes now being enacted is essential.

Many objections are likely to be made against any proposal along the lines we are suggesting. We conclude by considering some of them.

Some might object that no new strategy is needed at this time to deal with the euthanasia movement. Even legislation such as we are proposing will be open to amendment in the direction of facilitating voluntary euthanasia. The answer to this objection is that the euthanasia movement has been gaining momentum consistently; it has not suffered a serious setback since 1967. Opponents of abortion were able to appeal to a residue of decent sentiment in the battles up to 1973. Opponents of euthanasia will be able to appeal only to self-interest. A picture of a normal, unborn twenty-week baby has emotional impact; so, unfortunately, does a picture of a defective child, a psychotic, a senile person. Identification with such persons is more difficult for most of us than is identification with the infant. Self-interest can be served by limiting nonvoluntary euthanasia to the noncompetent in institutions. Therefore, some new strategy is needed. We believe that legislation along the lines we are proposing will be less open to revision to facilitate euthanasia than will the common-law situation which still exists in most states, and will be a substantial obstacle to euthanasia in comparison with the "death-with-dignity" legislation which provides both an ideological framework and the legal safeguards necessary for euthanasia.

Some might object that the legislation we propose will encourage people to make decisions about future treatment, when people are considering death abstractly and at a distance, but those decisions might well be different when the consequences of refusing treatment are imminent. The answer is that under the legislation we are proposing people could leave the future decisions to be made as they are now or could assign responsibility to someone they trust to make them at the time. Moreover, there is nothing in the proposed bill to prevent people from changing their minds. Besides, we see no reason to suppose that a person's desires or hypothetical desires at the time treatment is needed are more likely to express his or her true self than the same person's free and deliberate choice made at some earlier and calmer moment.

Some might object that it is unwise to give people so broad a right to refuse treatment. The answer is that legislation along the lines we are proposing is not giving anyone a right; it is only recognizing and facilitating a right people already have. The new statute would help people to make their wishes in respect to their own future more effective than is now possible. However, we can see no justification for limiting people's liberty with respect to the future which would

not equally justify limiting it with respect to the present. While the law does have a duty to protect children and the permanently non-competent from themselves and from the irresponsibility of others, it is of the essence of liberty that competent persons be able to make decisions about their personal lives and to have these decisions respected not only at the time they are made but also during the whole time to which they are meant to apply. Liberty may be exercised foolishly and even immorally, yet it must be respected. The alternative is a paternalism which might be benevolent but which cannot be just and is bound to be odious.

Some might object that if the liberty to refuse treatment is protected to the extent we propose, some people will abuse this liberty even to the point of using it to commit suicide, and that in consequence there will be further lessening of respect for human life. The answer is that nothing in our proposal lends color of lawfulness to suicide. On the contrary, we suggest provisions to make clear that suicide is against public policy. Still, someone might commit suicide by refusing treatment — understanding "suicide" in a moral sense. But this possibility already exists. The statute we are proposing only extends this possibility as an unwanted side-effect of extending the just protection of a genuine liberty. The grounds of this liberty are not in any supposed right to die, but rather in the right of persons to bodily integrity and intangibility, which is closely related to the right to life itself.

Those who favor euthanasia are attempting to impose a morality of beneficent killing, a quality-of-life ethic, upon the whole society. This ethic is based upon the utilitarian principle of the greatest happiness of the greatest number. As beneficent killing, this principle means that everyone would be better off if some people were dead. If any substantive moral view is going to be imposed upon American society today, it will be this view. Opponents of euthanasia can make their most compelling case against the imposition of the quality-of-life ethic not by appealing to the substantive good of life, but by appealing to liberty and by defending the right of defective children and other nonwilling beneficiaries of the "right to die" to protection of the laws equal to that afforded the rest of us. In short, in a society as anti-life as ours, anyone seriously dedicated to protecting the right to life also must be dedicated to protecting liberty.

Having taken a libertarian position, opponents of euthanasia will be able to appeal consistently to the same principle at every stage of the euthanasia debate. If euthanasia is to be safe, public involvement is required — public involvement even more extensive than that which is inevitable in our welfare society in any matter related to

medical care. Indeed, the legislation we are proposing would involve a court in the mere refusal of treatment. Opponents of euthanasia can object very strenuously on libertarian grounds to the involvement of society in it, for such involvement is an infringement upon the liberty of those persons who regard euthanasia, even voluntary euthanasia, as gravely immoral. Such persons have the liberty to stand aloof from killing and they have a right to public institutions which remain clear of killing, for all necessarily participate in these public institutions.

We believe there is still time — but only a little time — for opponents of euthanasia to preempt the libertarian ground and to block "death-with-dignity" legislation in many states. Objectionable statutes perhaps can be replaced or at least amended within the framework of a philosophy consonant with respect for life and concern about the right to life. If this opportunity is lost, all who fail to seize it will share in the blame for what will follow. One's obligation is not only to love life and to resist its obvious enemies. Fidelity to the good of life and the dignity of persons also calls for a creative response to the challenge posed by the euthanasia movement.

NOTES

1. *Cal. Health & Safety Code* §§7185-7195 (1976).

2. Proper citations were not available at the time of writing. The acts are: Texas, Texas Legislative Service, S.B. 148, 6-255, as finally passed and sent to the Governor; Oregon, Oregon Legislative Assembly, Engrossed Senate Bill 438; Nevada, Assembly Bill No. 8; 1977 Idaho *Sess. Laws,* ch. 106; 1977 N. C. *Sess. Laws,* ch. 815; 1977 N. M. *Sess. Laws,* ch. 287; 1977 *Ark. Acts.,* act 879.

3. §§7186 and 7195.

4. See, for example, Richard A. McCormick and André Hellegers, "Legislation and the Living Will," *America,* 136 (March 12, 1977), pp. 210-211.

5. "History of Euthanasia in U.S.: Concept for Our Time," *Euthanasia News,* 1 (November 1975), pp. 2-3. The following paragraph (p. 3) is of special importance: "Legislative initiative had all but ceased and it was decided that there was no chance of getting any bills passed until there was a massive educational effort. By the end of the '60s there were two significant events: the Euthanasia Educational Fund was established in 1967 to disseminate information concerning the problem of euthanasia, and Luis Kutner suggested the Living Will at a meeting of the Society." Kutner published his proposal in an article concerned primarily with active euthanasia which switched with practically no transition to the proposal of the "living will": "Comments: Due Process of Euthanasia: The Living Will, A Proposal," *Indiana Law Journal,* 44 (1969), pp. 539-554, especially pp. 548-550.

6. "Society Names New President," *Euthanasia News,* 1 (February 1975), p. 1.

7. Compare the list inside the back cover of *Death with Dignity: Legislative Manual,* 1976 ed. (New York: Society for the Right to Die, Inc., 1976), with the list on the back cover of *Death and Decisions: Excerpts from Papers and Discussion at the Seventh Annual Euthanasia Conference* (New York: The Euthanasia Educational Council, Inc., 1976).

8. Compare "Model Bill," *Death with Dignity: Legislative Manual,* pp. 95-96, with the New Mexico statute.

9. The British bill is printed in A. B. Downing, ed., *Euthanasia and the Right to Die* (London: Peter Owen, 1969), pp. 201-206.

10. The close relationship between "death-with-dignity" and the matter of emptying public institutions is seldom made as explicit, for obvious reasons, as it is by "Statement of Walter W. Sackett, M.D.," in *Death with Dignity: An Inquiry into Related Public Issues,* Hearings before the Special Committee on the Aging, United States Senate, 92nd Congress, 2nd session, part 1, Washington, D.C., August 7, 1972 (Washington, D.C.: U. S. Government Printing Office, 1972), pp. 29-39.

11. See Angela Roddey Holder, *Medical Malpractice Law* (New York, London, Sydney, Toronto: John Wiley & Sons, 1975), pp. 225-234; "Notes: Informed Consent and the Dying Patient," *Yale Law Journal,* 83 (1974), pp. 1632-1647.

12. A great many articles have appeared recently on this subject. The best single treatment is Robert M. Byrn, "Compulsory Lifesaving Treatment for the Competent Adult," *Fordham Law Review,* 44 (1975), pp. 1-36.

13. See *Ibid.*, pp. 14-15, with note 64; Kenney F. Hegland, "Unauthorized Rendition of Lifesaving Medical Treatment," *California Law Review,* 13 (1965), pp. 863-864.

14. *In the Matter of Karen Quinlan,* 70 N.J. 10, 355 A.2d 647 (1976) at 653-660. The record does not make clear whether the parents ever signed any consent to treat form; she was initially delivered to the hospital by others.

15. *Ibid.*, at 664. The crux of the decision is the argument that Miss Quinlan would refuse treatment if she could, and so her presumed nonconsent must be exercised — the Court conceived it in affirmative terms as a right of privacy — by Mr. Quinlan. The ground for judging that she could refuse if she could is the claim that the overwhelming majority of the members of society would in like circumstances refuse for themselves or for those closest to them. If this proves anything, it proves that the treatment was futile and of no benefit to the patient. In the event, it turned out that the respirator — which was the matter at issue so far as the plaintiff, Mr. Quinlan, was concerned — was *unnecessary.*

* Professor Robert M. Byrn and Mr. William B. Ball vigorously and very helpfully criticized an early draft of this article; neither, of course, should be considered responsible for it.

The Right to a Natural Death

James F. Csank

ONE OF THE inevitable results of the modern beliefs in judicial activism and judicial supremacy is the phenomenon of "taking to court" almost any aspect of contemporary life in these United States with which a person feels uncomfortable or by which he feels oppressed. Does someone object to the way in which the electoral districts of his state legislature are drawn? Take the "equal protection of the laws" clause of the Fourteenth Amendment to the United States Constitution, add a catchy slogan like "one man, one vote," and run to the courthouse. Does a pregnant woman in Texas want an abortion? Take a catchy slogan like "the right of privacy," add some rhetoric about "the penumbras of the Bill of Rights," and you have your lawsuit.

Theoretically, the court system exists to provide a forum for the resolution of the disputes which unavoidably arise between members or groups in society, and for the invocation of the organized power of the state with which to enforce the terms of the judicial resolution. Courts are necessary if we are to maintain at least a modicum of sociability, if we are to reduce to a minimum our resort to self-help. What we see around us today, however, is a *reductio ad absurdum* of this reliance on and faith in the judicial process. Conflicts are created, fashioned into lawsuits, and presented to various courts for decision. Often, the litigants are too impatient to turn to the political processes; in many cases, they are too unsure of obtaining their desired end by any method other than the judicial.

Many courts are only too eager to respond. Hypnotized by their power, which in the final analysis rests upon the seemingly endless capacity of the American people to accept any judicial decision as the right decision, and by their self-proclaimed wisdom, courts in general are willing to hear and decide any controversy submitted to them, no matter how nebulous, no matter how contrived, no matter whether the issues presented are within the competence of the judiciary to solve.

This increasing dependence upon judges for the settlement of conflicts would be neither dangerous nor frightening if the courts were merely undertaking to exercise more often their traditional role in their traditional areas. We might in such case only smile at the

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litigiousness of Americans, a phenomenon noted by Tocqueville. But we deal here with a difference in kind, not just in degree. The new litigation is not the type of dispute the courts are used to seeing; the new breed of lawsuit is a different kind of animal. When some segment of society, some widely-accepted attitude, some existing power structure frustrates the attainment of a desired end, a conflict exists for which new theories are developed. And this new breed of lawsuit requires the court to fashion new legal principles of jurisprudence. That the courts have become adept at disguising the nature and extent of the new principles upon which they rely, by using the language of existing, well-settled principles, should not blind us to what is actually happening.

What is dangerous and frightening about it all is the source of these new principles. Given our history and the make-up of our people, it is perhaps unavoidable that these principles are sought in the philosophy of secular humanism. And given the fact that the new breed of lawsuit arises within a society which is secularly oriented, and is fashioned by people who are, for the most part, secularly educated, it is unavoidable that the cases will demand resolution according to secularistic principles. This is not to say that all of the parties in whose names these cases are brought, all of the attorneys creating and arguing the new legal theories, and all of the judges considering these cases, are secular humanists. It is to say: 1) the society in which the suits arise has educated and conditioned the litigants, attorneys, and judges (which is obvious enough); 2) society has adopted and constantly presents to its members, through its most vocal and articulate members, the philosophy of secular humanism (which is not quite so obvious); and 3) many of the new breed of lawsuits embody principles which, on their face, are not openly or avowedly secularistic, but which, if they are carried to their logical end, and if their hidden premises and unstated conclusions are made explicit, reveal their true nature (which is the least obvious of all).

Secular humanism, no doubt, means different things to different people. Each of us, in communicating, is entitled to use whatever term he feels is proper, as long as two conditions are met: that he give fair warning of the meaning which he attaches to the term, and that he is consistent in that use. Without claiming that the following definition is exhaustive, then, by secular humanism I shall refer to that philosophy which sees the end of Man to be Man; which acknowledges nothing beyond this world and Man, and the perfection of both; which considers that God is dead because man no longer needs Him; which accepts Feuerbach's aphorism that "God is merely the projected essence of Man"; or, since that statement leaves

something to be desired if we are in the market for a slogan, Feuerbach's other aphorism: "man's God is Man."

An excellent example of the new breed of lawsuit was the aforementioned case brought in the early 1970's by a pregnant Texas woman who wished to be accorded the freedom to abort her unborn child, a freedom which Texas withheld from her. The United States Supreme Court decision is an excellent example of the adoption of principles of secular humanism by an activist court majority; that decision not only granted the litigant the right to abort her child, but declared such a right to be constitutionally mandated and protected, applicable nation-wide. Why? Because the unborn child is only a "potential life," with no rights of its own, and completely subject to the caprice of his or her mother.

Not all of the new breed litigants are open secular humanists, who see in the activist courts their best opportunity and greatest chance for success in replacing the principles of Judeo-Christian morality with their own ethical principles; some of them would be quite surprised if told that their legal theories — indeed, even the cases they fashion for the courts — are based on secularism.

In the successful litigation of a new-breed lawsuit, the strategy is to give the Court every opportunity to be judicially active by 1) framing the issues presented in as abstract a manner, with as broad a potential application as possible, while remaining within the context of the facts of the case; 2) requesting the Court to enter upon areas in which its competence is at least open to doubt; and 3) stretching accepted legal principles and phrases to cover the new situation.

Early in 1976, the Supreme Court of New Jersey was presented with *In the Matter of Karen Quinlan* (70 N.J.10., 355 A.2nd 647), a lawsuit pregnant with possibilities for the fashioning of new legal principles, for the assertion of judicial competence and authority over questions in the field of medicine and medical ethics. All of the strategies mentioned above were utilized in Karen's case. An activist court would not have been able to resist the temptation to discover a new "right to die"; an activist court would have been eager to lay down broad guidelines for determining when and under what circumstances the life of a patient had become meaningless because the hope of recovery was minimal, and an activist court would not have hesitated to impose its own solution to the complex medical problems and delicate moral dilemmas posed by the tragedy of Karen Ann Quinlan.

The New Jersey Supreme Court rejected the activist approach, in a display of judicial restraint rarely seen in the United States today. The Court's opinion, written by Chief Justice Richard Hughes for

a unanimous bench, is a remarkable document, not only for what it says and how it says it, but for what it does not say.

The Facts and the Issues Presented

Little time and space need be devoted to the circumstances involved in this litigation, for they are widely known. For reasons still unknown, Karen Ann Quinlan stopped breathing on the night of April 15, 1975; after being taken to a hospital, she was placed on a respirator and diagnosis was undertaken. She lapsed into a state of coma, from which she has never emerged. Physical deterioration, including brain damage, ensued, although Karen was still alive in the sense that her body continued to perform various functions, albeit with the aid of the respirator, catheters, feeding tubes, and twenty-four-hour care. Neither did Karen's condition amount to brain death, which, according to the testimony at the trial, results only when both the sapient and the vegetative functions of the brain are absent. (The vegetative functions of the brain refer to those functions of the body which are controlled by areas of the brain, such functions as breathing, blood pressure, swallowing, and heart beat.)

After some months, Karen's parents reluctantly came to the conclusion that the use of these extraordinary medical techniques (which we will hereafter, on our own, refer to as EMT's) gave no hope for eventual recovery. They asked that Karen be removed from the equipment, and that she be allowed to return to a more natural state. The attending physicians, as well as the hospital administrators, refused, claiming that to do so would not be in accordance with medical standards, practice, or ethics.

Mr. Quinlan brought suit, asking that he be appointed guardian for his daughter. The following is a list of the parties eventually involved in the litigation, with a brief statement of the relief requested or issues presented by each:

1) Mr. Quinlan asked that, if he were appointed guardian, he be granted "an express power . . . as guardian to authorize the discontinuance of all extraordinary medical procedures"; he also asked that Karen's attending physicians be restrained by court order from interfering with his removal of Karen from the EMT's if so authorized, and that the prosecuting attorney be enjoined from such interference prior to the removal and from initiating any criminal prosecution against any member of the family after such removal.

2) The Attorney General of New Jersey, asserting the state's interest in the preservation of life and defending the right of an attending physician to treat a patient according to the physicians' best judgment, opposed the granting to Mr. Quinlan of the relief he requested.

3) The County Prosecutor asked the court to state what effect the granting of relief to Mr. Quinlan would have on the enforcement of the state criminal homicide laws.

> 4) The hospital at which Karen was being treated requested that the Court declare whether a physician's reliance on the "brain death" criteria in his determination of a patient's death would be "in accordance with ordinary and standard medical practice."

The presentation of such a wide spectrum of issues is in the best tradition of judicial activism. For example, the criteria of "brain death" was based upon a 1968 report of the Ad Hoc Committee of the Harvard Medical School. At the time that the Court was considering this case, that report was less than eight years old; yet here was a hospital asking a *Court* to declare that the use of this criteria would or would not be "in accordance with ordinary and standard *medical* practice."

Nor did Mr. Quinlan's attorneys fail to avail themselves of the "stretching" tactic. One of the theories which they presented in support of their client's right to relief was that a denial of such relief would be tantamount to subjecting Karen Ann Quinlan to "cruel and unusual punishment," in violation of the Eighth Amendment to the Federal Constitution. The New Jersey Court, recognizing the ploy for what it was, spent only three short paragraphs dismissing the theory as "inapplicable" and "irrelevant."[1]

The Decision

The Court held that Karen had the right to order that the use of EMT's on her person be discontinued. Because such a decision affected only herself, the state of New Jersey had "no external compelling interest (which would require) Karen to endure the unendurable."[2] The State could interfere neither through the criminal law nor through injunctive proceedings. And since Karen was incapable of making such a decision, the Court would recognize the right and power in her guardian to make the decision for her.

Next, the Court held that the evidence indicated that Mr. Quinlan was a "very sincere, moral, ethical, and religious" person, and was therefore best-suited to be his daughter's guardian.[3] As such, he was to have "full power to make decisions with regard to the identity of (her) treating physicians."[4]

Resisting the temptation to speak *ex cathedra* on other complex questions set before the Court in the pleadings and briefs, the Court confined itself to the following issue, as they formulated it in the opening paragraph of the opinion:

> The litigation has to do, in final analysis, with (Karen's) life — its continuance or cessation — and the *responsibilities, rights, and duties,* with regard to any fateful decision concerning it, of her family, her guardian, her doctors, the hospital, the State through its law enforcement authorities, and finally the Courts of justice.[5] (Emphasis added)

Discussion

By refusing to remove Karen from the life-sustaining EMT's, her attending physicians had in effect assumed the right, the duty, and the responsibility of making the final decision as to her fate. That they had done so under their conception of prevailing medical standards and ethics, the Court was ready to accept and acknowledge. But the question, as the Justices saw it, was whether those standards, as they were employed in determining Karen's present status, her chances of recovery, and the procedures to be used, were of such binding quality, were "of such internal consistency and rationality" as to require the Court to deny Mr. Quinlan any authority to intervene or as to require the Court to adopt a hands-off policy toward the entire case. The Court answered in the negative. Its reasoning on this question included a recognition of the possibility that the doctors, perhaps unconsciously, reached their determination in part because of a fear of the imposition of criminal sanctions or of an exposure to malpractice claims should they decide to remove Karen from the EMT's. The physicians may have been acting on motivations personal to themselves; i.e., they may have lost some of the impartiality, some of the detachment from personal involvement, so necessary and desirable in the practice of medicine. The decision as to whether or not a person already relying upon life-sustaining equipment should be removed therefrom is a decision which should not rest with the doctors or with the administrators of the hospital alone. The Court suggests, but does not mandate, the establishment of a review board, before which all relevant facts could be presented, and expresses the "hope that this decision might be serviceable to some degree in ameliorating the professional problems under discussion."[6]

Since the decision to continue or suspend the use of EMT's is one personal to the patient, or to the patient's court-appointed guardian, the State has no power to interfere, either before or after the decision is carried out. And if, in the circumstances of this case, death ensues after the machines are disconnected, it will be due to existing natural causes within the patient, not to the infliction of harm by another.

It is important to note that the Court does not lay down broad rules in general language, rules which would only serve to confuse and mislead others, and which would lead to an increase in litigation attempting to resolve the unavoidable ambiguities. The Justices were careful to confine themselves to the narrow circumstances of Karen's case in every area in which they did award or deny relief, and to avoid discussing areas irrelevant to those circumstances.

The Relief

It will be recalled that Mr. Quinlan requested, if letters of guardianship were granted, that they include "an express power to him as guardian to authorize the discontinuance of all extraordinary medical procedures." The opinion of the Court characterized such authorization as itself "extraordinary,"[7] and it refused to grant it. The Court thus declined to appropriate to itself the right, the duty, or the responsibility for ordering such discontinuance; for if the Court had done so, the removal of Karen from the EMT's would have been the act of the Court, or in the abstract, of the Law, and not the act of Mr. Quinlan. It was as if the Court had addressed itself to Mr. Quinlan in the following words:

> We recognize that, as a loving parent and a moral and responsible person, your motivation arises from your love for your daughter and a sincere desire to do that which is best for her and for other members of your family. We also know that you have given deep consideration to the moral and religious factors involved. We agree that you are the person best suited to act in place of Karen. But we will not allow you to impose upon this Court, nor upon any other Court of this State which in the future must follow our guidelines, the responsibility for removing Karen from the machines which are, or appear to be at present, helping to sustain her life. Nor will we even go so far as to say that such a decision is yours alone, or that of your family alone; for we assume that you, like the members of this Court, lack the required medical knowledge and expertise. Neither do we grant you the authority to order the discontinuance of her present treatment against the advice or with the disapproval of the attending physicians, for no decision of this magnitude should be made without expert advice; and since this is a decision of life and death, with which you must live for the rest of your life, the moral weight of making it should not rest on your shoulders alone. What we do grant is that it is within your authority as Karen's guardian to choose who will be her doctors. If you choose to dismiss those who are at present so acting and retain others; and if these others conclude that there is no reasonable possibility of Karen's recovery; and if you and those doctors then consult with the Ethics Committee of the hospital; and if that body agrees with your determination; *then* the life-support systems presently in use may be withdrawn. They may be withdrawn without fear on your part or on the doctors' part of the imposition of criminal sanctions; they may be withdrawn without fear on the doctors' part that the doctors may be open to malpractice liability; for you, Mr. Quinlan, shall have taken such part in the process of decision, and shall bear such part of the responsibility therefor, as shall preclude you from calling that decision into question.

The Significance

Ask the next person you meet to characterize the "Karen Ann Quinlan" case, and chances are he will repeat what he has read in the papers and heard on television: "Oh yeah, that's the right to die case." Yet the New Jersey Supreme Court does not discover, and never even

discusses, a "right to die." The closest it comes to connecting the concept of "right" with the process of dying is when it cites, from one of the legal briefs, a statement issued by a Catholic bishop which used the phrase "the right to a natural death." Though some may argue that we are mincing words, and that what the Court in effect did was to recognize a "right to die," we must insist that there is a difference between the two concepts; the latter is susceptible to being stretched to rationalize euthanasia, while "the right to a natural death," by its very terms, cannot be so stretched.

The Court is careful not to rest its decision upon the tenets of the Roman Catholic religion, the religion of Karen and her family. It discusses the Church's attitude toward the moral dilemma with which the family is faced, but emphasizes that it does so only to judge the fitness of Joseph Quinlan for the guardianship of his daughter; i.e., it takes into account the Church's teaching only in order to determine whether Mr. Quinlan is acting with a formed conscience. And the Court goes out of its way to say that it would have done the same thing if Mr. Quinlan were a Buddhist, an agnostic, or an atheist. We are, after all, a nation which has agreed to subordinate the religious question in our discussion of other issues properly belonging to the public realm; a nation which, on the question of whether there is one God or twenty gods, has agreed to disagree; and this, to the extent that, if the Court *had* based its decision upon the principles of Roman Catholicism, we would have been shocked.

Yet it is also true that, as a nation, we belong to Western Civilization; we are part of the Judeo-Christian heritage, including its respect for human life, and its teaching of awe and humility in the face of death's mystery. To recognize that heritage, and to seek to preserve it in the face of the onslaught by secular humanism, is the great war through which we are living today.

The greatest victory to date in that war has been won by the secular humanists and is embodied in the 1973 abortion decision; because of that victory, untold millions of unborn children have been sacrificed to the comfort and convenience of others. The legal battle over the fate of Karen Ann Quinlan could have resulted in another such victory; establishing in the rhetoric of a "right to die" the rationalization for the "humane" disposition of those whose lives have become a burden to others. I have no doubt that such a result was never contemplated or desired by Karen's family; it may be that it was not contemplated or desired by anyone who had anything to do with the case. Yet if the Court had been persuaded to adopt principles of secular humanism; if it had discovered a "right to die"; if it had *judicially* determined that Karen had no hope of recovery;

if the Court itself had ordered the discontinuance of the EMT's, the danger is real that others, in the not too distant future, would have been eager to stretch those new principles to allow euthanasia, or infanticide of the deformed, or other "humane" practices.

But the Court did none of the foregoing. The decision it reached, the way in which it reached that decision, the things it refused to decide, are compatible with, indeed recognize and preserve, the Judeo-Christian heritage. The Court does not emphasize it, but it is there:

> We glean from the record here that physicians distinguish between curing the ill and comforting and easing the dying; that they refuse to treat the curable as if they were dying or ought to die, and that they have sometimes refused to treat the hopeless and dying as if they were curable . . . We think these attitudes represent a balance implementation of a profoundly realistic perspective on the meaning of life and death and that they respect the whole Judeo-Christian tradition of regard for human life.[8]

In one view, it would appear that judicial activism was alive and well in the decision of the Supreme Court of New Jersey. Using the tactic of "stretching accepted legal principles and phrases to cover the new situation," the Court based its decision on the theory of a right of privacy, a theory which first appeared in constitutional law in *Griswold v. Connecticut.*[9]

In the latter, the Supreme Court held that a Connecticut statute which prohibited the sale and use of contraceptives to married persons unlawfully infringed on the right to privacy, i.e., on the right of married persons to be free from governmental intrusion into the most intimate expressions of their love. Since then, the right of privacy has been extended to protect the availability of contraceptives to unmarried persons,[10] and to teen-agers.[11] It has protected the possession of pornography by a private person in his home,[12] and is the basis for the right to abort the unborn.[13] Indeed, this extension of the principle of the "right of privacy" from a case involving the sacred and most fundamental relationship underlying Judeo-Christian civilization to cases involving ethical beliefs of secular humanism which tend to destroy that basic relationship is an example *par excellence* of the technique of judicial activism and secularization with which this essay began.

The "right of privacy" cases have been used by the Courts to protect certain types of behavior from the imposition of criminal sanctions, but this is not to say that it cannot be used for other purposes or grounded on other beliefs. The New Jersey Court extended the right of privacy, but articulated a foundation for it significantly different from that previously posited.

The Court used the right of privacy 1) to prevent the imposition of criminal sanctions on *Mr. Quinlan,* if he decided to remove Karen from the respirator and she consequently died; and 2) to establish and protect *Karen's* right to decide to permit her "vegetative existence to terminate by natural forces."[14] There is a world of difference between these uses, as what follows will indicate.

The right to refuse medical treatment, or the right to terminate treatment already undertaken, is a right that belongs to Karen. She was held to have this right because 1) the invasion of her body was substantial, and 2) her chances of recovery were slight.[15] It is important to understand clearly what interests the state sought to protect by attempting to interfere in that question; as set out by the Court,[16] those interests were "the preservation and sanctity of human life," and "defense of the right of the *physician* to administer medical treatment according to *his* best judgment" (emphasis added). The Court in effect denied to the *state* the right or power to require a patient to accept medical treatment, and denied to a *physician* the right or power to impose such treatment regardless of the patient's wishes. Thus, the Court's "right of privacy" had nothing to do with the prevention of the state from prosecuting Karen; its concept of *Karen's* right is quite close to the "personal dignity. . . . (including) a right of bodily integrity and intangibility" cited by Professors Grisez and Boyle as the proper basis of a right to natural death.[17]

The right of privacy was also used to shelter Mr. Quinlan from criminal liability. The Court emphasized that Mr. Quinlan, as Karen's guardian, would be exercising *her* right to privacy, and that he had no separate, parental right of privacy of his own.[18] *Somebody* must exercise Karen's right of privacy, because, to reiterate, 1) the degree of invasion of her person was great, and 2) there was little hope of recovery; "her prognosis," said the Court, "is extremely poor."[19] (The fact that Karen still lives, that she did not die upon termination of the BMT's, is a fact clear only with the perfect vision of hindsight.)

The tone of the Court's opinion is learned, yet humble; dispassionate yet sensitive; frank yet subtle. The decision leaves this delicate question where it belongs: with the family of the stricken Karen, to be made after consultation with the medical experts, after consultation each with his own heart. The Court extends the right of privacy, true; but it extends it in such a way that the meaning of life, the sorrow of suffering, and the mystery of death are surrounded by a protective shell. The members of the family, with their shared faith and mutual love, are protected from all those who would in-

trude but who do not belong: the doctors, the hospital, the State, and, yes, the Courts of justice.

NOTES

1. *In the Matter of Karen Quinlan,* 355 A2 647, at 662 (N.J., 1976).
2. *Ibid.,* at 663.
3. *Ibid.,* at 671.
4. *Ibid.*
5. *Ibid.,* at 651.
6. *Ibid.* at 668.
7. *Ibid.,* at 651.
8. *Ibid.,* at 667.
9. 381 U.S. 479, 85 S. Ct. 1678 (1965).
10. *Eisenstadt v. Baird,* 405 U.S. 438, 92 S. Ct. 1029 (1972).
11. *Carey v. Population Services Int'l,* 97 S. Ct. 2010 (1977).
12. *Stanley v. Georgia,* 394 U.S. 557, 89 S. Ct. 1243 (1969).
13. *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705 (1973).
14. *In the Matter of Karen Quinlan,* supra, at 664.
15. *Ibid.*
16. *Ibid.,* at p..663.
17. See "An Alternative to 'Death with Dignity,'" in this issue.
18. *In the Matter of Karen Quinlan,* supra, at 664.
19. *Ibid.*

Abortion and Human Rights

Edward C. Smith

THROUGHOUT the first year of the Carter Administration the President has repeatedly reaffirmed his commitment to human rights and his opposition to abortion. His position on abortion has drawn confusion, disappointment, and vehement criticism from many circles, from those who feel that he has gone too far to those who feel that he has not gone far enough. Several women's groups, who find the President's position both inconsistent and intolerable, have opposed it because they view it as an encroachment upon their right to exercise self-government and control over their own bodies. What is clearly the crux of this volatile issue is the conflict between those who believe that abortion is as much in the realm of a citizen's rights as is the right to vote and those who believe that abortion is an act of murder.

The President's position on abortion is not, contrary to what many may think, inconsistent with his position on human rights. As a matter of fact his human rights position is planted in the abortion issue; they are roots and branches of the same tree. One cannot be for human rights and simultaneously favor abortions because to be in support of abortion is to be at war against humanity during its most vulnerable and defenseless state.

Let me, by way of analogy, attempt to amplify my point. First of all there is a similar relationship between government and citizen and mother and infant. Both are caretakers of their dependents. It is their responsibility to protect them, exercise custody over their welfare and to foster their growth and development. Consequently, what the President's human rights position is saying in effect is that although a nation has the sovereign right of self-government, that right of sovereignty does not include the right of a nation to abuse or mistreat its citizens. Suppression of personal liberty and freedom of speech is a denial of a basic human right of self-expression. Thus the President's human rights position has placed him in the laudable posture of supporting the rights of the frequently aborted voices of dissent in the Soviet Union, Eastern Europe, Latin America and elsewhere who bravely speak out

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against the injustices of their societies. Such criticism is unwanted by their governments, but warranted by the conditions.

Similar to a government, a mother becomes the custodian of her infant's welfare from the moment of conception. She constitutes the infant's only environment until birth. What she eats and drinks, her manner of rest and relaxation, whether she smokes or takes drugs, all have an immediate impact on the health and well-being of her unborn infant. Therefore, it is fair to say that the mother's right of personal self-government and control over her own body certainly does not include the right to mistreat, abuse, or abort the other body living and growing within her.

The law protects the members of a household from abuse from other members of that household whether they are blood relatives or not. Post-natal child abuse is a major criminal offense. Also in a fair number of jurisdictions in this country, self-assault (attempted suicide, self-amputation or maiming) is also considered a felony. Therefore, Mr. Carter's position on abortion is in effect saying that the mother's right of personal self-governance in no way extends to her the license to inflict harm on her child in either pre- or post-natal development.

The government can in no way sanction assault on any citizen's life at any stage of development, but especially while in its most dependent state, fetal development. Frankly speaking, there is something very *wrong* with a society that even contemplates, much less grants, infanticide as a *right*. Perhaps I would not feel as strongly as I do on this issue if I had not had the privilege and pleasure of watching my children position and re-position themselves in my wife's abdomen, and then witnessing, in person, their births. Whatever doubts I might have entertained about the nature of life before birth were all erased at the moment of the miracle of birth.

In 1793 the U.S. Government became inexplicably a part of the odious enterprise of slavery just as in 1973, as a result of the Supreme Court's decision, it became inexplicably a part of the equally odious enterprise of abortion. The Fugitive Slave Act of 1793 transformed slavery from a private instrument of bondage into a public institution of bondage. It justified Negro enslavement by dehumanizing the slaves. By stripping them of their humanity, legally reducing them to mere chattel, blacks became simply pieces of personal and communal property used for breeding, currency, entertainment, and labor. The official government position was not to recognize black families, marriages, claims to

property, or to personal or cultural identity. Therefore, the blacks were denied all the rights, privileges, and protections of citizenship because a citizen first had to be human and the law clearly said that the blacks were non-human. It was a brutal system. However, even though blacks were officially placed in a sub-human category, many guilt-ridden slave owners risked becoming social outcasts and traitors to their profession by granting individual acts of manumission, some even providing education and property for their slaves. I might add that this clandestine charity prevailed throughout the South from slavery's inception to its demise.

It is a sad commentary on our nation's history that a federal government, founded (by some of the most gifted and enlightened men of the age) on the principle of the individual's right to life and liberty, had to grope its way through the slavery question from 1793 to 1863, seventy long, tortuous years for the victims. Finally, the signing of the Emancipation Proclamation on January 1, 1863 brought the government back to its senses and since that moment in history America has made much progress in trying to make amends for the horrible consequences of this tragic misjudgment.

We cannot afford to make that kind of mistake again, but I feel that we already have. The Supreme Court's decisions, and subsequent lower court adjudications, have returned us once again to a social climate where the winds of narcissism and whim prevail over Christian charity and wisdom.

For example, the argument that the Hyde Amendment discriminates against poor women (which of course it does, as do tax loopholes and numerous other perquisities reserved for the privileged classes) is clearly a camouflage device to cover up something else. The something else being that "poor women" is a popularly understood euphemism for *poor minority women* — Blacks, Hispanics, Indians etc., — in other words those women more prone to have large families (four or more children) whether in, or outside of, marriage. These poor minority women, with their government medicaid cards, represent a very lucrative supplemental income market for middle and upper-income (and mostly white) male physicians. I have read that many doctors, who have added abortions to their *repertoire* of services, have tripled and quadrupled their yearly earnings. Consequently, because of this vested interest, the medical profession has become one of the principal elements in the abortion network and represents a very influential lobby in favor of continued fiscal support of abortion.

Contrary to what many seemingly well-intentioned people may feel,

abortion is not a gesture of social responsibility or humanitarian good will, nor is it the solution to the problem of unwanted or inconvenient pregnancies. The Hyde Amendment does not purport to reverse the Supreme Court's 1973 decision; only the Supreme Court can do that. What the Hyde Amendment in effect accomplishes, in limited degree, is the removal of the poor, and the public treasury, from the role of subsidizing the infanticide industry. Unfortunately, the Hyde Amendment will not stop abortions, neither will it stop some poor women from begging, borrowing, or stealing in order to secure an abortion. As a footnote to this discussion, it is interesting to note that Margaret Sanger, the foundress of Planned Parenthood, said in her autobiography that "Abortion is the wrong way, no matter how early it was performed it was taking life." Furthermore, this point of view is also reflected in a pamphlet published in August, 1963 by Planned Parenthood-World Publication titled "Plan Your Children For Health and Happiness" in which the question was asked "Is abortion a safe method of birth control?" The answer was the following:

> Definitely not. An abortion kills the life of a baby after it has begun.

Also, on September 6, 1977, Reverend Jesse Jackson, President of Operation P.U.S.H. (People United To Save Humanity) sent an "Open Letter To Congress" in which he said:

> As a matter of conscience I must oppose the use of federal funds for a policy of killing infants. The money would much better be expended to meet human needs. I am therefore urging that the Hyde amendment be supported in the interest of a more humane policy and some new directions on issues of caring for the most precious resource we have — our children.

This view is shared by many other black leaders as well.

One of the most demanding tasks facing the President is the establishment of the proper moral tone for our social order. Mr. Carter is struggling to make substantive progress in this area. He is attempting to restore public trust and confidence in government while at the same time re-tailoring our foreign policy to suit our reduced stature as a global power. He is also planning to submit to Congress a realistic domestic agenda that will include major initiatives in the areas of improved health care and cost containment, improvements in education, reduction of welfare dependents, increasing jobs in the private sector and launching a comprehensive urban revitalization program. And he hopes to be able to accomplish these goals within the margins of a balanced budget.

I am confident that he will continue in his forceful opposition to abortion because it is absolutely vital for the rest of the world to know that the *head* of this country has a *heart* for its unborn citizens.

History has clearly shown that when a society's social policy creates a social climate where sex as recreation transcends sex as procreation, that society's strength begins to seriously wane, egotism replaces charity and generosity, respect for authority and morality begins to collapse, families begin to disintegrate, the society atomizes and decays.

Let me elaborate. If sex is viewed as an enjoyable but essentially procreative act, then it can only be performed between a man and a woman, who are husband and wife, because its purpose is to set in motion the cycle of life. Therefore, contraceptives and abortions would clearly represent a prohibitive influence to the procreative process. On the other hand, if sex is viewed essentially as a recreative act, an act of sport, then it can be performed between man and woman, woman and woman, man and man, man and animal, woman and computer, the possibilities are limitless.

In Alex Haley's celebrated book *Roots,* Omoro, one of the principal characters, tries to explain death, and life, to young Kunta Kinte:

> "He said that three groups of people lived in every village. First were those you could see — walking around, eating, sleeping, and working. Second were the ancestors, whom Grandma Yaisa had now joined."
>
> "And the third people — who are they?" asked Kunta.
>
> "The third people," said Omoro, "are those waiting to be born."

Needless to say, this holistic view of life was needed then, and especially now, and certainly for the future. A society that accounts for even its unborn is the least likely candidate to breed an ecological disaster in the world or create a nuclear holocaust.

The American Consensus on Abortion

John T. Noonan, Jr.

PUBLIC OPINION polls are frequently read like ancient oracles, the reader discerning in them what he wants to hear; or they are treated the way an old-fashioned controversialist treated Holy Writ, citing only the passages supporting his side and conveniently neglecting context. In the article which follows this one you will find an examination of public opinion polls on abortion which is free of these defects — a full and frank examination of what the public thinks as captured by this special set of detectors.

Judith Blake, the author, is a professional demographer and social scientist, the former chairman of the Department of Demography at the University of California, Berkeley, and presently Bixby Professor of Demography and Sociology at U.C.L.A. As her language shows, she is not opposed to abortion. She speaks of "extreme opposition" when she speaks of the anti-abortion response to the Supreme Court's decisions. She writes of "erosion" of the Court's intent and of legislation that does not comply with "the spirit" of *The Abortion Cases.* In short, her tone is that of a person who sees the Court as having set a norm. When she reports the American consensus on abortion she is not reporting what she wants to hear.

Professor Blake is keenly aware of how much an answer depends upon the question. She notes of one question that it "may have engendered a negative bias in respondents," and of another, how it may have engendered a positive bias in respondents. She herself, in one Gallup survey, "commissioned two questions intentionally worded to give favorable responses." The introduction of bias into a question is a legitimate technique of investigation, if it is done self-consciously, publicly acknowledged, and discounted for. Far too often we have been confronted with the results of such loaded questionnaires with no admission that the questions producing the results were intentionally designed to provoke them. A scrupulous social scientist, Judith Blake draws attention to the procedures she has designedly employed.

From her careful, frank, and complete canvass of opinion, four conclusions emerge as beyond dispute.

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1. Women are More Opposed to Abortion than Men.

On each of the main questions — when human life begins, whether abortion on demand is acceptable, whether late abortions should be legal — more women than men take an anti-abortion stance. On each of these questions American women are by a substantial margin further from Harry Blackmun's opinions in *Roe v. Wade* and *Doe v. Bolton* than are American men.

Blake's analysis confirms what she had already discerned in 1971 before *The Abortion Cases.* Writing then in *Science,* February 12, 1971, she presented public opinion data that showed that neither the poor nor women were the main supporters of the pro-abortion position. The typical pro-abortionist was a white upper middle class male — exactly the kind of person Harry Blackmun is. Judith Blake has not been afraid to challenge the media's presentation of abortion as a great cause for women.

On a single question — should a woman be allowed to have an abortion if her husband opposes it? — more women than men gave a pro-abortion response. But the majority of both men and women answer this question negatively; and between 58 and 61 per cent of the women are opposed.

On the main abortion issues, the percentage of female opposition is very high. For example, on the question of when "human life begins," only 10% of the women (as opposed to 20% of the men) accepted the view that it begins at birth. Harry Blackmun implicitly took this position as the premise of his famous opinions, as he refers to the fetus throughout pregnancy as merely "potential life." Not only is his view not shared by 90% of the women, over half of the women believe that human life begins at conception. The number of women believing this has indeed increased dramatically from 1970 to 1975. It is fair to infer from Professor Blake's report that if we had had a Supreme Court composed of women who were representative of American women — not the self-appointed spokespersons of NOW (the National Organization for Women) — the 1973 decisions would never have happened. They have happened, but they are contrary to the basic belief about human existence of the overwhelming majority of American women.

2. A Strong Majority of American Women and Men Oppose Abortion After Three Months.

According to the 1975 Gallup Survey analyzed by Professor Blake, only 18% of the women and only 27% of the men answer "Yes" to the question whether they favor "a law" permitting an

abortion after three months of pregnancy. Of course the Supreme Court has enacted such a law by way of Harry Blackmun's opinions. The question in effect tested what sentiment there was in favor of this state of things. The sentiment was small — not enough to pass a law, not enough to block a constitutional amendment erasing Blackmun's opinions.

The "don't knows" or "others" on this question were not many. Definitely opposed to such "a law" were almost three-quarters of the women (72%) and not quite two-thirds (61%) of the men. Combining men and women, at least two-thirds of the respondents are against the legal situation Harry Blackmun has produced.

3. A Strong Majority of American Women and Men Oppose Abortion On Demand.

Different polls studied by Professor Blake asked different questions testing public approval of abortion where no serious specific reason motivated the desire for the abortion. None of the polls asked bluntly, "Do you approve of abortion on demand as a constitutional liberty?" That is the only question which would have actually captured the present legal situation. Of the questions that in fact were asked, the Gallup question apparently engendered a negative bias and the NORC question a positive bias. If the substantial difference between the two polls is split, there are still only 37% approving what Professor Blake calls "elective abortion." It may be inferred there would be even less approving if the question was put in the stark terms of "abortion on demand." There are — again splitting the difference — about 58% clearly opposed to "elective abortion." It may be inferred that this percentage would rise if the question was "abortion on demand."

4. The Consensus on Abortion Is Enough for Effective Political Action.

The Supreme Court conferred on American women a radical liberty — the ability to have a legal abortion on request at any time in pregnancy. As our first three conclusions show, the Court acted upon a premise which most women have rejected. If all that had to be done to correct the Court could be done by legislation, substantial national majorities exist rejecting abortion on demand and abortion after three months. However, to correct the Court, we need an amendment, carried by two-thirds of each branch of Congress and ratified by three-quarters of the States. Until we know more precisely how the pro-life majority is distributed in the States, we do not know if there is a large enough majority to enact the Amendment. The possibility that there is is clear.

The single national question on an Amendment analyzed by Professor Blake shows the nation equally divided on a Human Life Amendment outlawing all abortions except to save the carrier's life. She has no analysis of opinion on an Amendment reversing *Roe* and *Doe* by restoring to the States the power to protect unborn life. It is, however, a reasonable inference from her data that if everyone knew the full extent of the Supreme Court decisions — she shows they do not — and if everyone voted their convictions on abortion on demand and late abortions, there would easily be a large majority for such an Amendment.

On only one other issue, school desegregation, has the Court ever reached so deeply into the lives of a large number of Americans. There was intense opposition to this decision, but that opposition was first regional and then local. There was never a majority against it. There was never two-thirds of Americans opposed to its principal features. There was never a rejection of its premises by ninety per cent of its intended beneficiaries. All of these differences suggest the popular attitudes on abortion are very different from those the Court sought to overcome on school segregation.

What we know certainly is that there is a consensus large enough to support the kind of political action usual in a democracy. Since such a very large majority does in fact have opinions contrary to Harry Blackmun's, this majority should be able to translate its view into anti-abortion action by state legislatures, Congress, and the Executive. There is no reason why any of the bodies subject to the electorate should hesitate to take the steps necessary to reverse the Court's rulings. In a word, Professor Blake's study confirms professionally and scientifically what those close to the grass roots have been saying all along — and votes in the States and in the Congress are now demonstrating: The American consensus has not accepted the Court on abortion.

The Supreme Court's Abortion Decisions and Public Opinion in the United States

Judith Blake

BETWEEN January 1973 and July 1976, the United States Supreme Court handed down three major decisions concerning abortion—two in 1973 and one in 1976. The 1973 decrees struck down most state laws restricting pregnancy termination and ruled that, until after the first trimester, the decision to have an abortion rests with the woman and her physician. The Court said that between the beginning of the fourth month of pregnancy and fetal viability (approximately six months gestation) state regulation should be concerned with measures designed to preserve the mother's health but should not be needlessly restrictive. After viability, the state was held justified in regulating and even proscribing abortion, except where necessary for the preservation of the life or health of the mother. The Court nullified state statutes limiting the performance of abortions to hospitals; invalidated abortion review committees; and abrogated restrictions on migration between states for purposes of abortion. In 1976 the Court specifically refused to legitimate action by interested parties—such as the woman's husband or parents—to veto her free access to abortion.

Implementation of these judicial rulings is turning out to be an arduous process, analogous in many ways to implementation of the earlier decisions of the US Supreme Court on school desegregation. The abortion decisions are beginning to exemplify the increasingly familiar problems involved in the use of judicial review as a means of effecting social change; mobilization of extreme opposition and steady erosion of the Court's intent by means of collateral deterrence.[1]

This article outlines some of the major problems involved in fulfilling the Supreme Court decisions on abortion and presents data on public support for voluntary pregnancy termination.

Organized Opposition to the Supreme Court Decisions

Who has been short-circuiting implementation, and what have they been doing? The most obvious actors have been anti-abortion ("right

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to life") groups that have burgeoned nationwide since the 1973 decisions. These groups have been remarkably effective in bringing political and social pressure to bear, both locally and in Congress. States have passed legislation that does not comply with the spirit of the 1973 decisions—legislation that heavily regulates abortion clinics; withholds Medicaid (government-financed medical insurance) funds for purposes of abortion; requires doctors to supply detailed statistical information (sometimes including the woman's name) for every abortion; makes spousal or parental consent a condition of abortion; and involves numerous similar efforts at collateral deterrence. The number of abortion-related bills in state legislatures has increased dramatically, as has the proportion of such bills enacted. For example, in 1972, 134 such bills were introduced and 4 enacted. As a result of the Court's decisions in 1973, 260 bills were introduced and 39 enacted, and in 1974 the comparable figures were 189 introduced and 19 enacted.[2]

A recent decision by the US Supreme Court upheld the right of privately administered hospitals to refuse to perform abortions.[3] A movement has gained strength to amend the Constitution in an effort to bypass the Court's decisions, and pressures are constantly being exerted on Congress to curtail the use of public funds for purposes of abortion.

It is evident that such efforts are succeeding in making it difficult to obtain a legal abortion. Although approximately one million legal abortions were performed in 1975, most of these (Christopher Tietze estimates about 70 percent) replaced operations whose status would have been illegal prior to the Court's decisions.[4] That is, most legal abortions replaced abortions that would have occurred anyway on an illegal basis. Consequently it is still true that many types of women who could not readily obtain illegal abortions, notably the poor, the very young, and those in nonmetropolitan areas, suffer severe handicaps in obtaining legal ones, even though they are nominally available. Services are concentrated in nonhospital abortion clinics, and the latter are confined to a few large metropolitan areas.[5] In the words of Weinstock, Tietze, Jaffe, and Dryfoos,

> The failure of most hospitals to provide abortion services in response to the Supreme Court's 1973 abortion decisions is largely responsible for this inequitable distribution. The default of public hospitals, on which many poor persons traditionally depend for health care, undoubtedly deters many poor women from obtaining abortion services. Several states have enacted statutes to deny Medicaid reimbursements for abortions or to restrict it to medical emergencies. Although these statutes have been consistently overturned by the courts, there remains a chilling effect in states where they

exist. In a few states, Medicaid reimbursement is known to be unavailable, while in others it is hedged with medical or procedural restrictions.[6]

Finally, the conviction in 1975 of Dr. Kenneth Edelin on manslaughter charges for aborting a fetus of more than 20 weeks gestation (overturned in 1977) and the prevention of scientific research on fetuses scheduled for abortion are direct spin-offs of increasingly organized "pro-life" groups.[7]

The Public and the Abortion Decisions

A less obvious, but nonetheless politically important element in undermining implementation is public opposition to the basic content and implications of the Court's position—opposition that antedated the 1973 decisions and that has continued since them.[8]

What currently is the evidence regarding public views on abortion in the United States? I shall use data on public opinion concerning abortion derived from questions that I have commissioned on numerous national Gallup surveys from the late 1960s up through 1977. I shall also use results from nationwide surveys conducted by the National Opinion Research Center (NORC) each year between 1972 and 1975, as well as tabulations from the 1965 and 1970 National Fertility Studies (NFS) commissioned by Charles F. Westoff and Norman B. Ryder. The Gallup and NORC surveys were performed on cross-sectional samples of voting age adults. The National Fertility Studies were of married women in the reproductive ages. The results presented are for all races.

The surveys analyzed here deal with numerous aspects of legalized abortion. One facet concerns public support for elective abortion—abortion for reasons of personal desire rather than health, financial, or other crises. On this topic, it is possible to present the results from all three sources, since all asked specific questions on elective abortion, although wording differed somewhat.

Additional tabulations relate to a number of subissues implicit or explicit in the Supreme Court's major 1973 and 1976 decisions: whether abortion should be permitted after the first three months of pregnancy; when respondents feel that "human life" or the "human person" begins; whether abortion should be allowed without the consent of the husband; and whether the government should assume any part of the cost of an abortion. Finally, public reaction to possible constitutional amendments that would severely restrict abortion is discussed.

In assessing the results, the reader is enjoined to bear in mind that, among data bases, the sampling differed in some cases, the time periods were not exactly the same, and the questions were not always

identical. I shall try to call attention to incomparabilities and analyze their effects on responses; however, the point of my analysis is not to interpret fine shades of difference among replies so much as to outline broadly where the public stands. In general, this is not a difficult task with regard to abortion since, as will be seen, there are major similarities of response level and trend among different data sets. Hence, although surveys regarding some public issues may produce erratic results, as Lipset has recently suggested,[9] systematic consideration of the data on abortion seems to provide encouraging evidence of reliability.

Elective Abortion and Public Opinion

A controversial issue of the 1973 decisions concerned the Court's support for a woman's right to obtain an abortion without resort to such extenuating justifications as her health, probable malformation of the infant, rape, or financial and emotional stress. The decision that she does not want to continue the pregnancy is sufficient justification for a woman to seek medical help in procuring an abortion.

A variety of data are available concerning public views regarding elective abortion. Before discussing these data, which are summarized in Table 1, we should note that they stem from somewhat different questions.

On the Gallup surveys the question was:

> Do you think abortion operations should or should not be legal where the parents simply have all the children they want although there would be no major health or financial problems involved in having another child?

This question was asked after three prior questions concerning the mother's health, possible child deformity, and financial stress as justifications for abortion. The question posed the issue of elective abortion pointedly, calling attention to the difference between not wanting the child despite a lack of physical or financial stress and having such stress-related reasons for desiring to terminate the pregnancy. Also, the word "simply" carries the implication that the reason given is not—or may not be—sufficient. Thus, both the order in which the question was asked and the wording may have engendered a negative bias in respondents.

The National Opinion Research Center asked:

> Please tell me whether you think it should be possible for a pregnant woman to obtain a legal abortion if she is married and does not want any more children?

Table 1
Attitudes of US Men and Women Toward Elective Abortion (Percent Distribution)

Source and Attitude	1965	May 1968	Dec. 1968	1969	1970	1972	1973	1974	1975	1977
Gallup surveys										
Approving		11	13	14	23	27	27	31		30
Disapproving		85	81	79	69	67	68	63		63
No opinion		4	6	7	8	6	5	6		7
Total		100	100	100	100	100	100	100		100
Total respondents		(1,611)	(1,517)	(1,560)	(1,525)	(1,513)	(1,550)	(1,583)		(1,549)
NORC surveys										
Approving						38	46	45	44	
Disapproving						57	51	50	52	
No opinion						5	3	5	4	
Total						100	100	100	100	
Total respondents						(1,613)	(1,504)	(1,484)	(1,490)	
National Fertility Studies										
Approving	8				21					
Disapproving	91				76					
No opinion	1				3					
Total	100				100					
Total respondents	(4,810)				(5,981)					

NOTE: The questions asked on the three major data sets differed somewhat. See discussion in the text.

SOURCES: Nationwide Gallup and National Opinion Research Center surveys of voting age adults and the 1965 and 1970 National Fertility Studies of married women in the reproductive ages.

This item appeared second in a list of questions on abortion beginning with the justification in terms of possible child deformity. The NORC question—both because of the order in which it was asked and because it did not point up any difference between stress and nonstress reasons—avoided a possible negative bias, but may have engendered a positive one. A number of respondents may have responded affirmatively on the grounds of implicit stress reasons for not wanting a child. In effect, respondents had no way of knowing that additional questions were going to be asked concerning these reasons (health or finances) and may have injected them into the implicit logic of their responses—a woman may not want any more children because she is ill or in financial difficulties.

The two National Fertility Studies asked:

> I'm going to read you a list of several possible reasons why a woman might have a pregnancy interrupted. Would you tell me whether you think it

> would be all right for a woman to do this if the couple didn't want any more children?

The elective-abortion justification was presented after those concerning the woman's health, the possible illegitimate status of the pregnancy, and financial stress. Instead of asking whether abortion should be legal, these studies asked if it would be "all right." This may have introduced a slight negative bias, since some people feel that, in a pluralistic society, many things should be legal even though given individuals do not consider them "all right."

We see, from the Gallup surveys reported in Table 1, that opposition to elective abortion has clearly declined over the period from the high of 85 percent in 1968 to 63 percent in 1974 and 1977. We may also note that the two surveys in 1968 showed virtually identical results (suggesting high reliability) and that the 1965 and 1970 findings of the National Fertility Studies were very close to those of the Gallup surveys during the same period. Although negative views have declined and positive ones increased over time, it seems clear that the largest changes took place in the late 1960s. Both the Gallup and the NORC surveys evinced relatively little change beginning with 1973.

Regardless of the data base, none of the results shows as many as 50 percent of respondents approving, and most surveys indicate levels of approval that are well below 50 percent. The major incomparability is between the NORC and Gallup surveys: NORC systematically shows higher proportions approving than Gallup. These differences are doubtless due to differences in the wording and order of the questions asked. If, as has been suggested, the Gallup series understates and the NORC series overstates approval of elective abortion, then such approval in the United States in the mid-1970s hovers around 40 percent.

Finally, in an effort to avoid order-effects in questioning and to pose the issue in another way, I commissioned the following question on Gallup surveys in 1972 and 1974:

> Do you believe that there should be no legal restraint on getting an abortion —that is, if a woman wants one she need only consult her doctor, or do you believe that the law should specify what kinds of circumstances justify abortion?

Tabulations of responses to this question are presented in Table 2. They conform with the estimate of around 40 percent approving elective abortion in the mid-1970s based on the NORC and Gallup time series.[10]

When we turn to other specific points relating to the decisions—

allowance of abortion after three months of pregnancy, consent of interested parties such as the woman's husband, or use of government funds (like Medicaid) for abortions—public opinion diverges even further from the rulings of the Supreme Court.

Table 2
Responses to a Question Whether There Should Be No Legal Restraint on Abortion or Whether the Law Should Specify Circumstances that Justify Abortion (Percent Distribution)

Sex and Response	September 1972	September 1974
Men		
No legal restraint	40	41
Law should specify circumstances	52	50
No opinion	8	8
Total	100	100
Total respondents	(765)	(790)
Women		
No legal restraint	37	38
Law should specify circumstances	56	55
No opinion	7	7
Total	100	100
Total respondents	(781)	(793)
Men and Women		
No legal restraint	39	40
Law should specify circumstances	54	53
No opinion	7	7
Total	100	100
Total respondents	(1,546)	(1,583)

SOURCES: Gallup surveys of voting age adults, September 1972 and September 1974.

Abortion After Three Months of Pregnancy

In 1970 the National Fertility Study asked a national probability sample of approximately 6,000 American married women under age 45 the following question: "Are you in favor of a law which permits a woman to have an abortion even if she is more than three months pregnant?" In April 1975 I commissioned the same question on a Gallup Survey—a national probability sample that included both men and women of voting age and all marital statuses. Again, a negative bias may have arisen from the wording, since "even if" suggests the action may not be acceptable. Results of both studies are presented in Table 3.

Over the five-year period, there clearly was an increase in willingness to allow abortion after three months of pregnancy; however, as recently as 1975, over 70 percent of women (both in the total

sample and among those under age 45 who were married) disapproved of abortion after the first trimester. Men were less disapproving and more positive, but approximately 60 percent of men disapproved nonetheless.

Table 3
Responses to the Question, "Are You in Favor of a Law which Permits a Woman to Have an Abortion Even if She is More than Three Months Pregnant?" (Percent Distribution)

	Married, under Age 45			All Marital Statuses	
Response	Women 1970	Women 1975	Men 1975	Women 1975	Men 1975
Yes	12	18	27	17	27
No	84	72	61	73	58
Other	4	4	6	5	6
Don't know	3	3	6	5	9
Total	100	100	100	100	100
Total respondents	(5,981)	(327)	(259)	(799)	(800)

SOURCES: National Fertility Study, 1970, and Gallup Survey, April 1975.

In January 1973, during the week following the first two Supreme Court decisions, I commissioned two questions intentionally worded to give favorable responses:

> Some states have laws that say abortion cannot be performed after a woman has been pregnant a certain period of time. Do you think there should be some such time limit or do you think there should be no legal restriction concerning the time when abortion can be performed?
>
> [If there should be a limit]
>
> Taking into account that a woman may not know she is pregnant until three or four weeks after conception, after what month of pregnancy do you think it should be illegal to perform an abortion?

Thirty-five percent of men and 47 percent of women said that abortion should be limited to the first three months, while 16 and 17 percent respectively volunteered that they were against all abortion (Table 4). This conforms with the 1975 result of 58 percent of men and 73 percent of women answering negatively when asked whether abortion should be legal after the first three months of pregnancy (Table 3). Similarly, in 1973, 31 percent of men and 24 percent of women would allow abortion after the third month of gestation, compared with 27 percent of men and 17 percent of women in 1975. Given that the 1973 question called respondents' attention to the need for time in order to discover the fact of pregnancy, these results are remarkably similar. A minority of respondents in either survey would approve abortion beyond the third month of pregnancy.

Table 4
Views on Months of Gestation at Which Abortion May Be Permitted (Percent Distribution)

View	Men	Women
Abortion should never be performed (volunteered)	16	17
Abortion allowable only if pregnancy 3 months or less	35	47
Abortion allowable at 4 months pregnancy duration	6	8
Abortion allowable at 5 or more months[1]	6	5
There should be no legal restriction on timing of abortion	19	11
Other	4	4
No opinion[2]	14	8
Total	100	100
Total respondents	(735)	(773)

[1]Five months (40), six months (41), seven to nine months (3).

[2]Combined "no opinion" responses on both parts of the question.

SOURCE: Gallup survey of voting age adults, January 1973.

Why are respondents so concerned about confining abortion to the early months of pregnancy? One reason appears to be that they regard the fetus as a "human life," or a "human person," very early in the gestational period. The data in Table 5 for 1973 and 1975 on when "human life" begins stem from the following question:

> It is sometimes said that the morality of abortion rests on the question of when one thinks human life begins. For example, some people believe that it begins at conception, that is, when sperm and egg first meet. Others say that it begins only when the woman first feels movement inside her (what is sometimes called quickening), and still others say that human life has begun when the unborn baby could probably survive if it were born prematurely. Finally, there are those who hold that human life begins only with the actual birth of a baby. Which of these alternatives best expresses your views?
>
> 1. Human life begins at conception.
> 2. Human life begins at quickening.
> 3. Human life begins when the unborn baby could probably survive on the outside if it were born prematurely.
> 4. Human life begins only at birth.

A second type of question asked in 1975 attempted to present the respondent with the specific issue of when he or she would view the unborn as a "human person."

With regard to when "human life" begins, the majority of respondents dated it before birth, and in both 1973 and 1975 "at

conception" was the modal response. There was a clear differential between the sexes, with men more likely to see life beginning at a later point than women. Respondents were, if anything, more conservative in 1975 than in 1973—perhaps a response to "right to life" propaganda on this specific issue.

Table 5

Responses to Questions on When Human Life Begins and When the Unborn May Be Considered a Human Person (Percent Distribution)

	Life Begins		Unborn Is a Person
Time	1973	1975	1975
		Men	
At conception	36	43	33
At quickening	19	15	15
At viability	15	14	22
At birth	19	20	18
Don't know/other	11	8	12
Total	100	100	100
Total respondents	(735)	(794)	(800)
		Women	
At conception	50	58	51
At quickening	23	16	18
At viability	12	11	15
At birth	8	10	8
Don't know/other	7	5	7
Total	100	100	100
Total respondents	(773)	(800)	(799)

SOURCES: Gallup surveys, January 1973 and April 1975.

The question on the "human person" reduced somewhat the proportion of respondents who said "at conception" (especially among men), but left unchanged the proportion placing it before birth. In short, most men and women place both "human life" and personhood early in the gestational process, and this public definition of the situation may be important in coloring attitudes toward the timing of abortion. Moreover, it is a view that is both at odds with that of the Supreme Court and at variance with what the Court believed public opinion to be. For example, in 1973 the Court said,

> We need not resolve the difficult question of when life begins. . . . It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. *There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained.*[11]

Table 6 shows that even among non-Catholics, a plurality felt that human life begins at conception. Responses to the question on when the unborn may be considered a person showed a similar pattern by religion (data not shown).

Table 6
Responses by Religion to a Question on When Human Life Begins (Percent Distribution)

Time Life Begins	Men		Women	
	Catholic	Non-Catholic	Catholic	Non-Catholic
		1973		
At conception	49	31	61	45
At quickening	15	20	19	25
At viability	16	15	10	13
At birth	12	21	5	9
Don't know/other	8	13	5	8
Total	100	100	100	100
Total respondents	(200)	(535)	(230)	(543)
		1975		
At conception	52	41	75	52
At quickening	17	14	13	17
At viability	15	14	4	13
At birth	13	22	7	11
Don't know/other	5	9	1	7
Total	100	100	100	100
Total respondents	(200)	(594)	(212)	(588)

SOURCES: Gallup surveys, January 1973 and April 1975.

Abortion and the Husband's Consent

In its 1973 abortion decisions, the Court did not confront the issues of spousal and parental consent.[12] However, the 1976 decision affirmed the woman's right to obtain an abortion regardless of spousal or parental approval (if she is a minor).

Although no information is available at this time concerning public views on parental approval, public attitudes toward the husband's consent may be considered here. First, we can look at results of a question, "Are you in favor of a law which permits a woman to have an abortion even if her husband is against it?", that was originally asked on the 1970 National Fertility Study and again on a Gallup survey in 1975. Table 7 shows that in 1975 only about one-third of respondents approved a woman's right to have an abortion when her husband opposed it. Close to 60 percent disapproved. As compared with 1970, however, this is an issue where considerable change has occurred—among married women under 45, approval

increased from 15 to 35 percent. As perhaps might be expected, although men are generally more favorable toward abortion than women, in this instance they are less so.

Table 7
Responses to a Question Whether a Woman Should Be Allowed to Have an Abortion If her Husband Opposes It (Percent Distribution)

Response	Married, under Age 45			All Marital Statuses	
	Women 1970	Women 1975	Men 1975	Women 1975	Men 1975
Yes	15	35	34	33	35
No	81	57	58	56	52
Other	4	5	4	6	6
Don't know	—	3	4	5	7
Total	100	100	100	100	100
Total respondents	(5,981)	(327)	(259)	(799)	(800)

SOURCES: National Fertility Study, 1970, and Gallup survey, April 1975.

Next we can look at the results (Table 8) of a question that was worded somewhat more mildly, "Do you think it should be lawful for a woman to be able to get an abortion operation without her husband's consent?", asked in 1972 and 1974 on Gallup surveys. This question also brought out a high rate of disapproval—less than the previous question in 1970 and slightly more than in 1975.

In sum, there is a very low rate of approval, even among women, for the woman's right to have an abortion without her husband's consent.

Abortion at Government Expense

As has been noted already, a number of states have curtailed or forbidden the use of Medicaid funds, or other public monies, for purposes of abortion. Pressure on Congress to pass inhibiting legislation concerning this issue continues to be strong. Again, public opinion diverges from the views of the Court. In response to a question asked in the 1970 National Fertility Study and in the 1975 Gallup Survey, "Are you in favor of a law which permits a woman to have an abortion even if it has to be at government expense?", 57 percent of respondents answered negatively in 1975 and 35 percent positively, with virtually no variation by age or sex. American women were somewhat less negative than in 1970, when 66 percent opposed government subsidy, but the five-year period clearly did not greatly change Americans' views. It is possible that a share of negative responses to the question relates to hostility to-

ward government expense generally; however, the political implications are the same. Apparently, publicly financed abortion is, like food stamps, an unpopular government expense.

Table 8
Responses to a Question Whether It Should Be Lawful for a Woman to Be Able to Get an Abortion without her Husband's Consent (Percent Distribution)

	Men		Women	
Response	1972	1974	1972	1974
Under Age 45				
Should	22	24	24	31
Should not	68	66	68	61
Depends	6	8	7	6
Don't know, no opinion	4	2	1	2
Total	100	100	100	100
Total respondents	(377)	(411)	(406)	(410)
Total Sample				
Should	20	24	22	28
Should not	66	66	66	62
Depends	8	8	7	6
Don't know, no opinion	6	2	5	4
Total	100	100	100	100
Total respondents	(734)	(763)	(797)	(789)

SOURCES: Gallup Surveys, August 1972 and September 1974.

Effects on Public Opinion of the 1973 Supreme Court Decisions

None of our time series on public views regarding abortion indicates that the Supreme Court decisions had an important positive effect on opinion. The longest series—from 1968 through 1977 on elective abortion—shows a leveling off of opinion after 1970 and only a modest increase in approval by 1974 that remained unchanged by 1977. This increase can hardly be said to constitute a sharp rise in a long-term upward trend in approval antedating the Court's decisions.

One reason for the apparent lack of effect is that, even by 1975, less than half of American adult respondents were informed about the 1973 decisions. This conclusion stems from response to the following questions:

> During the past three years, have you heard of decisions by the Supreme Court concerning abortion?
>
> [If yes,]
>
> As you understand these decisions, which one of these effects would you

expect them to have had on a woman's ability to get a legal abortion if she wanted one?

1. Made no change.
2. Made it easier.
3. Made it harder.
4. Other.
5. Don't know.

Twenty-eight percent of men and 22 percent of women had never heard of the decisions, whereas 45 percent of men and 48 percent of women had heard of them and knew that their effect was to make it easier to have an abortion.[13] It seems logical to reason that widespread knowledge concerning the decisions might have induced more favorable views by the public. Indeed, among those who were informed on the 1975 survey, response was more positive concerning the questions on the husband's consent, abortion past three months of gestation, and abortion at government expense (Table 9). Moreover, this result remains even when educational level is controlled. We cannot be sure, however, about the causal direction involved. It may well be that people who were initially more favorable toward abortion were also more aware of Supreme Court decisions concerning it. Only a panel study could answer such a question definitively.

Attitudes Toward Proposed Constitutional Amendments Restricting Abortion

If popular support for important aspects of the Court's decisions is weak, does this imply that the public would favor a highly restrictive constitutional amendment regarding abortion—an amendment to outlaw it altogether or allow it only if the pregnant woman's life is endangered?

A variety of data suggest that the public overwhelmingly approves abortion if the woman's health is in danger. From the middle 1960s to 1977 approval of this justification has been well over 80 percent, according to the Gallup and NORC surveys and the National Fertility Studies. Moreover, the consistency of results from all data sets is quite remarkable. However, during September 1976, when a New York Times-CBS national survey asked, "Do you favor an amendment to the Constitution which would make abortions illegal, or do you oppose such a law?", 32 percent were found to approve such extremely severe legislation—legislation that would not even allow abortion to save the pregnant woman's life. Opposition amounted to 56 percent. The remaining respondents did not express an opinion.[14]

Table 9
Approval of Abortion in Relation to Knowledge of the Supreme Court's 1973 Decisions

	Percent Approving Abortion								
	Without Husband's Consent			After Three Months Pregnant			At Government Expense		
Knowledge of Supreme Court Decisions	High School Incomplete	Complete High School or More	Total	High School Incomplete	Complete High School or More	Total	High School Incomplete	Complete High School or More	Total
				Men					
Knows made it easier to get abortion	38	47	45	22	36	33	30	46	42
Does not know of decisions, or wrong effect	19	32	26	15	26	21	19	30	25
Total	25	40	35	17	31	27	22	38	33
				Women					
Knows made it easier to get abortion	27	46	42	13	24	21	32	44	41
Does not know of decisions, or wrong effect	15	31	25	7	16	12	19	30	26
Total	20	39	33	9	20	16	24	37	33

SOURCE: Gallup Survey, April 1975.

The surprisingly high percentage favoring such an amendment in 1976 may reflect a deterioration of public approval, or it may reflect an assumption by some respondents that the question meant making abortion illegal except where the woman's health was endangered. The results of a recent Gallup survey are indicative of public views on an amendment outlawing abortion except for health reasons. In late February 1976 Gallup asked:

> A constitutional amendment has been proposed which would prohibit abortions except where the pregnant woman's life is in danger. Would you favor this amendment which would prohibit abortion or would you oppose it?

The nation was almost equally divided, with 45 percent favoring such an amendment and 49 percent opposing it. The remaining respondents did not express an opinion.[15]

This result, too, suggests an ambivalence in views concerning abortion since, in surveys taken prior to 1976, rape and child deformity as justifications for abortion were approved by almost as many respondents as the woman's health.[16] For example, in the 1975 NORC survey both rape and child deformity elicited 80 percent responding positively, compared with 88 percent for the woman's health.[17] In any event, the 1976 data serve to buttress our other information on the public's conservatism with respect to the abortion issue.[18]

And One Step Back?

Full implementation of the US Supreme Court's decisions on abortion will be complex, involving individuals and agencies ranging from the local to the national levels of the country. Moreover, the issues and rights embedded in the decisions are also intricate. Certainly they are not encompassed by the Court's constitutional reasoning concerning a woman's right to privacy. Indeed, some of the issues seem to involve irreconcilable differences such as cases in which a wife wishes to terminate a pregnancy and her husband strongly opposes it.

The existing combination of a highly organized and vocal opposition to abortion, plus an electorate that largely opposes much of the content of the Court's ruling, suggests that supporters of the decisions must anticipate a long fight in order to realize anything close to full implementation. Actually, just holding present ground is proving to be a constant battle. Hence, although it would be a gross exaggeration to suggest that access to abortion has not undergone extensive liberalization, it would be equally misguided to believe that the

Court's intent is not widely and purposively frustrated. In fact, it is by no means clear whether the cause of elective abortion is better or worse off today than it would have been had states been allowed to continue to adopt liberalized abortion statutes without judicial prodding. For those interested in assessing the effectiveness of judicial review as a mechanism of social change, it is a question worth asking.

NOTES

1. Collateral deterrence involves indirect means of noncompliance with a judicial ruling, such as, in the case of abortion, overregulation of clinics, withholding of Medicaid (government financed medical insurance) funds, passing statutes requiring that physicians supply elaborate statistical information (including the woman's name) concerning every abortion, reluctance by public hospitals to perform abortions, and similar stratagems. For examples, see Jeannie I. Rosoff, "Is support of abortion political suicide?," *Family Planning Perspectives* 7, no. 1 (January/February 1975): 13—22, and, by the same author, "Pregnancy counseling and abortion referral for patients in federally funded family planning programs," *Family Planning Perspectives* 8, no. 1 (January/February 1976): 43—46. Also, Edward Weinstock, et al., "Abortion need and services in the United States, 1974—1975," *Family Planning Perspectives* 8, no. 2 (March/April 1976): 58—69.

2. *Family Planning/Population Reporter* 4 (February 1975): 14. Although, to my knowledge, no one has performed a comprehensive analysis of the legal effects of all of the proposed and enacted legislation, it seems to be agreed that a large share of it, perhaps the major share, is obstructive and unconstitutional. The complexity of such an analysis is illustrated by so-called "comprehensive" state abortion bills, parts of which comply with the Court's decisions and parts of which are definitely obstructionist. An interested reader may wish to scrutinize issues of the *Family Planning/Population Reporter* since the Court's 1973 decisions. The *Reporter* reviews state laws and policies in the population field.

3. Weinstock, et al., cited in note 1, p. 68.

4. Christopher Tietze, "The effect of legalization of abortion on population growth and public health," *Family Planning Perspectives* 7, no. 3 (May/June 1975): 123—127.

5. Weinstock, et al., cited in note 1; also, Willard Cates, Jr., and Roger W. Rochat, "Illegal abortions in the United States, 1972—1974," *Family Planning Perspectives* 8, no. 2 (March/April 1976): 86—92.

6. Weinstock, et al., cited in note 1, p. 67.

7. Barbara J. Culliton, "Fetal research: The case history of a Massachusetts law," *Science* 187 (24 January 1975): 237—241; also, by the same author, "Fetal research (II): The nature of a Massachusetts law," *Science* 187 (7 February 1975): 411—413; also "Fetal research (III): The impact of a Massachusetts law," *Science* 187 (28 March 1975): 1175—1176; and "Abortion and manslaughter: A Boston doctor goes on trial," *Science* 187 (31 January 1975): 334—335.

8. Judith Blake, "Abortion and public opinion: The 1960—1970 decade," *Science* 171 (12 February 1971): 540—549; also, by the same author, "Elective abortion and our reluctant citizenry," in *The Abortion Experience,* Howard J. and Joy Osofsky, ed. (Hagerstown, Maryland: Harper and Row, 1973): 447—467. See, also, Elise F. Jones and Charles F. Westoff, "Changes in attitudes toward abortion: With emphasis upon the National Fertility Study data," in *The Abortion Experience,* pp. 468—471.

9. Seymour Martin Lipset, "The wavering polls," *The Public Interest,* no. 43 (Spring 1976): 70—89.

10. Although not related directly to the issue of elective abortion, the results of the following question commissioned by Planned Parenthood on two Gallup surveys in 1972 are frequently cited: "As you may have heard, in the last few years a number of states have liberalized their abortion laws. To what extent do you agree or disagree with the following statement regarding abortion: The decision to have an abortion should be made solely by a woman and her doctor." Agreement in January 1972 was 57 percent and in June it was 64 percent. In another article ("Elective abortion and our reluctant citizenry," cited in note 8), I have devoted some pages to a discussion of the biases involved in this question. Essentially, it suggests abortion for medical reasons only, and indirectly stresses the importance of the woman's resistance to coercion by parents, a spouse or lover, welfare agencies, etc.: by default, it implies that no one has a legitimate interest in the woman's pregnancy but herself. These biases come

about through the common fault of the "implied alternative." No explicit alternative is offered in the question, so respondents are free to fill in such alternatives as come to mind. Since no other forms of questioning have found a result of this type, we must suspect that affirmative answers were given by a number of respondents who were actually opposed to liberalizing the abortion laws.

11. See *Roe v. Wade, The United States Law Week* 41, (23 January 1973), 4227.

12. *Roe v. Wade,* cited in note 11, p. 4229, footnote 67.

13. Herbert H. Hyman, Charles R. Wright, and John Shelton Reed have accumulated and tabulated the results of a large number of American surveys containing questions designed to ascertain respondents' levels of information on a variety of public affairs topics. For the early 1970s, the level of information about abortion (47 percent) compares with proportions knowing of Nationalist China, knowing their congressman's name, or knowing the school board head's name. By contrast, 88 percent knew who was the governor of their state or had heard of the Arab-Israeli conflict; whereas only 24 percent knew the names of two Supreme Court justices. These data are derived from Hyman, Wright, and Reed, *The Enduring Effects of Education* (Chicago: University of Chicago Press, 1975), Table 4.1 (no page numbers).

14. *New York Times,* 10 September 1976.

15. *San Francisco Chronicle,* 18 March 1976.

16. See, for example, William Ray Arney and William H. Trescher, "Trends in attitudes toward abortion, 1972—1975," *Family Planning Perspectives* 8, no. 3 (May/June 1976): 117—124.

17. Arney and Trescher, p. 118.

18. They suggest, as well, that the decline in approval for all justifications taken individually, found in the 1975 NORC survey as compared with 1974, may have substantive, if not statistical significance. See, for example, Arney and Trescher, cited in note 16, p. 118.

APPENDIX A

Abortion and Capital Punishment

Professor Paul Eidelberg

> *"Therefore but a single man was created in the world, to teach that if any man has caused a single soul to perish, Scripture imputes it to him as though he had caused a whole world to perish; and if any man saves alive a single soul, Scripture imputes it to him as though he had saved alive a whole world. . . . Again (but a single man was created) to proclaim the greatness of the Holy One, Blessed be He; for a man stamps many coins with the one seal and they are all alike one another; but the King of kings, the Holy One, blessed is He, has stamped every man with the seal of the first man, and yet not one of them is like his fellow. Therefore everyone must say, For my sake the world was created."*
>
> THE MISHNAH

Since the Supreme Court's epochal and still controversial abortion decision of *Roe v. Wade* in 1973, perhaps five or six million abortions have been performed in the United States, some involving *full-term* pregnancies. Which leads me to examine the issue of abortion in the light of capital punishment.

Among the arguments against capital punishment is the contention that society has no right to take the life even of an unmitigated murderer. Yet many if not most opponents of capital punishment assert the right of a woman, six and even nine months pregnant, to snuff out, with the aid of a physician, the life of her unborn child. We thus protect the murderer and murder the innocent. We feel compassion, perhaps some responsibility, for those who have taken life, not for those who have just begun to live. Without a twinge of moral doubt or remorse we execute the unborn while calling it cruel and barbaric to execute murderers.

That capital punishment should be called cruel and barbaric by its opponents is a nice commentary on our forefathers. Meanwhile, we, their humane descendants, each year execute more than a million unborn babies whose only crime was to be unwanted. An individual accused of murder receives due process of law. He is provided legal counsel to defend his rights, witnesses to testify on his behalf. A jury of twelve persons is empanelled to hear and weigh evidence bearing on his guilt or innocence. Let only one member of that jury entertain a reasonable doubt as to his guilt and the accused is acquitted, his life spared. Compare the plight of the unwanted, unborn child. He is utterly abandoned. Society affords him no defense, no legal counsel or friendly witness. Yet the life of the unborn child is on trial.

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He is on trial for being an inconvenient "fetus." But we too are on trial, on trial in the courtroom of indifference called the "humane" and "progressive" society. We are not only spectators; we are also the jury. And we have been instructed by judges. They have told us that this unborn child is not a human being — which we are all the more ready to believe having been taught to regard it as a mere "fetus." Had we not been thus instructed, had we only entertained a reasonable doubt on this life and death issue, we would have acquitted the child rather than become his executioners. Only a reasonable doubt, nothing more than this, and we would have affirmed the child's as well as our own humanity.

Our supposedly barbaric forefathers provided by law that a murderess could not be executed if she were pregnant with a child. To have executed her, they understood, would have been an act of murder, the murder of the unborn child. Yet these same ancestors recognized or enacted laws permitting capital punishment. Did they — did those laws — depreciate the value of human life? To the contrary. Precisely *because* human life was deemed precious, those laws required the execution of murderers, of those who had wantonly destroyed human life, of those whose act of murder was itself a denial that human life is sacred. Our so-called barbaric ancestors recognized that an act of murder is in truth the denial that mankind constitutes a single species governed by a universal moral law before which all men are equal and equally endowed with the right to life — a right which is unalienable. By taking the life of a human being the murderer negates his own humanity; he reduces himself to the level of the beast. And it is more as a beast, *homo lupus*, than as *homo civilis*, that the murderer, after being duly tried and convicted, is executed. Imposing upon him the extreme penalty of death does not deny his humanity so much as it affirms the humanity or dignity of his victim. Perhaps, in the last analysis, the punishment of death is the profoundest public affirmation of the sanctity of life.

But these thoughts are not intended as a defense of capital punishment, else far more would have to be said on the subject. Let them rather stand as an argument *against* capital punishment: the capital punishment tolerated under the name of "abortion on demand." If we oppose capital punishment on the ground that human life is so precious that even the life of the most vicious murderer must be spared, do we not cheapen life by the wholesale destruction of countless unborn children? Is the murderer more human than the unborn child?

APPENDIX B

The Dynamics of Anti-abortionism

John T. Noonan, Jr.

Our movement is made up of the people in it, and it is nothing apart from those people. Permit me to begin by recalling one who was one of us, whose place I am taking tonight, whose death has removed from our midst a great ally, David W. Louisell. I should like to show you how he stood with his colleagues in the law by reading to you from appreciation of him written by a colleague, David Daube, who was his friend:

> To me, David Louisell was the glory of our Law School. He was an American by ancestry, upbringing, spheres of activity, mode of thinking and behaving. And he represented the best, the noblest, that this civilisation can contribute to human endeavour. When I told Dorothy that in the days following his death there was such universal mourning at Boalt Hall as I had never experienced, she remarked that he would never have expected this. She is right. He had a rare, genuine humility.
>
> That is also why, with all his firmly held convictions, he was the least judgmental of men. In the most serious argument, an opponent would never feel hurt; on the contrary, he would sense a deep personal respect and concern. Paradoxically, this prevalence of caring over self-assertion greatly enhanced his influence: people were ready to listen to and ponder his views.

The last time I saw David Louisell alive was at a conference of lawyers in Washington. We were considering ways to curtail abortion in the light of the new possibilities opened by the Supreme Court decisions of last June. This devotion of David to the cause even up to the end of his life was characteristic of the man. I quote from Matthew Arnold's tribute to his own father lines that apply to him:

> When the forts of folly fall
> Find his body by the wall.

There are other persons, very much alive, I wish to draw to your attention tonight. They are those three students at the University of California at San Diego who have refused to pay that portion of their student health insurance which goes to fund abortions and whose registrations the University has revoked. Those three — Susan Erzinger, Peggy Patton, and Albin Rhomberg — have had the rare courage to act on principle. A freshman, a sophomore, and a graduate student, they have chosen to risk their education in order to act against abortion; and they have already paid a penalty for their action.

Our cause, I believe, will never triumph without such risk-taking, such willingness to act for principle, such sacrifice. We who only speak or write or give our money must salute their action and take courage from their conduct.

Our movement is made up of people, and whether we are lawyers like David Louisell or students like the San Diego Three — whatever our role in ordinary life — we can speak to others as David in his nonjudgmental way spoke to them, and the San Diego trio in their courageous way speak

to them. We can also learn how to speak to others by understanding something of the historical and political dimensions of our cause and movement. How shall we understand these dimensions? By analogy, I suggest, with that other great movement which occurred in the United States on behalf of the human person, the movement which ended in the abolition of slavery.

We are few in numbers absolutely committed to the elimination of abortion, as there were very few committed absolutely to the elimination of slavery. They never amounted to more, I should suppose, than 4 or 5 percent of the country. In their frustration, in their absolutism, they quarreled more often with themselves than with their opponents — this didn't help the cause — but they persevered. There were many more who thought slavery morally wrong and were opposed to its expansion by law. Abraham Lincoln was of this second, larger group, and the Republican Party was dominated by it. But as late as 1858, the Republican Party could seem hopeless to a dedicated abolitionist — it was just too full of compromising politicians who would never take decisive action.

Using this weak political instrument, the small band of dedicated opponents of slavery were able to achieve their goal of its elimination. The lessons for us I read in their success, beyond the obvious lesson of the futility of fighting one another, are these: 1) a small band dedicated to principle can achieve much — you do not need to control a major party; 2) it is a mistake to go outside the major parties — the Liberty Party of the abolitionists accomplished nothing at all; 3) do not despair of the major parties if their politicians hesitate and compromise and are neither steadfast nor straightforward — if you are steadfast and straightforward, you can bring the politicians with you.

Second, the slavery analogy is of great interest to us because of the role in it played by the Supreme Court. You have heard *Roe v. Wade* called the *Dred Scott* case of the twentieth century. How close are the parallels? *Dred Scott* announced in the broadest terms and in the most radical and unprecedented fashion that a child of Negro slaves could never, under any circumstances, become a citizen of the United States. The Court, of course, pretended that what it said was written irrevocably as the command of the Constitution, that it was not the personal preference of the individual Justices. By the Constitution itself, the Court claimed, the status of the slaves' child was forever stamped as less than a whole human person's. But in dissent, Justice Benjamin Curtis observed,

> Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same man at different times. . . . [W]e are under the government of individual men, who for the time being have power to declare that the Constitution is, according to their own views of what it ought to mean.

Look now at *Roe v. Wade.* The Court announced in the broadest terms and in the most radical and unprecedented fashion that no child in the womb could ever be treated as a human being by the criminal law of abortion. Of course the Court engaged in the fiction that this result was not the personal preference of the individual Justices, but the command of

the Constitution. It was the terms of this venerable document, the Court said, which fixed forever the status of the child as less than a whole human person. But in dissent, Justice Byron White, matching Justice Curtis in realism, wrote,

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right. . .As an exercise of raw judicial power, the Court perhaps had authority to do what it does today, but in my view its judgment is an improvident and extravagant exercise of the power of judicial review. . .

There is a final point of parallelism in the decisions: the reaction of the country. In each case the Court hoped to settle once and forever a matter that was being hotly debated in the political forum and was deeply dividing the nation. In each case the court settled nothing. Indeed in each case the narrow, partisan, doctrinaire attempt of the Court to settle matters one way convinced only the prejudiced and the Court's words provoked the strongest possible reaction against its intervention and its doctrine. As *Dred Scott* became a focal point in the struggle against slavery, so *The Abortion Cases* have become focal in the struggle against abortion.

There is a third reason for dwelling on the similarity between the cause of pro-liberty and the cause of pro-life. With each a great moral issue is faced. It is not for those who champion such a cause a matter of dollars and cents or bread and butter. Even our critic, *The New Republic,* recognizes that the pro-life movement is the only unselfish political force to have made itself felt since the end of the politics of the war in Vietnam. A moral issue of this kind will not stir everyone like a pocketbook issue, but those it does stir have the great advantage of acting not to further their own welfare, but the most basic right of others.

A moral issue of this dimension has a dynamism to it, and it is met by a counter-dynamism working on the side of the idea opposing it. That counter-dynamism is both our greatest threat and our greatest hope. It is our greatest threat because our opponents are impelled by it to press constantly to close off all pockets of resistance to abortion. It is our greatest hope because their aggressiveness leads them to outrages, and these outrages supply us with fresh reasons for our cause and new recruits for our movement.

Allow me to illustrate concretely what I mean, using first slavery as an example and then turning to abortion. The upholders of slavery in the South would have been well-advised to sit securely within their Southern citadel and defend their institution there. No one except the handful of abolitionists challenged them at home. The great body of Americans, in the North as well as in the South, were content to respect slavery where it already existed.

But, as if driven by the Furies to their destruction, the slaveholders became aggressive. They forced the passage of the Fugitive Slave Act of 1850 which brought federal marshals into every northern state; and the tragic spectacle of manacled blacks being marched back to bondage was

re-enacted again and again in horrified northern communities. They insisted on the right to bring their slaves into the new Territories and to make slave states out of the great Western empire that was being developed. Their frontier was not to be set by the Old South; the bulk of the United States-to-be must be slaveholding, too. Finally, the Supreme Court capped their drive for supremacy by laying it down as constitutional law that Congress could not bar slavery from the Territories and that a black child could never be a citizen. The blind, Fury-directed aggression of the slaveholders created the party which was to destroy them.

In our case today, the abortionists would have been well-advised to rest with the legislative victories they won between 1967 and 1973; but they wanted national vindication, and they received it from the Supreme Court. They would have been even better advised to stay content with this victory. But they would not or could not.

As if driven by the Furies to their own destruction, they sought more. You are familiar with the examples. They sought legal permission to perform experiments on the fetus. At first as dedicated an abortion leader as Harriet Pilpel was shocked at the idea. "What mother," she exclaimed on national television, "would consent to an experiment on her fetus?" But the abortion leaders were trapped by their own logic. If the fetus did not have to be respected as human, the fetus could be disposed of as property. Soon the researchers led by the National Institutes of Health were pressing for the right to experiment. A stacked national commission — David Louisell was the only dissenter — gave them the right. Experimentation on the child in the womb funded by the United States Government was one *sequela* of the abortion liberty.

In another way the pro-abortion party expanded its frontiers. It was unhappy with the traditional law on infanticide. It wanted to be allowed to abandon the baby delivered alive in the course of a botched abortion. They found a vehicle in the case of Dr. Kenneth Edelin, convicted by a Massachusetts jury of manslaughter in recklessly neglecting to care for a baby born alive. They bombarded the Massachusetts Supreme Judicial Court with briefs, claiming that the abortion liberty would be "chilled" if Dr. Edelin's conviction was allowed to stand. The Massachusetts Court found that the facts proved as to Dr. Edelin's actions after the delivery of the baby did not sustain the conviction. Freed, justified, Dr. Edelin has become a hero of the abortionists. He is a fitting symbol of the aggression that they, driven by a deep logic, must manifest.

The abortionists' greatest and most successful expansion of their gains was in an assault on the public purse. No constitutional liberty I know of is paid for by the government. We have had liberty of the press for two hundred years. You still cannot get the government to set you up with a printing press so that you may exercise this liberty, even if there should be a newspaper monopoly in your town. But the abortion liberty had not been a month old before the abortionists charged into the federal courts asking them to order city and state hospitals to perform abortions for nothing for

those unable to afford them and to command the states and federal government to provide funding for abortion as a regular part of Medicaid. In court after court around the country, the federal judges obliged. The new liberty, it was almost unanimouly held, had to be financed. The conscientious scruples of taxpayers, state officials, communities, did not matter at all. Since the revelation of *Roe v. Wade* and *Doe v. Bolton,* these scruples counted for nothing. State-provided, state-financed abortion was mandated by the federal judges anticipating the will of their masters on the Supreme Court.

This was going too far. Congress reacted first, with the prohibition on federal funding of abortion attached to an appropriation act by Congressman Henry Hyde. A federal judge almost instantly held the Hyde Amendment void. But the Supreme Court had read the message in the congressional vote. In June of this year, it stepped away from *The Abortion Cases* and recognized that there was no obligation on the government to pay for all abortions. The dynamism of the pro-abortion movement had set in motion the even stronger dynamism of anti-abortionism. Dozens of Congressmen who had sat by neutrally have been drawn into the conflict, the bulk of them on our side. Pushing for governmental funding, the abortionists have begun to create a party which will destroy them.

Why did they not stop content with their gains? The secret is that, in a moral issue of this magnitude involving the nature of humanity, you cannot stop halfway. You cannot rest within your citadel of slavery. You want your opponents to recognize that you are right.

It is for this reason — this secret desire for moral approbation — that the abortionists have so often sought to coerce our consciences — most spectacularly in the case of public funding, most tyranically in the case of students like Erzinger, Patton, and Rhomberg, most maliciously in the several suits led by the American Civil Liberties Union — that great champion of conscience — to force Catholic hospitals to turn their facilities over to abortionists.

Abraham Lincoln recognized the force of this hidden moral dynamism in his famous speech in 1860 at Cooper Institute. What would convince the slaveholders that his party respected the Union?, he asked; and he answered:

> This, and this only: cease to call slavery *wrong,* and join them in calling it *right.* And this must be done thoroughly — done in *acts* as well as in *words.* Silence will not be tolerated — we must place ourselves avowedly with them . . . All they ask we could readily grant if we thought slavery right; all we ask they could as readily grant, if they think it wrong. Their thinking it right and our thinking it wrong is the precise fact upon which depends the whole controversy.

If you substitute "abortion" for slavery, every word Lincoln spoke applies to our situation. If we could say abortion was right, there would be no controversy. As long as we say it is wrong, the abortionists will be driven to further aggressions — upon our consciences, upon the public purse, upon the lives of the unborn and the infant. And if we ever did say abortion was right, if we ever failed in our trust, the stones would rise to condemn us.

APPENDIX C

[The following is reprinted (with permission) from the original transcript of Wm. F. Buckley Jr.'s "Firing Line" program, originally titled Abortion: the Hyde Amendment, *which was taped in New York City on Oct. 5 and telecast on the Public Broadcasting System during the week of Nov. 4, 1977. Only a few minor abridgments (e.g., repetitive passages) have been made. "Firing Line" is a production of the Southern Educational Communications Association of Columbia, So. Carolina, and is produced and directed by Mr. Warren Steibel.]*

Ms. Pilpel vs. Mr. Hyde

At the moment Congress is stalled over the wording by which the use of tax money for abortions will be restrained. Congress wants to prohibit federal funding except for those abortions required to spare the life of the mother. The Senate wants to permit abortions that have a "therapeutic" purpose in the opinion of a doctor. Research suggests that you could get 90 percent of all abortions certified as "therapeutic," even as going to the movies or reading a good book can be described as therapeutic. The reason Congress is deliberating so gravely over the issue is that last June the Supreme Court affirmed the right of our legislatures to deny the use of tax funds for indiscriminate abortion. In doing so, the Supreme Court ratified the constitutionality of the so-called Hyde Amendment. Congressman Hyde is here today, but so is Ms. Harriet Pilpel.

Mr. Hyde has been in Congress as a Republican from Cook County for only two terms, but he has been prominent as a legislator over a considerable period, having served for many years in the Illinois General Assembly and as its majority leader toward the end of his stay. He is a lawyer, a trial attorney, a former ensign who saw action in the South Pacific during the war, a graduate of Georgetown University and the Loyola University Law School. He serves on the House Judiciary Committee and on the House Committee on Banking, Finance, and Urban Affairs.

Ms. Pilpel is well known to followers of this program. She is a senior partner in the New York law firm of Greenbaum, Wolf, and Ernst, a graduate of Vassar College and the Columbia Law School. She has served on more commissions, presidential study groups, and civic action committees than possibly any 12 other New Yorkers combined. Her enthusiasms, besides abortion, include family planning, women's rights, and civil liberties.

The examiner tonight will be Professor Michael Novak, the syndicated columnist about whom more in due course.

I should like to begin by asking Mr. Hyde whether there has been time enough to establish whether the Hyde Amendment will actually reduce the number of abortions?

MR. HYDE: I don't think so, Bill. The actual implementation of the Hyde Amendment has only been since June and we've only had a couple of months where the amendment has been in effect, so it's very hard to say.

What is a fact is that 300 thousand Medicaid abortions a year have been paid for out of tax funds, and if those funds are dried up, I think it's reasonable to assume, so will a lot of the Medicaid abortions not occur.

MR. BUCKLEY: So, therefore, you predict the economic factor is a critical factor with respect to how many abortions—10 percent, 20 percent, 30 percent, what?

MR. HYDE: Well, I really don't know. There's no way to get statistics as yet. When the Medicaid funds are not available, I do believe a percentage of the women otherwise eligible for a Medicaid abortion will obtain payment for their abortion from other sources, private sources. Planned Parenthood, I understand, is starting a fund to pay for these abortions but to predict to what percentage these women will indeed get an abortion is impossible to do at this point.

MR. BUCKLEY: Well, is it fair to say that you are using economic pressures to the extent that they are available in order to bring on a result which you consider to be required primarily on account of moral reasons?

MR. HYDE: Well, yes. The only way we have at this moment—practical way—of stopping the wave of abortion that has swept over this country is to try and deny public funds for paying for these abortions. The practical way to stop all abortions or to criminalize abortions—which would be a reversal of the decision of the United States Supreme Court of January 22, 1973 — would be to pass a constitutional amendment guaranteeing the right to life to the unborn. I don't see that happening in the near future, so the other method that's available is simply to deny tax monies to pay for these abortions. An awful lot of people resent the fact that their tax money is paying for the killing of innocent, inconvenient children.

MR. BUCKLEY: Well, this is a point I think it's important to straighten out before we mix it up with Ms. Pilpel here. Are you saying that the primary purpose of the Hyde Amendment — up until such time as a constitutional amendment is transacted — is to guard the taxpayer who has moral objections against the use of his money for the purpose of abortions, or are you saying that you are trying to increase the costs of abortions in order to diminish their frequency?

MR. HYDE: I'm trying to stop abortions any way that I legally and humanly can. All of those factors are part of it of course. If you put an abortion out of reach of someone who wants one, in so doing you may save a human life. An unwanted pregnancy could become a wanted child.

MR. BUCKLEY: Do you think that's an abuse, Ms. Pilpel, of legislative authority to take any action to prevent something which is undesirable even if it is oblique?

MS. PILPEL: Well, you've put the question in such a way that I can't possibly answer it. If you don't mind, I would like to rephrase the question in terms of whether—

MR. BUCKLEY: Just be sure you improve it. (laughter)

MS. PILPEL: I will improve it. The way the question is, is do I think that the purpose which Mr. Hyde expressed as being the purpose of the Hyde

Amendment is a valid legislative purpose? My answer to that question is no, I do not think so. Because the purpose behind his opposition to abortion, obviously, is his belief that unborn fetuses are persons. In my opinion that is a belief to which he is entitled, but it is also a belief which the Supreme Court of the United States has held is, in effect, a non-secular belief, a religious belief—

MR. BUCKLEY: Sort of a Dred Scott type tradition.

MS. PILPEL: Well, again, I don't accept the way you put the question.

MR. BUCKLEY: Improve on that.

MS. PILPEL: It's sort of a decision that was made many years ago when it was decided that religious matters should not be the subject of secular Congresses.

MR. BUCKLEY: Why is it a religious matter more than a scientific matter?

MS. PILPEL: Because the belief as to when human life starts, when a human being comes into existence, is held by some religions to mean at the moment of conception and by other religions to mean mid-way between — at viability or at birth. In any case—

MR. BUCKLEY: But some people who have no religion at all are highly committed on the subject and disagree. Scientists, for instance.

MS. PILPEL: Well, I don't think scientists, as far as I know, have expressed themselves on this issue.

MR. BUCKLEY: Oh, they have. Now you know that they have. (laughter)

MS. PILPEL: Now you know that they are on both sides.

MR. BUCKLEY: Well, sure. There have been disputes about it in Connecticut, for instance. As you undoubtedly know, there was a movement on the question of abortion whose sanction was primarily scientific rather than religious. After all, if we ask whether the question of human life is a scientific question, then scientific expertise becomes relevant rather than—

MS. PILPEL: That's why we don't consider it a scientific question.

MR. BUCKLEY: Well, why not? The Supreme Court didn't say that there couldn't be any scientific inquiry, did it?

MS. PILPEL: It said that this is a question which philosophers, religious leaders, scientists, theologians, and other categories have disagreed on for centuries, and they did not think it was for the Court to decide that question.

MR. BUCKLEY: But it did.

MS. PILPEL: No, it did not decide that question.

MR. BUCKLEY: Yes, it did. It decided on the grounds that it was okay to take a human life if it was unborn, right?

MS. PILPEL: If you say it was a human life that was unborn, but I would like to please straighten out a couple of the things you said earlier if you don't mind. The way you posed the question was indiscriminate abortion. I think it's very important that you bear in mind what the Supreme Court did or did not decide. The Supreme Court decided that states—state legislatures—are not required to fund elective abortions. Those are their exact words. Now I'd like to say something about what the Supreme Court did *not* decide. It did *not* decide that Congress could decide not to fund elective

abortions although that may be what they would decide if faced with the Hyde Amendment. They did not decide anything with reference to the funding of medically necessary abortions, and they did not decide anything with reference to the legality—

MR. BUCKLEY: Either pro or con.

MS. PILPEL: —of abortion other than to reiterate their earlier decision to the effect that abortion in this country is legal and that this statute—this type of statute, denying public funds for abortions—impacts only on those women who cannot afford to pay for abortions. I think it is very important to bear in mind that the Supreme Court has reiterated its 1973 decision to the effect that during the first trimester of pregnancy a woman has a constitutional right of privacy entitling her with her physician to have an abortion.

MR. BUCKLEY: I don't think Congressman Hyde has maintained, nor have I, that the Supreme Court has reformed in the last few years. It will probably take longer, but do you dispute her reading of that last decision?

MR. HYDE: Yes, I do. First of all I think the key question—and I'm glad we got to it earlier in this discussion—is whether or not the unborn is human life. I mean that is really the essential question. Whoever defines the argument has it half won, and in that regard, Ms. Pilpel, you're an official of Planned Parenthood, or are they a client of yours?

MS. PILPEL: I'm counsel for Planned Parenthood.

MR. HYDE: Counsel. I have a pamphlet that Planned Parenthood put out in 1964 and it asks this question. "Is it an abortion? Definitely not. An abortion kills the life of a baby after it has begun. It is dangerous to your life and health. It may make you sterile so that when you want a child you cannot have it. Birth control merely postpones the beginning of life." Now this is what your organization said, and I just wonder, if since 1964, some quantum leap in medical science has undone the position that you had that abortion doesn't kill the life of a baby after it has begun.

MS. PILPEL: Well, I don't think I'm here representing Planned Parenthood. I want to say I'm here representing myself. As far as Planned Parenthood is concerned—

MR. BUCKLEY: I thought you were representing the Supreme Court a minute ago. (laughter)

MS. PILPEL: I'll be glad to represent the Supreme Court. As far as Planned Parenthood is concerned, I don't know the origin of that pamphlet or who put it out, but it is certainly not their position today and it has not been their position for a long, long time, and I disagree with you that the issue is when does human life begin. If that is what we are going to discuss this evening, we can discuss it not only this evening but the rest of this week. The fact is we're not going to agree on that, and it was that reason—the reason that deeply-held beliefs on this subject have never been able to resolve it—that led the Supreme Court to say it was not going to decide the question, and I don't think we're going to decide it here this evening.

MR. HYDE: But I think it's important to know that the Supreme Court

pulled a Pontius Pilate. It said we don't know. Medicine, law, science don't tell us, so we're not going to say when life begins. But actually they heard no evidence. The Supreme Court doesn't hear evidence in the first place. There was no evidence in the record because that question was not up before the Court. Why the Court took it upon itself to adjudicate—really to legislate—in that case I don't know. But how they could pronounce anything on the question when there was no evidence before it, really, I don't know. But there is a responsible body of medicine—not theology, biology—in this country and in the world that posits the fact that human life begins at conception. I would cite the California Medical Journal of September, 1970, which said, you know: Let's quit kidding. Everyone knows life begins at conception, but because killing is socially abhorrent, we have to go through semantic gymnastics to otherwise describe what an abortion is.

MS. PILPEL: I think you should bear in mind that there was obviously not unanimity, but there is a substantial body of religious opinion to the contrary of what you're saying, and I would think that the intelligent way out would be to say what another professor of the Catholic faith and a priest, Father Robert Drinan, has said, which is that the subject of abortion is one which divides the populace. It is a subject not for legislation. People have to follow their own conscience—

MR. BUCKLEY: Well, civil rights divides the populace too, doesn't it? Does that mean that it's not a subject for legislation?

MS. PILPEL: No, but there is no answer to the question when human life begins, and it is a moral question and therefore to be left to the individual conscience of every human being.

MR. BUCKLEY: You're not suggesting that there should be no legislation unless there are conclusive answers to abstract questions?

MS. PILPEL: I'm suggesting there should be no legislation in a situation where the basis of the belief is a metaphysical or a religious belief.

MR. BUCKLEY: What kind of belief is equality if it's not metaphysical? There's absolutely no equality on any psychometric scale, on any scientific scale, but we believe in equal treatment under the laws. Why should there be legislation therefore?

MS. PILPEL: But there is a legal meaning of equality. I don't think it's based on metaphysics.

MR. BUCKLEY: I introduce you to the fact that it's based on metaphysics. What else is it based on? Not biology, surely.

MS. PILPEL: It's based on showing that there is a rational basis for making distinctions—a rational basis.

MR. BUCKLEY: Well, there's a rational basis for believing that life exists in the fetus.

MR. HYDE: Wait a second. You said you don't believe there's a rational basis—

MS. PILPEL: That's correct.

MR. HYDE: —for belief that life exists in the fetus?

MS. PILPEL: No. Not that life exists. That human life. That the fetus is a human being.

MR. HYDE: When does the fetus become human?

MS. PILPEL: I don't think you and I are ever going to agree on that answer, but I would like to point out to Bill that I listened with keen interest to a broadcast of yours in connection with your book in which you said you thought, and I agree, that there are great differences between birth control, abortion, and murder, and that abortion has never been regarded as murder or as homicide in the Anglo-American or—as far as I can see—in any other tradition.

MR. BUCKLEY: I agree. I think that the term murder is used metaphorically as applied to abortion, but this doesn't mean that it is not a grave act, the effect of which is to extinguish a human life. There is certainly a difference between homicide, isn't there, and murder, accidental—

MS. PILPEL: Murder is a species of homicide.

MR. BUCKLEY: Yes, but murder suggests also *mens rea,* doesn't it?

MS. PILPEL: But feticide has never been considered homicide either. I think that we're getting very far away from the point.

MR. BUCKLEY: But the fact of the matter is, Ms. Pilpel, one of the reasons we're talking about this is that there's a tremendous fluidity of thought concerning the subject. You would like to freeze all discussions of abortion at the moment when the Supreme Court agreed with you. You have to remember the Supreme Court only discovered Ms. Pilpel's position on abortion in 1973. During the preceding 150 years it was almost universally thought of as barbarous and outlawed.

MS. PILPEL: I mean you make a statement for which there is no foundation. It was not regarded as barbarous in the least degree.

MR. BUCKLEY: Forty-four states prohibited abortion at the time that the Supreme Court ruled it to be legal. Now—

MS. PILPEL: Yes, and up until 1823 it wasn't prohibited at all.

MR. BUCKLEY: Should discussion freeze at this moment?

MS. PILPEL: No discussion should freeze. People should be allowed to follow their own conscience with reference to abortion.

MR. BUCKLEY: Yes, but you say what you're saying with just a trace of smugness. But you will never agree with Mr. Hyde on the subject which suggests that you have less than an open mind. You profess to be willing to have a continuing discussion but you, in effect, tip us off that nothing we say is going to persuade you.

MS. PILPEL: I think you're discussing the wrong issues. I think for example that Mr. Hyde said that he wants to stop abortions and he said something about numbers. The fact is that the number of abortions being performed since 1973 is substantially similar—not exactly the same—but substantially similar to the number of abortions that were performed before 1973, and the reason for that is that abortion is a fact which exists, that all studies of the subject indicate that at least a million abortions were done prior to legalization of abortion so the only effect of the Supreme Court decision

in terms of numbers was to make it safer. It was safe and decent and you didn't have to run around and try to hide the fact that a woman wanted an abortion. I would also say when you talk about saving a human life that very often the woman who cannot face the prospect of having a child or, indeed, where having a child might damage her health permanently for the rest of her life will, if she cannot afford an abortion, go to a back street abortionist or try to abort herself and may very well have her own life at stake. These are all factors which should be brought to mind, and the decision in June by the United States Supreme Court merely held that public funds could not be used—need not be used—for elective abortion if the legislature chose not to appropriate them for that purpose, but it did not say the legislatures couldn't choose to appropriate for that purpose.

MR. BUCKLEY: No, no. Who said that? I didn't.

MR. HYDE: I didn't.

MS. PILPEL: There has been a great deal of misunderstanding about that, but you said— I will tell you something you said. You said that the Supreme Court decided that Congress could withhold funds for elective abortions. They did not decide that. They said the state legislatures could withhold funds for elective abortions, and there are different considerations with reference to Congress and the state legislatures.

MR. BUCKLEY: Would you and Mr. Hyde argue about that because I don't know what the criteria are.

MR. HYDE: Within a day from the Court's decision on June 20, 1977, they remanded the case that was pending before Judge Dooling that enjoined enforcement of the so-called Hyde Amendment for a judgment not inconsistent with the principles that they announced in the three cases on June 20 which in principle was that the allocation of money is a legislative priority—not a judicial one—and if the legislature—and we are a legislature—wishes to support childbearing with public funds rather than abortion, that's a political decision that ought to be made by the legislatures and not by the Court, and Judge Dooling, following that pronouncement, dissolved the injunction.

MS. PILPEL: Well, I think I should tell you something about what Judge Dooling really did because as you know, I've been involved in that case.

MR. HYDE: He didn't dissolve the injunction?

MS. PILPEL: He dissolved the injunction. He granted a temporary restraining order and then he vacated the temporary restraining order but continued the hearing on the injunction to determine whether the Hyde Amendment was constitutional, and that hearing is still going on and that question has not been decided. The problem that faces us here—rather than a metaphysical one— is that this decision—and more importantly, perhaps the Hyde Amendment—as I said before impacts only on poor women. It has absolutely no effect on the women who can afford abortions.

MR. BUCKLEY: Well, in the first place a law is not good or bad depending on whether the effects of it, as you put it, impact only on one economic sector.

MS. PILPEL. That depends on the law and sometimes it might be— I mean if you said all persons who have incomes of less than five thousand dollars may not vote, I can assure you that would be unconstitutional. It really depends on the facts.

MR. BUCKLEY: It would be unconstitutional in the last period.

MR. HYDE: I agree there is a sort of double standard here, but it operates in favor of the unborn children of the poor, and it operates to the detriment of the unborn children of the rich who have no hand to protect them if the pregnant woman wishes—in concert with her doctor, not her husband, her doctor—to dispose of her unborn child because it's inconvenient or it's unwanted, but at least the children of the poor now have a fighting chance to be born, so I would say—

MR. BUCKLEY: To the extent that the economic argument is critical.

MR. HYDE: That's right. That's why I say a fighting chance. It's not a positive chance.

MR. BUCKLEY: Are you trying to elevate this to a general principle that legislation is unconstitutional if the effect of it is economically prejudicious against a particular class?

MS. PILPEL: No, it would depend on all the facts of the circumstance. I gave you an example where if legislation said all persons with incomes of less than five thousand dollars may not vote, it would be clearly unconstitutional . I'm not saying that every economic discrimination flowing from legislation—

MR. BUCKLEY: You say it would be clearly unconstitutional. It would be clearly unconstitutional as of the last 15 years. It would not have been unconstitutional before. There were property requirements right up until quite recently. There were literacy requirements.

MS. PILPEL: Well, but it's not 15 years. It's much longer than that. It's like 50 years.

MR. BUCKLEY: It's rather facile of you to have selected the figure five thousand dollars because it does make it sound preposterous, which is the easiest way to win an argument. (laughter) However, the fact of the matter is that 50 million dollars was spent under Medicaid for abortion which actually comes down to only 15 dollars worth of federal patronage per abortion.

MS. PILPEL: I don't see that that relates to anything. The fact is that of that 60 million dollars some of it, no doubt, was expended for cases where medical necessity existed, and I am convinced that when the Supreme Court faces the question whether a state which has a Medicaid program gives funds for medically necessary procedures decides not to fund medically necessary abortions an entirely different constitutional question will be presented. And they most definitely did not decide that question in this case.

MR. BUCKLEY: I doubt very much that there is going to be anything like a sense of universal outrage over 50 million dollars being withheld out of deference to at least the people who don't want their own dollars to be used for what they consider to be an explicitly immoral purpose.

MS. PILPEL: That seems to be no basis for legislation at all, and if I thought it were, I would be much richer than I am today. I was opposed to many things that the Congress has done. I was opposed to the Vietnam War; I'm opposed to capital punishment; and I very much resent my tax dollars being used for these purposes, but I doubt that I would get it back.

MR. BUCKLEY: Well, capital punishment is not very expensive, but the Vietnam War was; but there can only be one foreign policy.

MS. PILPEL: Well, I think there can be only one rule of conscience as far as the subject we're discussing is concerned—mainly, that you have the right to follow your own conscience.

MR. HYDE: It just seems to me—

MR. BUCKLEY: I don't have to pay for your conscience, do I? I do under your dispensation, but Mr. Hyde, excuse me.

MR. HYDE: If I may, I just want to say that it seems to me my conception of what a legislature—and when I say that I mean the Congress—what it's all about: representative democracy is to protect innocent life. And I have to harken back to the definition of what it is you're aborting. It's not a bad tooth. It's not a diseased appendix. It's a human life, and it just seems to me when the pregnant woman who should be the natural protector of her unborn becomes its adversary, there's a very legitimate legislative interest in intervening to protect innocent human life. After all, the right to life is a basic human right, a basic civil right. Let me make another point if I may. The Court made a sharp distinction between the right to something and the right to have it paid for by the taxpayers. I have a right, if I choose, to a religious education, but I don't have a right to have the government pay for it. We all have a right of free speech. We don't have a right to have the government buy us a typewriter. The government's role in this situation is not to interfere with the exercise of that right, but the existence of it doesn't require public funds to pay for it.

MS. PILPEL: I think that you are assuming in everything you say that withholding public funds from poor women for abortions will necessarily mean that they won't get abortions. Many of them will get abortions on medical necessity grants no matter what Congressional statutes say because I believe that that would be otherwise a denial of equal protection of the laws as long as other medically necessary procedures were funded.

MR. HYDE: Can we talk about "medically necessary," because that phrase has a sort of a ring to it. Senator Brooke has used it often, and it's a bone of contention in the battle between the Senate and the House. Medically necessary abortions have been testified to before Judge Dooling, by Jane Hodgson, Dr. Hodgson, as any abortion. If a woman wants it, it's medically necessary. Would you accept that?

MS. PILPEL: I accept the Supreme Court's definition of medical necessity which it has now mentioned three times. It reitereated it most recently on June 20 in the state abortion Medicaid cases. It said that the final decision as to an abortion being medically necessary depended upon the physician's judgment as to the factors which impinge on a woman's health. And it

enumerated those as being physiological, psychological, emotional, familial, age, and other factors.

MR. BUCKLEY: What did they leave out?

MR. HYDE: Athlete's foot. They left out athlete's foot. (laughter)

MS. PILPEL: The Supreme Court obviously has in mind that physicians must be free to decide what is the best treatment for their patients, and they have given this definition repeated times.

MR. BUCKLEY: As long as they don't prescribe Tab.

MS. PILPEL: I don't think that question has been put up to them.

MR. BUCKLEY: It's certainly true that we have a highly interventionist government on certain things that physicians can't do. They can't prescribe cyclamates. Now, but all of a sudden—

MS. PILPEL: I don't think cyclamates are therapeutic agents, are they? I don't think they've ever been used—

MR. BUCKLEY: They certainly have. They've been used with fat people.

MS. PILPEL: Well, that doesn't make them therapeutic. I think also—

MR. BUCKLEY: That depends on whether obesity is a problem.

MS. PILPEL: Well, it is. I mean I'm perfectly willing to admit it is.

MR. HYDE: I don't see why we have to get personal. (laughter)

MS. PILPEL: I think you might also bear that in mind as an indication of the fact that this is truly not a money-saving measure, which Mr. Hyde hasn't said it was.

MR. HYDE: I don't claim it is. No.

MS. PILPEL: If all of the Medicaid abortions which were not to be performed now because no Medicaid was available were performed and all of the pregnancies were carried to term, the cost would not be 50 or 60 million. It would be like 600 or 700 million, and if you add to that the costs involved in bringing up children—including children who may be fatally defective in the sense that they only live a few years—it obviously would go into the billions. The fact is, this is not an economic issue except in so far as the only group in our society that is not permitted, in effect, to exercise freedom of choice as to whether to have a child—including any number of children—are the poor women.

MR. HYDE: But they do have the choice. The woman has the choice up until she conceives. Then there's a victim involved. There's a third party, and it just seems to me you can't turn your back on that and ignore the human life that is there.

MS. PILPEL: Well, what about when the woman is the victim? I know of a case, for example, where a woman has a malignancy, a cancer, and she has been taking X-ray treatments and she has discovered she's pregnant. It is probable that the X-rays have already maimed the fetus. She didn't know she was pregnant. If she discontinues the treatments, she will almost surely die, and if she doesn't— If she continues the treatments, it will mean the death of the fetus.

MR. HYDE: Well, under the Hyde Amendment, as you know, if her life

would be endangered—not surely fatal, but endangered—an abortion is permitted. So that really isn't a problem.

MS. PILPEL: What about a case which was written up in *Harper's Magazine* some years ago—in which I was vaguely involved—where a woman had German measles and she was told by her physician that the chances were fairly high that her child—she wanted to have a child—would be born with all kinds of defects and abnormalities. However, this was before the 1973 decision. She was refused an abortion. She had the child. The child is blind, deaf, dumb—

MR. HYDE: Sounds like Helen Keller.

MS. PILPEL: No. Can't walk, can't digest, and has almost total brain damage. Now, would you say that in that kind of situation a Medicaid woman should go ahead and have the child?

MR. HYDE: Yes, I do. That's a very tragic situation, but that is a fractional occurrence out of the number—

MR. BUCKLEY: As Professor Noonan once said to you on this program, hard cases make bad law. It is extremely hard to write legislation around tragedies of that kind. I could describe a tragedy of somebody I know equally maimed as a result of somebody driving a car too fast and ask you to vote to eliminate cars with equal plausibility. This simply isn't a way to attack these problems.

MR. HYDE: You risk thousands of normal births to take care of the one situation which is rare.

MS. PILPEL: Well, accepting Mr. Hyde's premise that it should not be aborted electively, it would seem to me that it would be relatively simple for him to permit women who have had German measles and other situations where damage to the fetus is apparent and can be ascertained as such so that women are not forced to carry to term babies that would not endanger their lives, but babies that would either be surely born dead or which would have no chance of survival after the first two years, or whose brain has been so seriously damaged that they would never have any mental capacity at all and would be a vegetable.

MR. HYDE: I know a lot of people who are severely disabled and mentally disabled who are still very wonderful, useful people, and I think you're really playing God when you decide that this is a defective product and should be exterminated because it doesn't measure up to the standard that somebody else sets. It's a tragic situation. It's not easy, but the principle of a life—casting away a life—destroying a life—for a lesser value—it seems to me clear what the choice should be, and society should help that woman. What does a caring, humane society do for unwanted people—defective people, retarded people? Do we kill them or do we try to find another answer?

MS. PILPEL: We don't do anywhere near enough for the children who are born. There are a hundred thousand cases reported every year of child abuse of which about three thousand die, and these are, as I said, only reported cases. I'm sure there are many more hundreds of thousands—

MR. HYDE: And it's increasing.
MR. BUCKLEY: You're not criticizing Mr. Hyde for inactivity on this score, are you?
MS. PILPEL: I am saying that the history of this nation does not demonstrate a concern for born children and that therefore I find it very hard to understand why there is such extreme concern for unborn children.
MR. BUCKLEY: I think that's awfully facile. You may say that to the extent that you authorize parents a presumptive authority over their children you encourage situations in which child abuse becomes possible. That's true. But I don't find America—in constrast with other countries—in any sense ambiguously insouciant about its children. On the contrary, it seems to me we're a more child-centered society than perhaps any other.
MS. PILPEL: That's the popular myth.
Mr. BUCKLEY: It seems to me that this is a digression because any piece of legislation you want to propose to Mr. Hyde he almost certainly would back, which would have the effect of augmenting the protections given to abused children, but that's not what he's talking about.
MS. PILPEL: But that's what I was talking about.
MR. BUCKLEY: I know, but that's why I said it was a digression, which is what I was talking about. (laughter) The fact of the matter is that the arguments that you use can be used for infanticide, and I wonder why you don't face the logic of your own analysis.
MS. PILPEL: That is not the logic of my own analysis. There has never been a tradition in our country —or any other country that follows the Judeo-Christian religion—that when a person has been born it is not entitled to all the rights that a born person has. For example, the penal law of New York State says a person is a human being who has been born alive.
MR. BUCKLEY: But you're not afraid of changing traditions. You just changed one a few minutes ago on the matter of abortion. In 1973 a tradition was changed. Now, you said well it's only a tradition since 1823, and on the other hand, it was previously tradition also.
MS. PILPEL. No, it really was not previous to 1823. An abortion was not prohibited in the 19th century because of any belief in the humanism—
MR. BUCKLEY: Well, I don't know how far back you want to take your argument, but since you started talking Judeo-Christianity stuff, I can give you a very long pedigree against abortion.
MS. PILPEL: And I can—if you'll give me a little time—give you a long pedigree showing that as far as the common law of England was concerned, early abortion was not a crime.
MR. HYDE: The Hippocratic Oath goes back—
MR. BUCKLEY: I might add they practiced infanticide in Great Britain, too.
MS. PILPEL: Well, but not at the time—not in 1803, which was the first time that abortion had ever been made a crime by common law.
MR. HYDE: Can we talk about child abuse?—
MR. BUCKLEY: I call hanging 10-year-olds for stealing sixpence infanticide.
MS. PILPEL: I'm not in favor of that.

MR. HYDE: I think a fascinating inquiry—a sociological inquiry—could be made on the explosive increase in child abuse since 1973, since abortion was legalized. It's interesting that we've legalized abortion now. We've made it available free to people who can't afford it, and yet child abuse goes up and up. There must be a correlation. George Will in his interesting article in *Newsweek* some time ago said if you think of people as meat, meat you will become. And I think that human life has become so cheap—abortion has been a sort of retroactive contraception as Planned Parenthood preaches—that human life is just like animal life. It's not as good as animal life because we have quotas for dolphins. We don't have quotas for human life. But I think human life is so cheap that we see that even when the children are born, they're abused by people. And I think the correlation is fascinating.

MS. PILPEL: I think there is no correlation. The correlation between child abuse and abortion has never been demonstrated, but what we do know is that crimes against children and babies have increased greatly. I mean literally crimes. The largest growing population against whom homicides are perpetrated in the United States are those from one to four.

MR. HYDE: Do you think that's because human life is being held cheaply since abortion is now—

MS. PILPEL: No, I do not. I think that human life becomes much more cheap when you say to a poor, sick woman who has seven children and can't support them, "I'm sorry you have to go ahead and have the eighth," even though we know that it will be born dead or diseased or cannot survive, and so forth.

MR. BUCKLEY: That argument, as you know, can be used to justify killing people because they are too old to lead a useful and productive— As a matter of fact, some of the phraseology in the 1973 decision was frightening in its application to people who have become, as a result of old age, useless.

MS. PILPEL: I think the language of the '73 decision was directed to the fetus and had nothing to do with old age.

MR. HYDE: Meaningful life—

MR. BUCKLEY: Meaningful life, yes.

MR. HYDE: —is a scary phrase. What is a meaningful life?

MR. BUCKLEY: In any case the reason I think this is dangerous is because, although I recognize your statistic and don't challenge it, it's also correct that children have become the greatest killers in history. The number of homicides perpetrated by people between the ages of 14 and 18 exceeds the number of homicides perpetrated by people between 18 and 70 so that at every level—

MS. PILPEL: Well, obviously there is something wrong.

MR. BUCKLEY: —there is something wrong, yes. Now, Mr. Hyde's point is that the insensitivity required in a society that permits abortion for any reason at all is one that depreciates the dignity *tout court* of life itself.

MS. PILPEL: I know that's his point, but I think you depreciate dignity—

MR. BUCKLEY: It's an honorable point, isn't it?

MS. PILPEL: Well, I think you depreciate the dignity of human life much more by forcing women to resort to the kind of things women do resort to when they cannot bear a baby and are forced to have one. I would like to point out also that in the overwhelming part of the globe, in other words almost every nation in the world of any size, has made abortion elective at least in the early stages. And that is not just the United States, but it's virtually all of Western Europe, and it is of course the Soviet countries, China, and so forth. It is not unique to this country.

MR. HYDE: I just came back from Rumania and I looked in the museum in Bucharest and I saw the Order of Heroic Motherhood and I said to the guides, "What is that?" And they said, "Women are encouraged to have children over here, and the more children, the more heroic, and she is honored by the state." And I thought what an interesting thing, and so they aren't encouraging abortions in Eastern Europe.

MS. PILPEL: They aren't making them legal. On the other side they aren't making them illegal, right?

MR. BUCKLEY: Incidentally, before we turn to the examiner, I do think that Mr. Hyde ought to be encouraged to comment on the economic argument because you brought it up so frequently. My understanding of it is that what we are talking about is approximately 150 to 200 dollars. That is to say, that is what you can get a non-coathanger abortion for by a licensed physician.

MS. PILPEL: That is not so. That is not what you said in a column of yours, and I meant to write you a letter about it.

MR. BUCKLEY: I was quoting published figures—

MS. PILPEL: Well, the figures—

MR. BUCKLEY: In fact there was an auction of one free abortion by the ACLU in its most distinctive style in New Orleans which only sold for 30 dollars, suggesting that—

MR. HYDE: Don't you hope they pay for that in silver money so they will have stabilized the price for two or three thousand years.

MS. PILPEL: I think you should know that the average cost of an abortion in the United States, according to the study just released, is 240 dollars and that that is—

MR. BUCKLEY: Okay. Let's take that figure.

MS. PILPEL: —an excess of the total welfare allowance for an entire family in many states for months. So to say that they could afford it is absolutely absurd. In many states there are no abortion clinics; therefore, the women who want abortions have to go to hospitals, and the price in hospitals is 350 to 600 dollars. You are not talking about anything that a family on welfare could even think about.

MR. BUCKLEY: Well, the answer is, of course, that it's not true because they do in fact—the families on welfare have television sets that cost more than 240 dollars. The question is a matter of priorities. If they feel as flamboyantly as—

MS. PILPEL: I don't know that it's true they have television sets.

MR. BUCKLEY: Well, I assure you they do. I welcome you to familiarize yourself with people—who have these problems.
MS. PILPEL: I'll look into that. I just want you to know I don't concede it. The kind of people I'm talking about I think probably don't have televisions.
MR. BUCKLEY: Well, it may be that you're talking about a section of people whose problems require much more therapy than mere introduction to abortion clinics.
MS. PILPEL: But that doesn't mean you should force them to have children.
MR. BUCKLEY: —if 240 dollars is the average price, then presumably the basement price is less than that. I think it's a pity that you base your arguments as frequently as you do on the economic factor, which is increasingly unconvincing in an affluent society.
MS. PILPEL: I'm not basing my arguments on an economic factor at all. I want to make that clear. What I am saying is that poor women without public funding assistance cannot have abortions. That is the only economic argument I'm making, and I'm saying that those women—
MR. BUCKLEY: It's an extremely interesting argument since you began the evening by saying that abortions hadn't increased since the Supreme Court decision. Therefore, they were having them.
MS. PILPEL: Well, they have been publicly funded for a considerable period of time.
MR. BUCKLEY: Before '73. You said they had no—
MS. PILPEL: I said they were having illegal abortions. I made a clear distinction between the type of abortion— ...Many of them were illegal and dangerous—
MR. BUCKLEY: Illegal does not necessarily mean dangerous.
MS. PILPEL: Yes, but illegal often does mean dangerous in this situation—more often than not.
MR. BUCKLEY: Yes, and legal can sometimes mean dangerous too.
MR. HYDE: I've never understood the argument that says women are going to get illegal back-alley abortions as the result of drying up public funds, and then in three or four minutes saying that there's going to be an explosion of welfare children which is going to cost billions of dollars. You really can't have it both ways.
MS. PILPEL: I didn't say there would be an explosion. I said that if the effect of your amendment were to compel all the women who will not be receiving public funding to bear their children, then the price would be at least ten times more than funding the abortion, but I'm not in any way placing any argument on any grounds other than that the cost of an abortion without public funding for poor women is prohibitive.
MR. BUCKLEY: I must interrupt you to introduce the examiner. Michael Novak is a syndicated columnist. He's a professor of religious study at Syracuse University. He has advanced degrees from Harvard and other universities and has written a dozen books, including books on ethics and sports. Professor Novak.

MR. NOVAK: It's a shame to interrupt such a vital discussion, but I did have some questions. I wondered if the impact of the Supreme Court decision and of the Hyde Amendment actually wasn't only on poor persons but was indeed on all of us—that is, that we haven't all begun to think more sharply and more clearly about this issue. And therefore I'd like to ask both Congressman Hyde and Ms. Pilpel what change of climate they have sensed. Do they find their work easier or harder? Is the argument following different lines than before, and what has happened in the last two or three months?

MR. HYDE: Well, I would just say that I think since the issue surfaced last year in Congress—and it was lying rather quietly there—more people are thinking about the issue. It has surfaced. People are discussing it. It certainly got the Court thinking about it and resulted in what I thought was an excellent series of decisions in June of this year. I think it has revived an issue and it was lying very dormant following the January 22, 1973, decision. Human life amendments were filed in Congress where they were gathering fungus sitting in the sub-committees, not going anywhere. Now it's a live issue again and bothering a lot of people. And I think that's to the good.

MS. PILPEL: I think that what has happened in the last few months is very interesting in a number of ways. One is that the Senate has taken the position that poor women should not be denied medically necessary abortions, and there has been a complete deadlock—or whatever the word is—between the House and the Senate and that is a change from other years when the Senate went along with the House recommendations, and I think that's very significant. It's also very significant that the religious coalition for human rights has taken the position—

MR. BUCKLEY: Human rights being what in this case—pro- or anti-abortion?

MS. PILPEL: The rights of the woman.

MR. BUCKLEY: Oh.

MS. PILPEL: Which includes most of the Protestant denominations. And most of the Jewish denominations have come out against a denial of public funding for poor women who want abortions. May I just finish by saying that so have all the major medical associations, namely from the American Medical Association down, have all said that it is outrageous to deny the poor woman a medically necessary abortion and to force her to resort either to having a baby she shouldn't medically have, or to abort herself, or to go to an illegal abortionist.

MR. HYDE: Very quickly if I could respond. The argument was made, I think by Ms. Pilpel, that this is really a Catholic plot. She, by excluding the Catholics, except Father Drinan, has mentioned that all major religions are for abortion. That's just not so.

MS. PILPEL: Well, freedom for choice, not of abortion.

MR. HYDE: You can make it sound as euphemistic as you want, that's what we're talking about.

MS. PILPEL: Well, many people who are against abortion are in favor of freedom of choice, and if they don't want to impose their beliefs on the rest of the population—

MR. HYDE: Nor do I, but I want access to the political process just like you do. Let me suggest to you that Reverend Jesse Jackson is not a Catholic, and he sent a ringing telegram to every member of Congress supporting my amendment. There are hundreds and hundreds and thousands of non-Catholics who support the pro-life cause, so it just isn't so that this is a bunch of fringe Catholics who are trying to impose their wishes on others.

MR. BUCKLEY: Well, if my memory is correct, the closest we had before 1973 in terms of a mandate—a plebiscite—was in North Dakota—

MR. NOVAK: Michigan.

MR. BUCKLEY: Michigan was it?

MR. NOVAK: There was one in Michigan.

MR. BUCKLEY: Rather Michigan, and that went against abortion—

MS. PILPEL: There was one in Washington.

MR. BUCKLEY: —by over 50 percent.

MR. HYDE: Jimmy Carter's not a Catholic.

MR. NOVAK: Another question I'd like to get to is to what do you attribute the difference in attitude in the Senate and in the House, Ms. Pilpel?

MS. PILPEL: Well, I don't think I'd be nearly as expert about that as Congressman Hyde, but I would imagine that the difference has to do with the recognition on the part of the Senate that to deny medically necessary procedures of any kind to poor women is a discrimination which is most unfortunate as a matter of legislative policy, and I think therefore that they believe that as far as medically necessary abortions are concerned public funds should be used to make them possible.

MR. BUCKLEY: You mean they're just brighter than Congressmen, is that it?

MS. PILPEL: No.

MR. BUCKLEY: Are they brighter about gas also?

MS. PILPEL: I don't know whether they're brighter.

MR. BUCKLEY: He asked you what the difference was and you just gave him a little benediction.

MS. PILPEL: Was that the question? What is the difference?

MR. NOVAK: Yes. How do you account for the difference between the two?

MS. PILPEL: Well, I will stand on what I said about the Senate, and the House has apparently been persuaded by Congressman Hyde's position that the fetus is a human being—

MR. NOVAK: And the Senate just hasn't heard Congressman Hyde enough?

MS. PILPEL: They don't agree with him.

MR. HYDE: They haven't heard me either I might add. Let me, if I can, comment on that. There are 435 of us plebeians in the House who run every two years. We're terribly close, embarrassingly close to the people. The Senators are on Mount Olympus and they run every six years, and they're somewhat detached from us lesser beings, and so they naturally take a different view on many things, not everything.

MR. BUCKLEY: They have to take six years to be beaten.
MR. HYDE: That's right. That's right. Actually, and very candidly, last year they didn't want to cave in either. The sub-committee that deals with this and is in the conference with the House is just loaded with people who think abortion is an answer, is a good thing, but they did cave in last year because they felt the Supreme Court would bail them out and declare the Hyde Amendment unconstitutional. That didn't happen, and as a matter of fact, August 4th the Hyde Amendment came into effect. They can't rely on the Court to nullify the Hyde Amendment, so they've become more intransigent. That's one of the reasons. The second one is frankly the conference committee has not been affected because they've been tied up in energy debates, and nobody really comes into the meetings except one or two senators with a fist full of proxies, and you can't talk to proxies.
MR. NOVAK: I'd like to ask another question. As the House and Senate are in a sort of deadlock, so are lots of people, and some people are in deadlock with themselves actually. In a country like ours they're always going to disagree about things like this and it seems very important to try—each of us—to put ourselves in the other person's shoes; and, therefore, I'd like to ask both of you, and maybe Bill, too, to reply to this. What in your opponent's position—both in substance and in strategy or in tactics—do you most admire? In a brief way tell me. You don't have to build them up, but I'd just like to know what you see substantively, and in strategy, in those who disagree with you.
MR. BUCKLEY: Don't be too extravagant, Ms. Pilpel. (laughter)
MS. PILPEL: Well, actually, I find that it is possible to talk to Congressman Hyde on this issue whereas many people who hold this position become so wildly excited it's not possible to talk to them. But I would like also to say that I trust it was a mistake on your part when you said that they were pro-abortion because my information is not that they're pro-abortion, but they're pro-freedom of choice, and you can't brush that away by saying it's the same thing. I repeat, many people who are opposed to abortion do not feel that they have the right to force people who are not opposed to abortion to adhere to their views. Consequently, I think that if you will grant that the Senators are in favor of freedom of choice I will grant that you are a good arguer.
MR. HYDE: Well, I simply would say they don't care for having the fetus to have any choice at all in the matter.
MR. BUCKLEY: You're supposed to be paying her compliments.
MR. HYDE: Oh, I'm sorry. I think the sincerity of many of the leading opponents of the pro-life movement is enormous. I wish we had as many people articulately committed to our cause as they do.
MS. PILPEL: I think you do.
MR. HYDE: Well, I hope you're right. But many, many people, —say, Senator Brooke, for example, who is marvelous in his defense of his position, and he's effective and he's persuasive—and that's true, as I say, of yourself and others. I think sincerity and the ability to articulate the

position is something that I admire. I just wish you'd think we were sincere, too.

MR. NOVAK: I'd like to get Bill in on this, too. It's not as if your own views are so hidden, but you have a way of seeing two sides of issues sometimes and I'd like to see what you admire.

MR. BUCKLEY: I think that the pro-abortion people—at least those of them I respect, which is, by the way, not all of them—but those of them I respect, including Ms. Pilpel, do believe that the right to abort is an exercise in the implications of pluralism and that under the circumstances the anti-abortion sanction is to be resisted as an effort to impose a single cultural authority over the whole of society. I respect that as a perfectly tenable point of view.

MR. NOVAK: On the practical side, is there any possibility that one could work out a way of financing abortions for poor people privately or even through something like a tax checkoff—that is, those who are willing to allow their money to be used for that to use it. In other words, nobody would feel coerced. I mean is there a way of hitting this very controversial position in a way that nobody's conscience feels coerced.

MS. PILPEL: I can answer the first part of your question by saying that it is inconceivable under the present conditions of charitable giving in the United States that you would be able to get enough money to pay for the Medicaid abortions.

MR. BUCKLEY: Why?

MS. PILPEL: Because it's not possible to raise that kind of money. It's very difficult to raise money now for almost anything. And, as you know, the government is a chief source of funding for many, many activities.

MR. BUCKLEY: But many, many times the required amount is spent by private philanthropy for all kinds of reasons, and if people feel as passionately on the subject as you do, why shouldn't they use some of their philanthropic energies in that direction?

MS. PILPEL: I'm sure that every effort will be made by those organizations that favor freedom of choice to fund abortions for poor women, but they will not possibly be able to raise 50 or 60 million dollars, not possibly. Now, as far as a tax checkoff is concerned, I don't know that Congressman Hyde would be willing to do that, so I—

MR. BUCKLEY: That would be an invasion, wouldn't it?

MR. HYDE: Well, that involves government again in the structure of paying for abortions, and that's something that I'm not thrilled about. But it would just seem to me— I'd like to see public money going for family planning, going for all sorts of alternatives to abortion for people that are unwanted, maybe preventing them from being conceived in the first place, or doing something about them when they're born. But killing them, it just seems to me, is not an answer at all.

MS. PILPEL: I would like to say in response to that that as you know no contraceptive is perfect, and even if everyone in this country had access to family planning—which I hope eventually they will have, and that's a point

on which we agree—there will be a certain percentage of failure which in a nation of 200 million people amounts to several hundred thousand so that even if they used family planning they might find themselves pregnant when their condition is such that they should not have a baby.

MR. HYDE: But why be so pessimistic? These children who will come into the world unplanned, I'm sure most of them will be very useful.

MS. PILPEL: Well, some may permanently injure their mothers.

MR. HYDE: Well, and they may discover a cure for cancer, write some great music or poetry. Be optimistic about this. . . .

MR. BUCKLEY: I'm afraid we have to conclude. Thank you, Mr. Novak, and thank you, Ms. Pilpel, and thank you Congressman Hyde, ladies and gentlemen.

APPENDIX D

[*The following is the complete text of an editorial that appeared in* California Medicine, *the official journal of the California Medical Association (Sept., 1970; Vol. 113, No. 3). We previously reprinted this editorial in Vol. I, No. 1 (Winter, 1975) of this review. We did so because we judged it a landmark document in the continuing abortion debate. All subsequent indications would seem to confirm that we were correct in this judgment: a) the editorial is continually referred to and cited in articles on the abortion question; b) it is frequently cited in our* own *pages — often enough that, in some cases, we have neglected to remind readers that we have already published it — and, c) it remains as freshly relevant as it is largely unavailable — e.g., we must have perhaps ten times as many readers today as we had when we first reprinted it, and a considerable number of them, we think, would like to read it now. We therefore print it again, in full.* —Ed.]

The traditional Western ethic has always placed great emphasis on the intrinsic worth and equal value of every human life regardless of its stage or condition. This ethic has had the blessing of the Judeo-Christian heritage and has been the basis for most of our laws and much of our social policy. The reverence for each and every human life has also been a keystone of Western medicine and is the ethic which has caused physicians to try to preserve, protect, repair, prolong, and enhance every human life which comes under their surveillance. This traditional ethic is still clearly dominant, but there is much to suggest that it is being eroded at its core and may eventually even be abandoned. This of course will produce profound changes in Western medicine and in Western society.

There are certain new facts and social realities which are becoming recognized, are widely discussed in Western society and seem certain to undermine and transform this traditional ethic. They have come into being and into focus as the social by-products of unprecedented technologic progress and achievement. Of particular importance are, first, the demographic data of human population expansion which tends to proceed uncontrolled and at a geometric rate of progression; second, an ever growing ecological disparity between the numbers of people and the resources available to support these numbers in the manner to which they are or would like to become accustomed; and third, and perhaps most important, a quite new social emphasis on something which is beginning to be called the quality of life, a something which becomes possible for the first time in human history because of scientific and technologic development. These are now being seen by a growing segment of the public as realities which are within the power of humans to control and there is quite evidently an increasing determination to do this.

What is not yet so clearly perceived is that in order to bring this about hard choices will have to be made with respect to what is to be preserved and strengthened and what is not, and that this will of necessity violate and ultimately destroy the traditional Western ethic with all that this

portends. It will become necessary and acceptable to place relative rather than absolute values on such things as human lives, the use of scarce resources and the various elements which are to make up the quality of life or of living which is to be sought. This is quite distinctly at variance with the Judeo-Christian ethic and carries serious philosophical, social, economic, and political implications for Western society and perhaps for world society.

The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition, or status, abortion is becoming accepted by society as moral, right, and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws, and public policy rather than the reverse. 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 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. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.

It seems safe to predict that the new demographic, ecological, and social realities and aspirations are so powerful that the new ethic of relative rather than of absolute and equal values will utimately prevail as man exercises ever more certain and effective control over his numbers, and uses his always comparatively scarce resources to provide the nutrition, housing, economic support, education, and health care in such ways as to achieve his desired quality of life and living. The criteria upon which these relative values are to be based will depend considerably upon whatever concept of the quality of life or living is developed. This may be expected to reflect the extent that quality of life is considered to be a function of personal fulfillment; of individual responsibility for the common welfare, the preservation of the environment, the betterment of the species; and of whether or not, or to what extent, these responsibilities are to be exercised on a compulsory or voluntary basis.

The part which medicine will play as all this develops is not yet entirely clear. That it will be deeply involved is certain. Medicine's role with respect to changing attitudes toward abortion may well be a prototype of what is to occur. Another precedent may be found in the part physicians have played in evaluating who is and who is not to be given costly long-term renal dialysis. Certainly this has required placing relative values on human lives and the impact of the physician to this decision process has been considerable. One may anticipate further development of these roles as the

problems of birth control and birth selection are extended inevitably to death selection and death control whether by the individual or by society, and further public and professional determinations of when and when not to use scarce resources.

Since the problems which the new demographic, ecologic and social realities pose are fundamentally biological and ecological in nature and pertain to the survival and well-being of human beings, the participation of physicians and of the medical profession will be essential in planning and decision-making at many levels. No other discipline has the knowledge of human nature, human behavior, health and disease, and of what is involved in physical and mental well-being which will be needed. It is not too early for our profession to examine this new ethic, recognize it for what it is, and will mean for human society, and prepare to apply it in a rational development for the fulfillment and betterment of mankind in what is almost certain to be a biologically-oriented world society.

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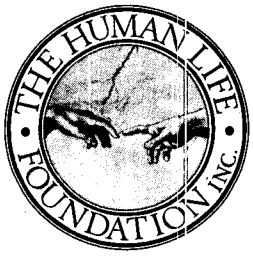
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