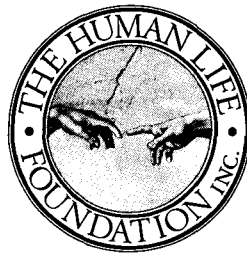


the
HUMAN LIFE
REVIEW



WINTER 1979

Featured in this issue:

M. J. Sobran on *Roe & Doe: Six Years After*
Prof. Paul Ramsey on *In Vitro* Fertilization
Robert A. Brungs on Biotechnology and the
Social Order
Ellen Wilson on Men of Feeling
Michael Novak on Men without Women
Harold O. J. Brown on Making Law
Prof. Germain Grisez
& Joseph M. Boyle on . . . The Liberty to Stand Aloof

Published by:

The Human Life Foundation, Inc.

New York, N.Y.

Vol. V, No. 1

\$3.00 a copy

. . . about THE HUMAN LIFE REVIEW

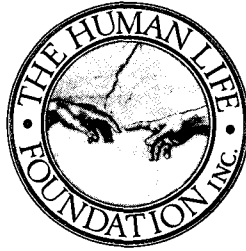
This issue begins our fifth year of publication. Should we complete it, we will have reached a milestone of sorts: in fact, many publications nowadays, even though they begin with reasonable expectations of reaching a (more or less) clearly identified “market,” fail to survive that long for reasons as often financial as editorial. In our case, we began with roughly the opposite of Great Expectations: there was certainly no assurance that the often-unhappy subjects we meant to discuss (abortion, euthanasia, and the obvious steady deterioration of the American family) would find an audience — especially one willing to support such a venture.

But so far so good: we obviously *have* found an audience — a much wider one, in fact, than we thought possible. And while we could certainly use more support, we have at least managed to keep going, and to publish virtually everything we have wanted to, with the help of those who have shown a special interest in this journal. We therefore thank all who have helped us, and hope that they will continue to do so.

Two of the articles in the current issue first appeared elsewhere: Prof. Paul Ramsey’s was published in booklet form in late ’78 by Americans United for Life, Inc. (230 N. Michigan Avenue, Chicago, Ill. 60601), and we thank AUL for letting us use the text; Mr. Michael Novak’s article appeared in the October ’78 issue of *The American Spectator*, a feisty (and we think, very enjoyable) review that regularly carries a selection of fine articles (it is available at \$10 per year from P.O. Box 877, Bloomington, Indiana 47401). The selection by Profs. Germain Grisez and Joseph Boyle is taken from a book soon to be published by the University of Notre Dame Press (South Bend, Indiana 46556).

Once again, we remind readers that all previous issues of our review are available — as well as bound volumes of the first four years (we think they are worth having — few if any of the articles we have published are out-dated). Full information on how to order is printed inside the back cover of this issue.

THE HUMAN LIFE REVIEW



WINTER 1979

Introduction	2
Six Years After	<i>M. J. Sobran</i> 5
On <i>In Vitro</i> Fertilization	<i>Paul Ramsey</i> 17
Biotechnology and the Social Order	<i>Robert A. Brungs</i> 31
Men of Feeling	<i>Ellen Wilson</i> 51
Men without Women	<i>Michael Novak</i> 61
What Makes the Law the Law?	<i>Harold O. J. Brown</i> 68
The Liberty to Stand Aloof	<i>Germain Grisez &</i> <i>Joseph M. Boyle, Jr.</i> 80

Editor

J. P. MCFADDEN

Publisher

EDWARD A. CAPANO

Contributing Editor

M. J. SOBRAN, JR.

Managing Editor

ANNE FINN

Associates

JAMES BERGER R. F. JENKINS MARGARET PRINCE ELLEN M. WILSON

Editorial Board

JEFFREY HART

MALACHI MARTIN

JOHN T. NOONAN, JR.

Published by THE HUMAN LIFE FOUNDATION, INC. Editorial office, Room 540, 150 East 35 St., New York City 10016. The editors will consider all manuscripts submitted, but assume no responsibility for unsolicited material. All editorial and subscription inquiries (and all requests for reprints and permissions) should be sent directly to the editorial office. Subscription price: \$12 per year; single copy, \$3.00. Bulk prices on request.

Vol. V, No. 1 © 1979 by THE HUMAN LIFE FOUNDATION, INC. Printed in the U.S.A.

INTRODUCTION

WE BEGIN this issue with Mr. M. J. Sobran's reflections on the sixth anniversary of the Supreme Court's legalization of abortion. Our regular readers know that the abortion issue has been a constant concern of this journal, and that Mr. Sobran (our most constant contributor) has written about it often before in these pages. But he has the knack of freshening any argument, as well as an uncanny ability to argue persuasively merely by reminding the reader of the facts. Here, he reminds us that the original arguments *for* abortion have all but disappeared (indeed, hardly survived the Court's approval), replaced now by wholly different ones. Thus, the argument that abortion, however undesirable, would "happen" anyway, and that "the wisest policy was to legalize it so as to ensure that it be safe" quickly gave way to the contention that, after all, abortion was now "a woman's 'constitutional' right" to the extent that, "Lest any woman lack means of implementing this now sacred prerogative, we were exhorted to pay for it with public monies." As he suggests, things might have turned out quite differently if the arguments had not shifted so drastically. Defended as an unavoidable evil, abortion might have been accepted, however grudgingly, by the necessary "consensus." Advocated as a positive *good*, it has engendered such massive opposition that it is by no means certain that the *Abortion Cases* will stand. "Those who talk about a woman's right to choose," Sobran says, "usually make it sound as if it doesn't matter what she chooses . . . But any genuine expansion of human freedom must imply an increase in the domain of the moral: as soon as we are free to choose, we are obliged to define values to guide our choice. You cannot exalt freedom without respect to its objects. If the freedom to abort is good, then abortion must be good." But, Sobran concludes, "Despite the formidable institutional and propaganda power of its advocates, abortion has failed to persuade the nation that it deserves respect as an option. It is still unassimilable to American morality. After six years, it remains a focus of shame — and therefore of hope."

We next shift to another subject of public concern, the now-realized possibility of "test-tube" babies. As a possibility, such "scientific" generation has a long history of fascination for many (e.g., novelists). But when British Drs. Patrick Steptoe and Robert Edwards announced the birth of Louise Brown last year, the world seemed unprepared for the reality. Predictably, the common response was the "modern" one: now that it *could* be done, why, of course it would — should — be done. A typical example was an item in a trade journal (*Medical World News*, December 25, 1978) that began, "Test-tube babies for childless U.S. couples are just around two corners, one

THE HUMAN LIFE REVIEW

medical, the other ethical. Already at least half a dozen clinical centers are tooling up to offer Americans the new infertility therapy . . ." The breathless prose makes the point exactly: "progress" won't be stopped by a few corners, of whatever kind; Americans, by God, want to get in on a new — and therefore a good — thing! But that second (ethical) corner raises questions, however belated, that not only remain but will undoubtedly grow apace with the expected (assembly-line?) production.

We present two articles here which we think are of unusual interest. The first is by Prof. Paul Ramsey of Princeton, who is well-known for his many books and articles on moral and ethical questions (he is, we'd say, a prototype of the "authority" that we Americans so dearly love to "hear" on any vexed question — we certainly hope he will gain attentive listeners here!). In fact, we reprint the text of his recent testimony as submitted to the Ethics Advisory Board of the Department of Health, Education and Welfare. In retrospect, one wonders why the Board did not want to know more about *in vitro* fertilization well *before* the fact, since HEW will undoubtedly be the dominant force in determining its future course (the same *Medical World News* article quoted above reports that HEW Secretary Joseph Califano has already given a "green light" for federal funds to create the "proper climate" for the "clinical application of the technique"). Better late than never, for Prof. Ramsey leaves no doubt about what *he* recommends: ". . . my considered judgment [is that] *in vitro* fertilization . . . should not be allowed by medical policy or public policy in the United States — not now, not ever." He provides reasons aplenty for his stark conclusion, as the reader will see. We were particularly struck by his pointing out that, whereas in natural reproduction an unfathomable "screening" produces results "relatively free from genetic defects," there is no way to duplicate this in glass-dish "mating" — so that *nobody knows* what results, immediate or ultimate, may be set in motion. (Ironically, a primary reason for the Supreme Court's denial of human rights to the unborn was that "nobody knows" when life begins; *post* Louise Brown, anybody can see that it begins at the beginning, but the secondary consideration of "unwanted life" may now be projected beyond the womb . . .)

The second article is by Robert A. Brungs, a Jesuit who has devoted his energies to the study of what theology doesn't know about "science," and *vice versa*. Perhaps we might have placed his article first: it outlines the history of the notion that Prof. Ramsey rejects, i.e., that what can be done *should* be (all that is needed, Brungs says, is "the social will to proceed"). On reflection, however, we think Ramsey's powerful "Here I stand" is an ideal preface for the mass of evidence Brungs provides to show that, if we fail to say "No" now, we may never have another opportunity.

Right about here, we'd like to give you, dear reader, a break. Given the weight of our chosen subjects, that's hard to do — however, we think we've done it. To be sure, Ellen Wilson discusses serious matters, but she does so with refreshing style and grace. She ranges far and wide; along the way, please note, she discusses the testimony given by Prof. Leon Kass to the same Board, and on the same subject, as Prof. Ramsey's. Read it, you'll enjoy it.

INTRODUCTION

Next we reprint an article by Mr. Michael Novak, another well-known commentator on public issues. We have had several articles on homosexuality in recent issues, but nothing like this one. Mr. Novak goes well beyond the usual arguments, illuminating the connection between the “Gay rights” struggle and the many other manifestations of today’s “rage against society.” He concludes that, “For the good of all of us, homosexuals included, it is well that society should prefer heterosexuality” — and explains why with such great civility as to offend nobody.

Then Rev. Harold O. J. Brown writes about the law: specifically, the dilemma that our current reliance on “positive” law has produced in relation to the questions of abortion and homosexuality. Time was, he says, when most Americans accepted the “law of the land” as being derived from “eternal principles” such as the Founding Fathers discerned in “the laws of Nature and of Nature’s God.” No more; nor has the “will of the people” been consulted on the changes, with the result that many wonder if a “higher law” must be invoked to redress the balance between what our laws now *say*, and what they *ought* to say.

We conclude with another excerpt from a soon-to-be-published book by Profs. Germain Grisez and Joseph Boyle, titled *Life and Death with Liberty and Justice*; it is primarily a (definitive, we think) treatment of the euthanasia debate, but covers a wealth of related material as well. Thus our previous selection (*Fall '78*) discussed various aspects of a) the Court’s abortion decisions and b) the Nazi experience with euthanasia. The present selection is even more wide-ranging (as we trust the reader will discover for himself), but with particular emphasis on the “need for constitutional recognition of the liberty to stand aloof,” i.e., that if the state imposes forms of action to which citizens conscientiously object, it should protect “such citizens from any more intimate involvement than necessary in the actions they find abhorrent” — a problem already raised by abortion, and, say the authors, likely to become much more serious should euthanasia also be legalized.

There you have it. We think it is a balanced collection of articles that are of unusual interest, and we hope the reader will agree. We certainly welcome your opinions; if you’d like to send them to us, please do so.

J. P. MCFADDEN
Editor

Six Years After

M. J. Sobran

IT IS NOW six years since the Supreme Court made perhaps the most tragic blunder in its history. Within a few weeks after January 22, 1973, the free market had made its customary rapid adjustments, and ads for abortion “counselling,” “referral,” and “services” were appearing in the classified pages. An industry had been born. In the first year alone several hundred thousand extra lives were taken.

The press — that symbol of enlightenment — and the mass media responded, on the whole, with liberal optimism. The Court’s *Roe* and *Doe* rulings were “historic,” a word of veiled approbation that suggests not only impact but a kind of irreversibility it is a little perverse to bemoan, let alone resist.

Before the Court ruled and for a short time afterward, the main pro-abortion argument was that abortion, though (perhaps) undesirable, was going to “happen” anyway, and that the wisest policy was to legalize it so as to insure that it be safe and sanitary. Quickly the arguments became bolder. Abortion was a “right,” even a woman’s “constitutional” right: it had, after all, been validated on a constitutional pretext. Lest any woman lack means of implementing this now sacred prerogative, we were exhorted to pay for it with public monies.

As the pro-abortion lobby swelled and acquired what Marx would call “class consciousness,” its polemics grew more aggressive. Those who opposed abortion were chastised as oppressors of women. A vein of anti-Catholicism, often downright and unconcealed, crept into pro-abortion literature and propaganda.

This was perhaps to be expected among the militant portion of that lobby. What was more appalling was the tolerance the allegedly neutral forums showed for the religious slurs. The *New York Times*, properly sensitive to insults against Jews, blacks, women, and other acknowledged victim-categories, proved hospitable to Op-Ed commentary and even reportage that made Catholics the villains of the abortion struggle. This may have reflected confusion as much as malice. But for whatever reason, the *Times* editorially took up the assumption that opposition to abortion was “merely” religious, hence unsuitable as a basis for public policy.

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

Before long the clear momentum of the loftier organs of “public opinion” was quite crudely pro-abortion, equating the availability of abortion with social justice. The original tone of regret was gone.

Those were dispiriting days for opponents. A great evil had been perpetrated: that was serious enough. In addition, the Court, in perpetrating that evil, had peremptorily removed the means of redress from the usual democratic channels. And crowning all this, all attempts to mount a campaign of persuasion were frustrated by the corruption of that public debate which is (as the *Times* so often reminds us) the life of democracy.

We who deplored abortion found ourselves in a difficult and exasperating position. Given the political obstacles we faced, it was especially galling that our desire for discussion should be met with evasion (killing becoming “termination”) and personal dismissal that sometimes sank into vilification. A malign stereotype was invented to discredit us. Because some of us were Catholic, and because the Catholic Church was active in the controversy, the attempt to restore the laws (passed in the first place by Protestant legislators, for secularly humane reasons) was characterized as an attempt to impose Catholic dogma on the nation. When a few fanatics firebombed clinics, their acts were seized on as incriminating millions whose behavior had been gentle and law-abiding. I hardly need point out how differently the antiwar and civil rights movements were treated in the press, despite the presence within them of far more violent people: in those cases the acts of a minority were scrupulously distinguished from the issues that claimed public attention. In some cases the violence was even excused on grounds that protestors’ consciences had been grievously affronted, and that the mechanisms of peaceful change had been “unresponsive.”

We need no reminders in this. Our adversaries seem to feel that those mechanisms should be made as unresponsive to us as possible. The American Civil Liberties Union has pursued a suit against the Hyde Amendment on grounds that its support is excessively “religious,” which fact allegedly makes for a “divisiveness” that is unconstitutional under the ground rules of pluralism. The opposite argument would make more (but only slightly more) sense: that the appropriation of public funds for a purpose repugnant to the religious conscience of millions of people is in fact far more divisive.

Divisiveness is hardly unconstitutional, but we can agree that it should be avoided. But how can it be avoided when a longstanding consensus is suddenly overturned by nine men? Even if the Court’s argument were sound, or at least lucid, is it humanly probable that a new consensus would instantly crystallize around their decision? Is it

THE HUMAN LIFE REVIEW

in any sense “democratic” to insist that the people ought to acquiesce before a *fiat*? To legal institutions we owe only legal compliance. It is strange that liberal opinion, which a few years ago was so hospitable to civil disobedience and the rights of conscience, should so peremptorily demand not only our obedience but our approval. Even our efforts at persuasion are resented.

That there should be incidents of violence is hardly surprising, given the precedents that were set a decade ago. It is only fair to note that this is one natural response to an injustice for which legal remedies seem at least remote. Weren't we told, *ad nauseam*, that violence too “happens” under oppressive circumstances? That we must remove its “causes” rather than seek merely to repress the “symptoms”? Weren't the violent ones of the Sixties described, in tones somewhere between pity and eulogy, as morally sensitive idealists trying (however misguidedly) to make this a better world? But anti-abortion bombers can't expect the reflective indulgence that was so habitually accorded to anti-war bombers.

Not that they should expect it, or receive it. However “sincere,” they are wrong, and guilty. In violating the law they wrong law-abiding citizens; in wronging them, they additionally wrong those of us who seek lawful remedies, by inviting good people to entertain suspicions of us.

It is often hard to know just how to serve a moral ideal. But the resort to violence, while non-violent means are still possible, bespeaks a kind of despair which itself is immoral. While violence is sometimes necessary, it is wrong whenever persuasion is possible, because it is wrong to give up on the consciences of our neighbors. Violence then is desperate in the etymological sense: hopeless.

Because hope is among the cardinal virtues, Catholic moral theology traditionally spoke of the “sin of despair,” the failure to hope. The idea is worth understanding. The Latin word for hope (*spes*) is the root of “despair” (*desperare*). Despair was not necessarily a mood, or a gloomy demeanor: a man might be apparently happy, and yet be guilty of it. Nor was hope the sort of attitude we now mean by the word optimism, that sunny confidence that things will work out all right.

The sin of despair specifically meant ceasing to hope for one's own salvation, and consequently ceasing to make the human effort to receive God's grace; resigning oneself to damnation. Despair therefore was the objective condition of any life ordered to some good below man's final end, union with God in heaven. A man might lead a contented and respectable life, yet be guilty of despair in aiming too low and hoping for less than he ought to hope for.

The wisdom of this view is that it perceives that hope is a kind of duty. It is wrong to hope for too little; and it is also wrong to hope in the wrong way, like the Grand Inquisitor, who, hoping for the salvation of all men, tries to achieve it by relieving them of their freedom and *forcing* them to be saved. If there is a sin of despair, there are also sins of idealism, familiar to us in the deeds of terrorist and totalitarian movements. These, pursuing a fantasized perfection, reject the co-participation of their imperfect fellow men in that pursuit. They want all the freedom for themselves.

Always we face the problem of adjustment. Ideals must be fitted not only to reality but to other ideals. To bomb an abortion clinic is to sacrifice one ideal — that of civility — to another, with the result that neither is advanced. Most people realize this instinctively, which is why few of even the most fervent foes of abortion have turned to such drastic methods. Even if the fanatic John Brown did in fact hasten the day of abolition, nobody is disposed even now to give him much credit for that.

There is a certain amount of truth in the assertion that abortion is going to occur regardless. For that reason the most important task of the anti-abortion movement may be to keep alive the ideal of respecting innocent life. Murder will occur whether there are laws against it or not, but we do not therefore feel that those laws are important only for the sake of the marginal few they actually prevent. They are important as signs of the moral commitment of the polity. As John Noonan has reminded us, laws matter for the tone they set as well as for the immediate obstacles they throw up before evildoers: law teaches.

When Abraham Lincoln rose to leadership in the young Republican Party, there was no question of abolishing slavery. Abolitionism, though morally honorable, was politically extreme; and it may be that its impracticability even diminishes, in a sense, the moral credit it deserves, since the fervor of abolitionists helped precipitate the Civil War. In any case, most people, North and South, perceived abolitionism as somehow extravagant and dangerous, and this perception should count for something with us. If abolitionism was extreme and slavery was wrong, what was the golden mean?

Many Americans felt it was possible to be “personally opposed” to slavery without forbidding others to practice it. Others felt one could be relativist about slavery, but absolutist about states’ rights. According to this latter view it was a matter of indifference *whether* a state had slavery, but a matter of critical importance that a state should be *free* to have it. Lincoln gave this sophistry the answer it deserved. As long as any state had slavery by right (rather than by

THE HUMAN LIFE REVIEW

mere sufferance), then the entire nation was in a sense pro-slavery: under the Constitution all the states must respect and in practice support the rights of slave states and slaveholders.

Lincoln conceded that the Federal government had no power to do away with the “peculiar institution ” at once. Nevertheless, he held that it might and should, within its powers, foster eventual emancipation. He argued that the Founding Fathers had admitted it to be an evil and had hoped that their constitutional arrangements would tend toward its ultimate extinction. Thus (said Lincoln) the nation had had an original anti-slavery commitment, though generations were to pass before it was to be fulfilled. The Founders had tragically failed to foresee the impetus for the extension of slavery into new territories, and so (Lincoln went on to say) the commitment had to be renewed by new arrangements, beginning with the prohibition of slavery in territories where it did not already exist.

It must be stressed that total emancipation was not yet politically feasible (and of course there was no extra-political way to effect it). Under the circumstances, as Lincoln saw, it was vital to re-establish the operative *principle* that slavery was wrong, and trust that this would dispose men’s minds toward acceptance of abolition in the long run. This is a model of acting in hope, neither utopian nor passively “optimistic.”

Such optimism as Lincoln rejected was typified by Stephen Douglas, who thought that a workable solution lay in the principle of “popular sovereignty” — whereby the (white) people of each territory would decide for themselves whether to import slavery. This position was neither practical nor moral, because it was incoherent: such a freedom excludes the very subjects whose freedom is at issue. It does not posit individual rights, but the right of a ruling class to decide whether (and how far) to extend privilege.

In positing a freedom for some that postulates the subhumanity of others, “popular sovereignty” closely parallels the pro-abortion position. It makes just as little sense as letting a woman decide whether her child is human: we can hardly say it is only if she says so.

When we ask if X is a human being, it is no answer to say that this depends on whether Y, a person in a relation of sheer power or legal jurisdiction over X, decides to *treat* X as human. This is true whether X is a fetus or a Negro; whether Y is a mother or a slaveholder. The reason is precisely that the question “Is X human?” *means*, among other things, “Is it proper for Y to have absolute power over X?” Questions about essence cannot be answered by appealing to anyone’s will. If I ask whether Bossie is a cow, I am hardly satisfied by being told that it depends on whether Farmer Brown chooses to milk

her or to put a saddle on her and ride her. Farmer Brown's undoubted title to her has nothing to do with the question. If we pass a law requiring that cows be inoculated against disease, and we perceive that Bossie is a cow, we will hardly be deterred by Farmer Brown's resolution to treat her as a horse. She is *his* cow, all right, but she is still a cow. His property right depends on her nature. It does not in the slightest determine her nature.

The abortion controversy revolves around just such a confusion concerning essences. A critical moment in that controversy occurs when the pro-abortion argument shifts from the "necessary evil" to the "woman's right" position. If abortion were a kind of constant of social existence such that legalization would not increase it, a case might be made for allowing it under controlled conditions. This, be it remembered, was just the argument we used to hear. This is important because it maintained (or pretended to maintain) the ideal, namely that no innocent life should be taken. It offered the humane if specious hope that no further evil should attend an evil that was ineradicable anyway.

Gradually, however, this argument elided into an agnosticism about human life. The question "When does life begin?" became an enigma, to which there could be only "religious" answers, i.e. answers of no rational value and hence inappropriate for corporate civic action.

The elision was finally completed when the pro-abortionists began to assert (and they haven't stopped asserting) that elective abortion represented an unmitigated triumph for personal freedom. It has hardly been noticed how difficult this argument is to reconcile with the previous two. If abortion is a necessary *evil*, we cannot rejoice in the freedom to abort. If abortion *may* mean the destruction of a human life, any rejoicing must at least be tempered by a sense of ambiguity.

In either case — necessary-evil or maybe-evil — the appropriate policy conclusion is still that abortion must be discouraged wherever possible. Yet rather than seeking to minimize it, pro-abortionists have militated for public expenditures and relaxed moral attitudes so as to make the decision in favor of abortion as easy and painless as possible. They are plainly less concerned with whether abortion is undesirable than whether the desire for it can be universally satisfied. It is as if we were to let boys shoot out the windows of a building, and replied to qualms lest the building be inhabited that there was no way of knowing, and besides, isn't it wonderful that we enjoy the right to bear arms?

There is a primal human sense that it is better to let a child come to

THE HUMAN LIFE REVIEW

term than to kill it even at an early stage. Yet expressions of this sense have by now vanished from most of the public discussion on abortion. This is not logically required even by the pro-abortion position. It could be held that while life is preferable to abortion, legal prevention does more harm than good. In that case, however, one must still deplore abortion in principle *and* seek to express that disapproval in ways that are publicly appropriate. It is easy to imagine it being treated like smoking. We might hold that it is permissible but not desirable, and require that any woman seeking an abortion be fully informed as to the nature of the embryo or fetus at whatever stage of its growth it had reached; this would be no different in principle from requiring that cigarettes bear a warning on the label or that soft drinks mention the effects of saccharin. But when the City Council of Akron did just that, great was the wrath of the pro-abortion forces: from charging their foes with ignorance, they turned instantly to attacking them for insisting on informed consent.

Evidently they regard even factual information (such as pictures of fetuses) as adversely inflammatory. Anesthetizing the conscience seems to be an essential part of the abortion "procedure." No doubt this helps explain why pro-abortion arguments are so heavily composed of abstract slogan and euphemism. All of this weighs heavily against the insistence that the only conceivable moral criteria for abortion are religious. But some religions have demanded human sacrifice, and many naturalistic ethics take as their starting point the assumption that life is to be favored.

Many people who favor elective abortion protest the term "pro-abortion." They insist that they are not pro-abortion but "pro-choice." But the term seems fair as long as they fail to concede at least as an ordering principle that abortion is undesirable. After all, society disapproves of adultery in many ways, and expresses that disapproval: while criminal law does not usually punish it, few consider it a "right" such that civil law must disregard it or the Federal government provide motel rooms. Abortion too could be permitted and disapproved, or permitted and discouraged, or permitted *and* subsidized *and* discouraged. But the pro-abortion forces will settle for nothing less than full support for abortion; they even measure progress, as I have said, by the simple criterion of whether every abortion desired is obtained. This hardly suggests moral discrimination. And while they often speak of the freedom of anti-abortionists to exert moral suasion, they often seem to feel that anyone who disapproves of abortion should, in the interests of good taste, keep quiet about it. Which, in turn, hardly suggests the tolerance and openness they recommend to the rest of us.

The pro-abortionists have slid from one position to another, ditching principles along the way, so that finally they have abandoned any vision of a model of behavior to be encouraged. On the whole they seem not even to admit that some genuine human value might be served by persuading a pregnant woman to have her baby rather than destroy it. As a firm opponent of their position, I have often marvelled at their rigidity. Is their position so fragile that they can't concede any beauty to a pro-life choice? Must they make *every* abortion sound like the best and most conscientious decision? Must they *always* rush to the defense of an Edelin without first ascertaining whether he killed a viable baby? Surely it is relevant to make minimal moral distinctions between emergencies and whimsies. In opposing all abortions *I* can admit such gradations. Can't they? Or do they favor *all* abortions?

That absence of an ordering ideal is an example of what I mean by despair. Resignation to abortion in hard cases is not incompatible with favoring live birth. But to abandon the attempt to encourage life is to give up something vital and precious at the heart of humane values. It is perhaps natural that the apologists for abortion should speak only of "unwanted children" in such terms as to intimate that to abort a child is to do him a favor; but just as the Old South's insistence that Negroes were better off as slaves implied a despair of black capacities for freedom, so the maudlin talk of sparing children life implies a despair about the intrinsic value of life. It is hard not to pity anyone so consumed with pity.

By now I hope it is clear that the "necessary-evil" argument, whose logic has not been followed by its own proponents, was no more than a preliminary rhetorical stage in the movement toward total moral passivity *vis-a-vis* abortion. The contention that abortion could not be prevented anyway — that it just "happened" — was always a symptom of a hopeless disposition.

Its great strength is the prevalence of that kind of disposition. Most people do feel that there is nothing they can do about many of the world's evils. As Hilaire Belloc observed, slavery was accepted as a normal and natural condition throughout most of recorded time. Of course a man would always prefer freedom for himself, just as a hamster would rather not be in a cage; but the mass of men accepted slavery as a brute fact of life, which the individual might escape but which it was pointless to think of abolishing *in toto*. *Libertas*, the status of a freeman, was a social rank rather than a natural right. The freeman was in fact *defined* by the very fact that he was not a slave. The word "freeman" itself has a quaint ring to ears accustomed to assuming that freedom is natural and universal. It is hard to realize

THE HUMAN LIFE REVIEW

that a condition we now take for granted was once the subject of a militant idealism. We are perhaps as passive about freedom as our ancestors were about slavery. As we look back on them they seem to have lived in needless despair about universal freedom simply because they never gave it a thought; and we are right. But of course this does not mean that they felt dejected about it: despair means simply not-hoping. And we find it hard to imagine men living without the notion of freedom as an ordering ideal toward which they should ultimately direct their efforts. But the ideal did slowly emerge, and was beginning to be a social fact even before it was clarified, by Locke and others, as an ideal. Our imaginations seldom run far ahead of circumstances.

The basic argument in defense of any social evil is that it is natural and ineradicable. Of course this is always partly true, true enough to warn us against glib optimism. But as soon as a genuine ideal exists, it begins to give us hope and to shape our behavior, if we are prudent about it, toward an eventual realization. No ideal is ever fully realized, of course; there will always be murder, abortion, servitude. But the ideal begins to become a reality from the moment we give ourselves to it. Once we are conscious of it, the evil is on the defensive. The ideal begins by transforming the terms in which we look at and define the world; eventually it pervades our behavior in myriad ways, as the chivalric ideal changed even literary diction. If the strategic strength of pro-abortionism is that it appeals to the part of us that accepts things as "facts," its strategic weakness is that it offers nothing to that predominant part that causes us to conceive things in their best possible arrangements. It is anti-human in seeking to shrink the domain of the moral and the esthetic. It urges us to regard victims with no more concern than the escaped hamster looks back on his old cage-fellows.

Put another way, it would have us regard the future as if it were already the past. That is the meaning of any claim that nothing can be done. Which, again, is always partly, but never quite, true. The mentality that seeks to evade moral crisis can also be seen in the debate over American policy toward Communism.

At first the progressive concedes that Communism is evil — or at least that of course "we" are agreed in "preferring" our system to Communism. This admits at least the ideal of personal freedom. Even so, the form of the concession usually blunts the distinction between objective value and mere personal preference. Our aversion to Communism becomes, subtly, an irrational passion rather than part of a commitment to the good life.

As with abortion, we pass from the abstract admission that

Communism is undesirable to a kind of value-agnosticism. Since different people have different preferences, who is to say that the preference for our system is better than the preference for Communism? Eventually a tacit taboo is established against the outright condemnation of Communism. It begins at the diplomatic level with those who seek to “avoid confrontation” and emphasize “areas of mutual interest” and “common aspirations.”

Peace is a good thing, but once it becomes a god-term it vitiates any uncompromising moral principle. The fear of nuclear war has all but discredited, as “vestiges of the cold war,” any sharp opposition to Communism. Now it is logically possible — even easy — to avoid conflict with a superior force, and yet retain full moral clarity about the wielders of that force. A weak but free country can sustain its ideals without trying to conquer a powerful tyranny. As Lincoln’s example shows, principled men can co-exist with an evil they are unable to destroy at once: the evil is vulnerable as long as they recognize it as such. But our last two presidents have been reduced to the near-total confusion of asserting that the Soviet satellites are both free and devoted to our own ideals of freedom.

Finally the apotheosis of accommodation ushers in an anti-moral moralism. If it is impossible to destroy Communism, it becomes wrongheaded even to disapprove of it. Detente, instead of remaining merely a necessary compromise with circumstance, becomes a positive good, even an ideal. It becomes imperative to look for silver linings. New Communist regimes are judged solely on their professions and given the benefit of every doubt until it is too late to do anything about them. Thus Anthony Lewis, in 1975, berated the “cultural arrogance” of those who expected the Khmer Rouge to be harsh masters of the Cambodian people they proceeded to exterminate. When the Italian Communists made a show of strength a few months ago, Tom Wicker wrote hopefully of “A New Communism?” When Mao Tse-tung died, Western eulogists extolled his dreams and achievements, admitting his brutalities incidentally but relegating them to subordinate clauses.

Optimism looks to the future. Hope looks to the eternal. This is why they are incompatible. If Communism is strong and getting stronger, the voices of optimism will scabble for consolations, because they are possessed by a kind of future-worship that takes a trend for a *fait accompli*. But the compulsive idealization of the supposed future is not only destructive of any permanent ideal that appears to be losing ground; it is also resentful of the attempt to reaffirm such an ideal. As with Communism, so with abortion. It is just going to *happen*, that’s all. At first the futurists explain, calmly

enough, that it is just senseless to buck the wave of the future. But they soon lose patience, and anyone who holds to the ideal is an obstinate reactionary, "clinging to the past," jingoistic, fanatical, culturally arrogant, seeking to impose his views on others . . . Gradually it becomes, paradoxically, immoral to oppose a trend. We can do nothing, they reason: therefore we must do nothing. Not only must we never impose our views: we must never *have* our views.

Those who think this way actually get indignant at being treated as moral subjects. The attempt to persuade them irritates them as "crusading." They want certain matters treated as beyond discussion; and they regard themselves as irreversibly progressive, participants in an idealized future or process-of-becoming, so that they think absurd any effort to pull them "backwards" into an obsolete realm of static standards. That some people continue to affirm such standards annoys them too, because it means that the future is a little behind schedule. Troglodytes should be extinct by now. Evil, imperfection, reaction are supposed to fade away. When they persist, the futurist metaphysic is threatened: the past lingers maddeningly, like Banquo's ghost.

Conservatives often protest, as I have done, that progressives refuse to engage in honest discussion with them. But, in a sense, this is to be expected. The progressive believes, deep in his progressive heart, that he has nothing to discuss with the representatives of what he can only conceive of as the "past." Only between progressives and radicals or Communists can there be fruitful intercredal "dialogue" or "negotiation," because only they are talking about ultimate reality, the Future of their imaginations.

This may explain why people of the progressive temper almost never describe any conservative or reactionary as an "idealist." This honorific term is reserved for those who imagine and will into being a world that has never yet existed. Idealism, in this sense, means a kind of piety toward the future. Piety toward the past is merely spiritual atavism.

But as T.S. Eliot observed, there are no lost causes, because there are no gained causes. The only ideals worth holding are those that have already shown their power to inspire and control a world of very imperfect men; men who will always stray from even the good they know, only to be tugged back toward it. To wait upon the future as if it were capable of supplying new ideals is to despair, by sacrificing what we already have to something we do not even know. Despair characteristically involves confusion about ends, and part of the reason it is a sin is that it is irrational.

Abortion, murder, slavery, tyranny: these are "facts of life" all

M. J. SOBRAN

right, but only in the sense that moral evil is a fact of life. They exist because people will them, and are brute facts only to the extent that we cannot help what others desire. But it is another fact of life that we very often *can* affect what others desire, by reason, persuasion, example. Those who talk about a woman's right to choose usually make it sound as if it doesn't matter what she chooses; her choice, they imply, just "happens," and it is both vain and somehow wrong to try to affect it. But any genuine expansion of human freedom must imply an increase in the domain of the moral: as soon as we are free to choose, we are obliged to define values to guide our choice. You cannot exalt freedom without respect to its objects. If the freedom to abort is good, then abortion must be good.

So there is no escaping idealism. There is only the task of clarifying ideals. Despite the formidable institutional and propaganda power of its advocates, abortion has failed to persuade the nation that it deserves respect as an option. It is still unassimilable to American morality. After six years, it remains a focus of shame — and therefore of hope.

On *In Vitro* Fertilization

Paul Ramsey

MY NAME is Paul Ramsey. I am the Harrington Spear Paine Professor of Religion at Princeton University. My field of scholarly specialization is ethics and social philosophy — in particular, though not exclusively, Christian ethics. My credentials for submitting this testimony are the fact that as long ago as 1972 I wrote a two-part article on *in vitro* fertilization published in the *Journal of the American Medical Association*,¹ that for the past fifteen years I have written extensively in the area of medical ethics,² that I am a member of the Institute of Medicine of the National Academy of Sciences, and a founding Fellow and member of the Board of Directors of the Institute of Society, Ethics and the Life Sciences, and was once awarded an honorary doctorate of science by the Worcester Polytechnic Institute (of which I am inordinately proud).

To state my considered judgment in advance of the reasons for it: *in vitro* fertilization and embryo transfer should not be allowed by medical policy or public policy in the United States — not now, not ever. I venture no comment on whether sufficient “animal work” has been done, by *scientific* standards, for this technology safely to be applied within general practice or in trials on human beings. That question and such like questions you will explore with scientific experts. I limit myself to basic ethical and policy considerations that any knowledgeable citizen can understand; and it is in this capacity that I submit this written testimony.

It is my conviction that the Ethics Advisory Board, the Department of Health, Education and Welfare, the National Institutes of Health and the Congress of the United States — and, in absence of action from these Federal sources, the medical profession itself if it has any remaining power to enforce standards or the legislatures of the several States — should take appropriate action to the extent of their jurisdictions to stop embryo manipulation as a form of human genesis.

I am not unmindful of the gift of a child this procedure promises to women with oviduct blockage — a promise now once delivered, with possibly more soon to come in Great Britain. Still there are, I judge,

Paul Ramsey is a prolific author whose latest book is *Ethics at the Edges of Life* (Yale University Press, 1978), an excerpt from which was reprinted in our Summer '78 issue. This article is the text of his recent testimony submitted to the Ethics Advisory Board of the Department of Health, Education and Welfare.

PAUL RAMSEY

conclusive reasons for not continuing these experimental trials and for not allowing the procedure to become standard practice in the United States.

I offer four reasons in support of this verdict: 1) the need to avoid bringing further trauma upon this nation that is already deeply divided on the matter of the morality of abortion, and about when the killing of a human being (at tax expense) can occur; 2) the *irremovable* possibility that this manner of human genesis may produce a damaged human being; 3) the *immediate* and not unintended assault this procedure brings against marriage and the family, the *immediate* possibility of the exploitation of women as surrogate mothers with wombs-for-hire, and the *immediate* and not unintended prospect of beginning right now to “design” our descendents; and 4) the remote — but still very near — prospect of substituting laboratory generation from first to last for human procreation. We ought not to choose — step by step — a world in which extracorporal gestation is a possibility. Since I wish to testify to things *distinctively* characteristic of embryo manipulation, reasons 2, 3, and 4 are more significant, in my opinion.

I

Nevertheless, the abortion issue cannot simply be passed by. Millions of U.S. citizens who oppose abortion will bring the same moral objection against *in vitro* fertilization because of the numerous “discards” the procedure requires.

Let me be clear about this first point. I am not speaking of traditional Roman Catholics only. I refer also to the growing number of “evangelical” Protestants whose voice in Washington is the Christian Action Council. I also have in mind the hundreds of thousands of our fellow citizens in the “mainline” Protestant churches who conscientiously oppose abortion despite their leaders. I also have in mind Orthodox Jews and many Conservative Jews and all Mormons, and for all I know many humanists as well, who agree in this common opposition. We are a pluralistic society, like none other in the world.

I do not here open the question of the morality of abortion. Instead, I mean only to call attention to the additional trauma that will be brought upon a nation morally divided on this issue if *any* Federal funding by the Department of Health, Education and Welfare or the National Institute of Health goes to support *in vitro* fertilization as a form of human genesis, or to support any research tending in that direction. Millions and millions of our fellow citizens do not want their pockets picked by the Internal Revenue Service if

THE HUMAN LIFE REVIEW

any portion of their income taxes goes to support what they sincerely believe to be repeated abortions.

The Supreme Court has declared that public policy in regard to funding abortion is not a question of constitutional right, but rather a matter to be determined by the democratic process of Federal, State, and even municipal legislation.³ The Ethics Advisory Board will play a crucial role in determining public policy by “administrative law,” not by legislation. Your hearings on *in vitro* fertilization may eventuate, or may not eventuate, in a policy that uses citizens’ taxes for purposes to which vast millions are conscientiously opposed. I urge you to consider that constitutionally, on this point alone, you have the legal authority to make whatever “value judgment” or public policy judgment you wish to make. It is within your power of recommendation to encourage or discourage, to allow or to prohibit, the funding of the number of “discards” that are required in the course of *in vitro* fertilization as a new form of human genesis.

To this first point I add the following. To me, at least, it would be significant to find out — if Dr. Robert G. Edwards or Dr. Patrick C. Steptoe could be called to testify — how many, if any, of their monitored trials (from 60 to 200 “failures” have been estimated) have required abortion after the embryo had become, technically, a fetus; and how many, if any, monitored trials required abortion at a stage after viability, which the Supreme Court in *Wade* declared the States could go as far as to prohibit.

Whatever policy the EAB-HEW (or the Congress) promulgates, it is clear that the several States can constitutionally prohibit *in vitro* fertilization in their jurisdictions, as many have done in the case of fetal research. I would prefer a *national* solution flowing from the recommendation of the Ethics Advisory Board or by Congressional legislation. My plea is that the consciences of millions of our fellow citizens ought not to be additionally burdened by forced cooperation, through funding, in believed evil. You would not want any one of these millions of people to be your friends or neighbors if they thought it right to kill 60 or 200 human lives in order to give birth to one. You would want them to resist, instead of tacitly consenting to, such a spectacular increase of “elective abortions.” So my first point is that a prudent medical and public policy on this matter should not, for the sake of so few for whom there are other alternatives including improved oviduct reconstruction, further exacerbate our “civil war” over the morality of abortion.

As a matter of national public policy, I ask you to consider the result of allowing embryo manipulation to become first a trial and

PAUL RAMSEY

then standard medical practice. Already it is the case that Federal and State “conscience clauses” allowing freedom from participation in elective abortions for individuals and medical institutions are not working. For them to be effective would require “affirmative action” such as is now devoted to racial and women’s rights.⁴ Already there is a lawsuit soon to be brought to court on behalf of Georgetown University against the requirement in Health Maintenance Organizations that abortion and sterilization be provided as medical services. So I ask: if the Ethics Advisory Board and HEW approves, and if then the Congress negligently approves (or lets research continue on) embryo manipulation and discard, what obstacles will this raise against the adoption of a national health plan in which these procedures could become standard medical practice?

A judicious approach would surely be to exclude such procedures from among the medical procedures claiming public support or general approval. If any American supports a comprehensive national health plan, he or she should exclude *in vitro* fertilization, and other deeply divisive proposals, from such a plan. For the same reasons, we ought not to ask our conscientiously-opposed fellow citizens to support elective abortions with their taxes. I see no other practical compromise that will not increase the polarization and tear further asunder the fragile moral fabric of our nation.

It may be objected that my argument from believed “moral contamination by taxation” does not hold because it would make every person’s conscience his own government, and therefore would frustrate public policy on almost every matter. Here, I think, sound judgment requires us to distinguish between policies and funding that are overridingly in the national interest and those that are not. A person may believe, for example, that suicide is morally wrong and yet oppose any law against suicide. Since no one any longer believes that suicide is wrong because, among other things, it “deprives the king of a subject,” the death of a person by self-willed destruction may not always be a matter of overriding national interest. Two authors (conservative Catholics, as it happens)⁵ have used this consideration to argue that decisions to live or to die could well be left to be settled between a patient and his or her physician by legislation making the tort of treating a person against his or her will (whatever it is, and however for these authors immorally suicidal) survive the deceased. Such tort legislation would privatize a possibly immoral decision involving no third party: that is to be preferred to the States’ and its peoples’ involvement in “living wills” or “right to die” legislation. I judge that these authors feel deeply that the former policy is much to be preferred to believed moral contamination by

THE HUMAN LIFE REVIEW

euthanasia or near-euthanasia legislation brought upon the public at large.

I use this only as an analogy. The freely chosen death of an individual by (believably) immoral means or circumstances need not be regarded as a matter of national interest or public policy concern. Neither is enabling a woman to have a baby in the overriding national interest, unless one believes that hereby “the king” gains a needed “subject.”

For another comparison, foreign policy and even bad wars are matters that require coercive taxation. Persons who during the Vietnam war withheld their taxes were doubtless to be admired for this form of “witnessing” protest, provided they were willing to bear the consequences of their action. “Curing” infertility in particular cases is an entirely different question, as are individual choices no longer to live by medical means. We are born and we die; the people of the United States go on, with little or no consequence from those personal events.

I am not suggesting that such outcomes are anything other than profoundly important personally, and morally. But I do suggest that neither should become entwined with public policy. I urge the Ethical Advisory Board to consider that any funds to learn how to do *in vitro* fertilization in the United States across numerous “discards” is 1) profoundly conscientiously objectionable to millions and millions of our fellow citizens and 2) can in no way be deemed to be an overriding national interest worth making “tax objectors” of them.

I add also that any member of the Board who can wish this to become a “standard medical practice” must want both our present health care delivery system (which is largely funded) and any future national health plan to be profoundly oppressive to consciences. The argument will be — will it not? — that since rich women can afford this service, “distributive justice” requires us to provide it to poverty women as well, through Medicaid. Heretofore that argument — in the matter of abortion — has had behind it the *fiscal* consideration that otherwise it will cost more to care for children born in poverty. In future, the “distributive justice” argument will stand alone, no matter what the cost of perfecting and delivering this service, or the cost of having done so in supporting the children so produced. I don’t suppose that in years to come we are going to prohibit women on welfare from overcoming oviduct blockage, or refuse to fund this medical service, simply because of the cost in ADC payments. Of course, conscientious objectors to funding abortion or funding petri dish discarding do not think highly of this argument, since for them it is meaningless to speak of fairness in justly distributing an immoral

PAUL RAMSEY

practice. But I do urge its weight upon members of the Ethics Advisory Board who are charged with recommending the future direction which national medical practice should take.

Perhaps I have prolonged my reply to the objection too far. My main appeal is to ask the Ethical Advisory Board to consider the suppression and alienation from the community of this nation of the consciences of millions and millions of our fellow citizens if your approval and any tax funds are put into *in vitro* fertilization, embryo transfer — and embryo discard. I ask you to consider — with no prejudice in favor of “science” — whether approval of Vanderbilt’s professor of Ob-Gyn, Dr. Pierre Soupart’s application for funds is really worth the other moral and social costs that will surely be imposed upon this nation.

II

My final three points do not touch upon the issue of the morality of abortion, or Federal funding of it. The *distinctive* arguments I submit to you are, first, the *irremovable* possibility that this manner of human genesis may produce a damaged child and that this constitutes a *conclusive* argument against allowing such attempts to be made in the human community, in the United States or any other society.

One “successful” case does not settle the issue I am raising. Besides, who now knows that Louise Brown was a scientific success? Physical characteristics are not enough to show this.

Here I detour beyond my depth to invoke an analogy with amniocentesis. This procedure has been judged by medical authorities to be safe, no longer experimental. That verdict seems to be concentrated on the mother’s safety, and on the unlikelihood that the procedure would induce spontaneous abortion. Incidentally, one percent chance of “false positive” diagnosis for the unborn child, i.e. one in one hundred, does not seem to me to be a negligible risk for the child. My point here, however, goes beyond the physical destruction of normal unborns instead of physically defective fetuses because of mistaken diagnosis. The point is rather whether the procedure of amniocentesis does or does not induce unknown and unknowable *psychological* damage to the children who are saved from genetic abortion. Henry Nadler, M.D., wrote that, while amniocentesis detects gross anomalies, “There is no way, with present studies, our own included, of establishing, ten or fifteen years from now, if these children [the children saved from genetic abortion] lose 5 or 10 I.Q. points”; “The risks of ‘induced’ congenital malformations are difficult to determine and the subtle damage in terms of loss of intelligence is almost impossible to evaluate.”⁶

THE HUMAN LIFE REVIEW

The comparison with human genesis by embryo manipulation should be clear. No one knows the future of these children. We ought not to try to discover these truths by human experimentation upon them. But there is no other way to find out. The argument is *conclusive*, unless as a people we mean to make technical medical advances by creating our progeny at risk of unknown and unknowable damage from the procedure itself.

This would violate the primary principle of medical ethics, "Do no harm." To understand that this is the case, we have to distinguish clearly between the procedure in question and medical treatments given the "maternal-fetal unit" when both mother and fetus are actual patients. Sometimes procedures are necessary that are hazardous to the fetus (e.g. intrauterine blood transfusions), but the life that is exposed to hazard stands also to be benefited. In such treatments, possible harm may be risked. Embryo manipulation is quite different: here the mother seeks a benefit; this benefit can be delivered only at some risk of grave injury to the future possible child. Oviduct reconstruction (now a much improved art) is by contrast a treatment that can be undertaken at no risk to another life than the one who elects the operation — since no other life has yet been conceived or will be manipulated.

In his series of articles in *The New York Times*⁷ Walter Sullivan brought up another possibly deleterious outcome that is impossible to remove. Notably, he was quoting the British scientists. The eggs after superovulation of the female may not be those that would mature normally. The sperm that in natural reproduction reach their goal are "a highly selective sample," Dr. Edwards noted, "relatively free from genetic defects." There is no such "screening" in *in vitro* fertilization. The "screen" may be the opposite. Such subtle effects, Sullivan correctly concluded, "may not be evident until babies born by the Steptoe-Edwards method reach maturity." No woman should have wanted a baby under these stated conditions, nor should a (tax exempt) American Foundation have funded the Steptoe-Edwards trials, nor should any such thing ever be approved by the Ethical Advisory Board. Only an unexamined preference for *human design* over nature can support any other conclusion.

No answer to the foregoing objection can be found in more time for trying *in vitro* fertilization in the sub-human primates, or the proposal that medical and public policy be to *delay* permission for applying this procedure to human beings until more "animal work" has been done. In other connections — when scientists need normal volunteers to place *themselves* at risk — the stress is always correctly

placed on the unknown risk involved in moving from animals to the human.

In a 1974 scientific article one member of the winning team, Dr. Robert G. Edwards⁸ of Cambridge University, asserted, “If there is no *undue* risk of deformity additional to those of natural conception, and *publicity is avoided*, the children should grow up and develop normally and be no more misfits than other children born today after some form of medical help.” Here Edwards raised two points: how we are to estimate “undue” additional risks of deformity (whether *any* such risks should be imposed) and the psychological damage that may result because publicity was not avoided in the case of Louise Brown.

On the first point, Dr. Edwards argues for 15 pages that there is no risk of deformity from the procedure. I understand why the risks are very low. The developing life (the blastocyst, not yet called an embryo) that is manipulated is a cluster of cleaving cells. These cells have “toti-potency.” None is as yet on its way to becoming, say, blood, or has “clicked-off” its potency for becoming, say, a liver cell or a bone. At this point in human development the individual can renew itself even if momentarily injured (like an earthworm). After differentiation into various tissues and organs, the embryo and fetus are more vulnerable to irreversible damage. For example, by thalidomide taken by the mother during pregnancy.

Still there is risk of procedurally induced injury, however small. The question of “undue” additional risk remains at the heart of the moral question whether human genesis should ever be attempted in this way. Having carefully built the case for no undue risk, Dr. Edwards — to my amazement — then spends four pages warning all participants in this procedure that they are liable to “wrongful life” suits for tort compensation. As defendants, all the participants would have to prove that any manifest damage did not result from manipulating the blastocyst.

I was stunned by this contradiction in a single article by an eminent scientist because I heretofore supposed that only theologians were reputed to “fudge” in their arguments. In any case, knowing that one may induce injury, though not foreseen injury, cannot be excluded. This seems to me to be significant in a *conclusive* moral argument against the experiments that have gone on for more than a decade. Moreover, even if longitudinal studies of *in vitro* children for the next five or ten years determine that they are in every respect normal, this will prove only that this kind of human genesis is at that point in time and for the future not to be condemned for *this* reason. Such successes will *not* show that all the past trials at irremovable *possible*

THE HUMAN LIFE REVIEW

risk (including Louise Brown's) were for that period of time excusable. Two decades of morally unacceptable human experimentation, by rough reckoning: one decade to perfect the technology; another to prove it *was* safe.

I once expressed the “macabre ‘hope’” that the first child by laboratory fertilization would prove to be a bad result — and that it be well advertised, not hidden from view. That might halt the practice! Dr. Edwards missed my irony, failing to note what else I said: “I do not actually believe that the good to come from public revulsion in such an event would justify the impairment of that child. But then for the same reasons, neither is the manipulation of embryos a procedure that can possibly be morally justified” — even if the result happens to be a Mahalia Jackson.⁹ A small risk of grave induced injury is still a morally unacceptable risk.

Concerning the second source of possible grave damage — publicity — I do not know whether or why Dr. Edwards changed his mind. Perhaps there was only a breakdown of communication between him and Dr. Steptoe, the gynecologist who advised that the next Brown be capitalized from birth. “Checkbook publicity,” the British press calls it. One can speculate, however, as follows concerning the dilemma the winning team faced. They needed to prove their accomplishment to the scientific community and to the world at large. Already a British doctor had announced that there were one or more babies already born in Europe by this procedure. He offered no proof, and was *disbelieved*. Nobody wins a Nobel prize for science that way.

If the Steptoe-Edwards team wanted *both* to advance science and/or their scientific reputations *and* to protect the next Brown from damaging publicity, they should have tried to create a new “institution” for doing both. The British Medical Association could have been asked to appoint a monitor who could now certify the team's achievement while at the same time avoiding publicity focused upon the subjects (the Browns) with whom the scientist-physician team have achieved their success.

In the absence of this anticipatory solution, there was no other recourse than to try to control the publicity and to enable Louise Brown to garner the revenues. She will be hailed or stigmatized all her life as the first laboratory fertilized progeny to be birthed in all human history. Think of the enormity of that reputation! “Brown” is an ordinary name; the father is a railway worker. Louise Brown can in no way have a natural human life. If she is not psychologically damaged from her beginning, socio-psychological ruin seems invited. If she is Britain's best tennis player at Wimbledon or if she becomes a

juvenile delinquent, the outcome will be explained or excused by the child's unique genesis. Mahalia Jackson had a more obscure and normal passage into maturity. So also did the parents of Brown, and Drs. Steptoe and Edwards. What now have they visited upon this child?

Perhaps Dr. Edwards' warnings about "wrongful life" suits could be taken up, and used to advantage. Such suits (for having been born illegitimate, or in poverty) have not succeeded in American courts. Judges have reasoned that the plaintiff would not be there to sue if he or she had never been born. The plaintiff can have no legal standing to sue, because that depends upon the wrongful life he complains of. This seems to me to be the sound legal decision.¹⁰

In vitro fertilization and embryo manipulation, however, introduce quite different considerations. This form of human genesis *reaches back* to before the beginning. If tort damage results, there were human agents who did it — knowing the possibility could not be excluded. They should be liable. I do not say liable to punishment or to pay damages; but liable to suits that will determine their accountability. It can, therefore, be recommended that our several State legislatures create a special category of "wrongful life" cases limited to torts occurring in this, and coming, new forms of human genesis. Then perhaps the practice can be stopped while there is still time.

III

Among the parties liable and warned by Dr. Edwards in his 1974 article¹¹ was the "semen donor," not only the husband. This demonstrates that one member of the winning team does not intend the procedure to be used only to the good end of overcoming a married woman's oviduct blockage.¹² This brings me to my third point, which brings into view the *immediate* and not unintended assault this procedure brings against marriage and the family, the *immediate* (not remote and not unintended) spectre that we are going right now to begin to "design" our descendants up to the limit that is scientifically possible.

We are told that this sort of "assisted pregnancy" is a "far cry" from Aldous Huxley's *Brave New World*. This is true for the moment. Women with fallopian tube blockage now will be able with their husbands to have children. That is all.

Still there is more to be said about medical and public policy than that a woman's infertility can be "cured." This medical technology is another "long step for mankind" (to quote from the moon landing) toward Aldous Huxley's womb-free paradise. Host "mothers" with

THE HUMAN LIFE REVIEW

wombs-for-hire are immediately possible. Nothing technically limits the fertilization to the husband's sperm. We already have sperm banks. Egg banks will be next. People will go to either to select. No loved-woman need bear the child. This can be arranged by contract, and financial payment. The consequences to come from the opening of the human uterus to medical technological control are not likely to contribute to the emancipation of women.¹³

There is still more. We are not limited to human progeny growing with their own natural genetic endowments. We are not limited to the child the Browns wanted. Gene splicing soon can be done before the blastocyst or embryo is transferred to the womb of the woman — *any* woman. “The procedures leading to replacement and implantation,” Edwards and D. J. Sharpe wrote in a 1971 scientific article,¹⁴ “*open the way* to further work on human embryos in the laboratory.” The authors do not mean only benign attempts to correct genetic defects. They also mention cloning and the creation of “chimeras” by importing cells from other blastocysts (perhaps from other species). These creations also now need women to carry them through pregnancy. Noting that the first principle of medical ethics, “Do no harm,” permits the alleviation of infertility, and that this “*has been stretched* to cover destruction of fetuses with hereditary defects,” Edwards and Sharpe ask rhetorically whether the first principle of medical ethics can be stretched to justify “the more remote techniques of modifying embryos?”

Even more ominous is the announced claim that scientists have the “right” to “exercise their professional activities *to the limit that is tolerable by society* . . . as lay attitudes *struggle to catch up* with what scientists can do.” Publics must be “helped to keep pace.” In short, science does not operate within the ethics of a wider human community. It is a scientific ethics, or whatever *can* be done, that should shape our public philosophy. Let laggards beware.

True, in his 1974 article,¹⁵ Dr. Edwards stated that there is “hardly any point in making chimeras until some clinical advantage can be shown to accrue from the method.” But he also speaks of “*sexing* blastocysts” before transfer. His remedy for the problems this will lead to is: “Imbalance of the sexes could probably be prevented by recording the sex of newborn children, and adjusting the choice open to parents.” Scientist-kings will manage everything. Concerning the use of “surrogate mothers,” his only reservation is that this should be avoided *at the present time* until more is known about the interlocking psychological relationships among the parties. Edwards does not say how we can acquire such knowledge without (on his own

PAUL RAMSEY

terms) doing unethical experimentation now in order to find out whether we ought to do it or not.

IV

I have not yet mentioned the *remote* — but still very near — prospect of substituting laboratory generation from first to last for human procreation.

Pope Pius XII once warned against reducing the cohabitation of married persons to the transmission of germ life. This would, he said, “convert the domestic hearth, sanctuary of the family, into nothing more than a biological laboratory.”¹⁶ That quaint language was spoken about artificial insemination. The Pontiff feared the nemesis of humanity under the fluorescent light of laboratories. He warned of this in 1951 — ages ago in technological time. To the fluorescent light of the laboratory has been added the glare of media protection and copyrighted publicity.

The first book to be printed entitled *Test Tube Babies* was published in 1934¹⁷ — again ages ago in technological time. Its subject matter was not at all what we mean by this expression. The book’s subtitle was “A History of the Artificial Impregnation of Human Beings, Including a Detailed Account of its Technique, together with Personal Experiences, Clinical Cases, A Review of its Literature, and the Medical and Legal Aspects Involved.”

Clearly ours is an age of galloping biomedical technology. Aldous Huxley and C. S. Lewis had the prescience to see already the future that comes ever closer. Not the abuse of political power by Hitler nor of nuclear power but the unchecked employment of powers the biological revolution places in human hands was for these authors the final threat to the “abolition of man.”

The human womb is a half-way technology. It is replaceable by more “perfect” artifices.¹⁸ Human life has been maintained in petri dishes for two weeks; and our National Commission for the Protection of Human Subjects used 20-24 weeks as its definition of a “possibly viable” infant. Only about 18 to 22 weeks remain to be conquered in which the human female must necessarily participate in procreation, except as the source of the ovum. Then “reproduction” can replace procreation, and we will come to Huxley’s Hatcheries. His was a vision of society in which everyone was quite happy. The way there is also a happy one, and we go along that way always motivated by good ends, such as the relief of women’s infertility and salvaging “premies” earlier and earlier.

For all the motherhood intended at present, the truth is that (as C.

THE HUMAN LIFE REVIEW

S. Lewis once wrote¹⁹⁾: “We should not do to minerals and vegetables what modern science threatens to do to man himself.”

Members of the Ethical Advisory Board may wish to perform the following experiment on themselves. Turn off the tube. Don't pick up the newspaper for two days. Instead, read the third of C. S. Lewis' space-science trilogy, *That Hideous Strength*. The final assault upon humanity is gathering in Edgestow, a fictional British college town. The forces of technology, limited no more by the Christian ages, are trying to combine with pre-Christian forces, represented by Merlin the Magician whose body is buried on the Bracton College grounds. Only the philologist Ransom can save humankind from the powers of the present age concentrated in the National Institute for Coordinated Experimentation (acronym NICE).

It is NICE that the Browns have a wonderful baby girl; her middle name is Joy. Lewis need not have thought of his fictional college, Bracton. Cambridge University is NICE too. So is Vanderbilt. To give couples a baby sexed to their desires will be NICE. Every other step taken will certainly be NICE. Finally, *Brave New World* is entirely NICE. For everyone is happy in Huxley's pharmacological, genetic and womb-free paradise. Only there is no poetry there. Nor does a baby have the right to be a *surprise*.

NOTES

1. “Shall We ‘Reproduce?’” *JAMA*, Vol. 220, Nos. 10 and 11 (June 5 and 12, 1972), pp. 1346-1350 and 1480-1485.
2. In addition to numerous articles, the titles of four volumes perhaps deserve mention (all published by the Yale University Press): *The Patient as Person: Explorations of Medical Ethics*. The Lyman Beecher Lectures delivered at Yale Medical and Divinity Schools (1970); *Fabricated Man: The Ethics of Genetic Control* (1970); *The Ethics of Fetal Research* (1975); and *Ethics at the Edges of Life: Medical and Legal Intersections*. The Bampton Lectures in America, Columbia University (1978).
3. *Beal v. Doe*, no. 75-554, 45 LW, pp. 4781-87; *Maher v. Roe*, no. 75-1440, 45 LW, pp. 4787-94; *Poelker v. Doe*, no. 75-442, 45 LW, pp. 4794-97 (the three decisions handed down June 21, 1977).
4. See my *Ethics at the Edges of Life*, *op. cit.*, Chapter Two.
5. Joseph M. Boyle, Jr. and Germain Grisez, “An Alternative to ‘Death with Dignity,’” *The Human Life Review*, Vol. IV, No. 1, Winter 1978, pp. 26-43, with “model bill” and commentary.
6. Henry Nadler, M.D. in Maureen Harris, ed.: *Early Diagnosis of Human Genetic Defects* (Washington, D.C.: U.S. Government Printing Office, 1972), pp. 315 and 230.
7. Walter Sullivan, “Successful Laboratory Conception Intensifies Debate over Procedures,” *The New York Times*, July 27, 1978.
8. R.G. Edwards, “Fertilization of Human Eggs *in Vitro*: Morals, Ethics and the Law,” *The Quarterly Review of Biology*, 49:1 (March 1974), pp.3-26. (Stoney Brook Foundation, Inc.) Italics added.
9. Paul Ramsey, “Shall We ‘Reproduce?’”, *Journal of the American Medical Association*, 220:11 (June 12, 1972), p.1482. My suggestion paraphrased and reversed a statement by Dr. Joshua Lederberg concerning whether “cloning” human beings will be socially acceptable. This depends, he wrote, on the first clonant's batting average; and on his good looks, success and being well advertised. Joshua Lederberg, “Experimental Genetics and Human Evolution,” *The American Naturalist*, Vol. 100 (Sept.-Oct., 1966), pp. 519-31; slightly revised and reprinted. *Bulletin of Atomic Scientists*, Oct., 1966, pp. 4-11. See also my *Fabricated Man*, *op. cit.*, Chapter Two.
10. A convenient reference for those decisions, with commentary, is Joel Feinberg, ed., *The Problem of Abortion* (Belmont, CA: Wadsworth Publishing Company, 1973).
11. See note 8, *supra*.

PAUL RAMSEY

12. Testifying before the Sub-Committee on Health and the Environment, U.S. House of Representatives, on August 4, 1978, Dr. James C. Gaither, Chairman of the Ethics Advisory Board, offered the opinion not only that implantation of human fertilized ova should not be done until the safety of the procedure is demonstrated *as far as possible* in subhuman primates. He also testified that it was the opinion of some 20 experts in ethics and the life sciences convened by HEW that such a procedure should await definition of the responsibilities of the *donor*, recipient "parents," and of the research institution. Walter J. Wadlington, professor of law at the University of Virginia Law School, urged that Congress propose model legislation for use by the States in coping with such problems as *legitimacy* and parental responsibility if *in vitro* fertilization becomes widespread. *The New York Times*, August 5, 1978.

13. Here I quote from a striking letter to *The New York Times* (August 6, 1978) by Judith Lorber, Department of Sociology, Brooklyn College:

I am thankful that the first child born from laboratory fertilization is a girl. At least now there are *two* female principals in the drama, instead of one lonely woman surrounded by powerful and prestigious male doctors, male scientists, male legal, ethical and religious experts, male newspapermen, and so on and on.

Men now have the ability to freeze their sperm, fertilize eggs *in vitro* and deliver the children surgically, and the potential ability for freezing embryos and transplanting them in women other than the egg producers. Fortunately, a woman's body is still needed to carry the fetus to term.

But women of the future had better get more than a toehold in the bastions of power. Otherwise, when male-dominated technological reproduction develops artificial wombs, too, women, except for a few egg producers, may end up totally superfluous.

14. R.G. Edwards and D.J. Sharpe, "Social Values and Research in Human Embryology," *Nature* 231:87-91 (1971). Italics added.

15. See note 8, *supra*.

16. *Acta Apostolicae Sedis* 43:850 (1951).

17. Dr. Hermann Rohleder, *Test Tube Babies* (New York: The Panurge Press, 1934). Can we use "panurge" as a symbol for the basic problem of modern times, since Bacon unfurled the flag for "the relief of the human estate" of disease, suffering, death, and any other deficit?

18. If I were a reproductive biologist in need of funds and reputation, and anyway a sincere believer in progress by science, I would begin now to search for an animal species whose gestation is close enough to the human for it to be not impossible to use its females as hosts for human embryos. After all, "herds" of prime cattle in embryo have been flown across the Atlantic within rabbits, thereafter transferred again to scrub cows to bear them. So my idea is not a fanciful one (if we ought to treat the human embryo like cattle). If I can secure funds for my trials I may gain Senator Proxmire's "golden fleece" award, even if I do not gain an honored place in the moral history of humankind.

19. C.S. Lewis, *The Abolition of Man* (New York: Macmillan Co., 1947).

Biotechnology and the Social Order

Robert A. Brungs

ON THE 25th of July, 1978, Louise Brown was born in Britain, the product of an *in vitro* fertilization (henceforth IVF) and embryo transplant procedure. Her birth was accompanied by full press coverage, acclaim for the scientists' achievement, soaring statements about the hope that this new technique holds out to hitherto childless couples. Her birth also brought with it a rather widespread sense of foreboding about the meaning of this technological feat for the human race. Will our world ever be the same?

Fertilization *in vitro* is a development or by-product of a very large amount of reproductive research over the last two decades. This research has already given us the contraceptive pill and intrauterine devices, and more "efficient" methods of abortion. It now stands poised to open up several fronts of experimental embryology, "artificial" or asexual reproduction, genetic engineering, and, indeed, eugenics in general.

There has been enough written elsewhere about the techniques involved in IVF to permit just a very brief summary here. In the IVF process, the ripe egg is removed from the ovary by laparoscopy. It is then joined to the sperm outside of the mother's body. When grown to the proper stage, the resulting blastocyst is reimplanted in the mother's (or some other woman's) womb. If all proceeds well, as it seems to have done in the case of Louise Brown, the process will eventuate in a normal birth. This technique, as we have been assured over and over again, has been developed only to treat women who cannot conceive because of blocked tubes.

Nonetheless, there is a striking sequence and continuity of events in the development of techniques in "artificial" reproduction which has been delineated by Gerald Leach in the development of what he calls "the ladder of unnaturalness" under the guise of therapy for infertility.¹ He lists the following steps: 1) the infertility ladder; 2) artificial insemination, husband (AIH); 3) the sperm bank; 4) artificial insemination, donor (AID); 5) "space-time" sperm banks; 6) egg grafts; 7) test-tube fertilization; 8) egg banks and "embryo" banks; 9) host mothers; 10) gonad grafts; 11) clones or "carbon-copy"

Robert J. Brungs, S.J., is director of the Institute for the Theological Encounter with Science and Technology (ITEST) in St. Louis.

children; 12) human-animal hybrids. Leach's analysis and reflections on these various interrelated issues is most pertinent.

IVF, both as an experimental technique and later on as a predictable clinical process, involves many social and ethical problems. As Dr. Claude Lanctot stated in 1974:

The IVF debate, in my opinion, is but a symptom of a much more fundamental problem of civilization or, as the French would call it *une escarmouche* on a much broader front. Daniel Callahan, the director of the Institute of Society, Ethics and Life Sciences, has recently developed this entire question of the necessary limits of technology in *Tyranny of Survival* (Macmillan, 1973). Lacking an instinct for limitation and prohibition, society has no way to judge and control technology. In his opinion, civilization urgently needs a "science of limits" for technology, to use Philip Rieff's term. By this he means a system of prohibitions, denials and interdictions which establishes the limits of technological aggressiveness, hopes and mandates (cf. Daniel Callahan, "Science: Limits and Prohibitions," *Hastings Center Report*, Vol. 3, No. 5, Nov., 1973, pp. 5-7). In my opinion this is even more urgently to be recognized in the biomedical field, because the object is man and the categories of technologies are those of death and life control. Callahan rightly recognizes how in the death control category, when survival and technology join hands, as with heart or vascular transplants or renal dialysis or transplants, a technological imperative is introduced by which society easily becomes seduced.²

As Dr. Lanctot suggests, the questions arising from life technologies, such as IVF, must be considered on a broad base. We cannot adequately handle the moral and social aspects of such issues as contraception, abortion, IVF, cloning, and so on, by considering each as if it were unconnected with many other phases of the application of technology to human beings. On the contrary, they must be considered in the whole context of a broad-gauged technological revolution and of an almost total collapse of a socio-ethical consensus in the country.

The Contemporary Technology

The majority of social thinkers, as well as civic and religious leaders, politicians, and even the academic community, have yet to notice what will be the most significant expansion of technology in the entire history of the human race. Scientific advance, with its attendant technological and industrial capacity, has opened up a world of incredible beauty, complexity, and significance that has by and large escaped the attention and understanding of intellectual leaders, who seem hardly aware of the significance of what has been and is going on.

Within the last thirty years the biological sciences have moved with amazing rapidity from an observational posture, through an intense analytic phase which still continues, into the beginnings of a synthetic

THE HUMAN LIFE REVIEW

capability — synthetic in the sense of making something — here, of making new or different living systems. Beginning with the identification of the structure of deoxyribonucleic acid (DNA) in 1953, genetic sciences have progressed enormously. The same is true of almost all the other branches of the life sciences: of microbiology, biochemistry, molecular biology, brain physiology, and so on. We are now disassembling and rearranging basic genetic components. The details of this work, although fascinating, are of less importance to our society, and to us here, than what they signal for the future.

We are witnessing the beginnings of a remarkable and major technological revolution, a revolution far more important to the future of human beings than the significant technological revolutions of the past. In the past quarter century, the weight of scientific effort and discovery, along with technological application, has shifted from physics and chemistry to the life sciences. Over that twenty-five year span, science, technology, and industry have become more centered on living systems in general, and on human beings in particular. The human race is reaching for absolutely unprecedented knowledge of and technological control (i.e., power) over itself. We are quite literally on the threshold of consciously and deliberately directing our own future evolutionary development.

Historically our technology has been addressed primarily to changing things external to human beings for the “good” of human beings. Technology has been directed to domesticating plants and animals or to the harnessing of the forces of nature in order to change the environment external to the human. Whatever the object of the technology, it was “the world out there” that was immediately and directly affected. One branch of chemistry, namely pharmaceuticals, was directed to immediate intervention into the human composite. Together with pharmaceuticals, medical intervention in general was, and to a great extent still is, directed primarily to changes within the human, but on an *ad hoc* basis. The latest discoveries in the life sciences, together with their technological applications, allow and may even mandate the direct intervention into the human being with little or no mediation by either the physical or social environment.

Some thirty years ago, C.S. Lewis perceived that technology’s so-called conquest of nature deeply affected human beings: “All that talk about the power of Man over Nature — Man in the abstract — is only for the *canaglia*. You know as well as I do that Man’s power over Nature means the power of some men over other men with Nature as the instrument.”³ Also, as Charles Frankel has observed, this is doubly true with respect to those technological innovations involving direct interventions into the human composite:

ROBERT A. BRUNGS

. . . biomedicine differs in significant ways from other kinds of technology. . . Biomedicine . . . involves the deliberate, not incidental or inadvertent, modification of the human organism; and it involves, besides, the making of changes that will be irreversible. . . Biomedicine has eliminated the insouciance with which most people have embraced technological progress. It forces consideration not simply of techniques and instrumentalities but of ends and purposes.⁴

The quest for meaning in the development of bioscience, biotechnology, and bio-industry is of absolutely vital social importance. Harry Boardman, former Secretary General, Council for Biology in Human Affairs, Salk Institute, has remarked that the crucial issue in the area of science, values, and society is the viability of the norms upon which the culture rests. In a speech to the American Association for the Advancement of Science, he stated:

Such misleading rubrics as “the social responsibility of science and scientist” and “the ethical implications of science and technology,” commonly packaged in sexy and monstrous bundles, like bioethics, are indeed . . . often regarded as comprising novel and wholly contemporary problems. . . Certainly these science and value questions are interesting mostly to the extent . . . that they may be regarded as contemporary manifestations of perennial issues. . . But far too pervasively, these endless bio-medical-science-value discussions manifest a deplorable blindness which seems to proceed directly from an hypnotic fascination with appliances and appliance makers. . . [T]he central concern is not with science or scientist, but with the whole of knowledge — its benefits, the price it exacts, and its special provinces: that of ideas. For ideas far afield from science and technology may be the most lethal. Inspiration to man’s action lies not in his appliances — much as they may encourage or inhibit it — but in the spell of ideas and the convictions of mind and heart which they generate. . . Neither the curse of nuclear detonation nor the boon of genetic research depend principally upon machinery. Rather their vice or virtue lie in the ideas to which the technology becomes fitted.⁵

This quest for meaning is now even more urgent. The new discoveries in science and technology carry within themselves a characteristic that was not present in the older ones. We cannot afford to ignore nor underestimate the deliberate nature of this technological revolution so new as not to have a name. For convenience we might call it the “Genitive Revolution.” One of George Bernard Shaw’s characters says something to the effect that we are all involved in two games, the one which we are playing and the one which is being played on us. We are now beginning to experience this on a level which practically benumbs the imagination. While we continue to transform the earth and, in time perhaps other planets, we are also developing the capability of transforming the human race. It has been a commonplace to say that human nature has not changed over the ages — circumstances, options, and challenges have changed, we say, but not human nature. But for how long shall we be

able to make this assertion with that easy self-assurance with which it has been made in the past? Profound changes in physical composition or in “spiritual” qualities cannot help but introduce profound changes in us as human beings.

What is happening now — and what in the future will be looked back upon as revolutionary — is the direct, immediate, and systematic intervention into the human. As was stated earlier, medical procedures and pharmaceutical products have been direct and immediate interventions into the body. But this new addition of the systematic must be deeply and carefully scrutinized. Systematic can mean “based on or involving a system” and “characterized by the use of method or orderly planning, methodical.” Both aspects, namely, methodical and methodological, are present in biotechnology and bio-industrialization. Medicine has in the past been directed to the alleviation of pain and/or the removal of pathological barriers to good health, with the accent on the welfare of the individual. This will *not* be the case with much of the “new medicine.” Many of the biomedical techniques will not be directed primarily to the good of the individual, to restore him or her to some already-perceived norm of healthy life, but will be ordered to the creation of new norms of health.

At this point, it might be helpful to specify some aspects of these new technological capabilities by adapting an outline originally proposed several years ago by Dr. Leon Kass. We can briefly look at three areas of technological intervention: A) control over life and death; B) control over human potentialities; C) control over human achievement.

A. Control over life and death

In the past, our ancestors tried to ward off death by means of amulets, dances, and most recently better plumbing, i.e., by purging the spiritual and material environments of death-dealing factors. Now many different hypotheses are being investigated, of which we shall mention only two. The first is that the life span could be increased by lowering the temperature of the vital organs by about one degree Fahrenheit. Another hypothesis is that the human life span could be increased indefinitely by the addition of properly-coded genetic information to the human body. Earlier attempts to ward off death looked to changes in the external environment; the newer attempts look to changes in the human body itself.

At the other end of the life continuum, we have seen the start of successful laboratory production of human beings with IVF techniques. These techniques, some day in the future combined with *in vitro* gestation techniques, are aimed at the creation of an entirely

ROBERT A. BRUNGS

novel environment for the pregnancy months, external to the mother, which will provide opportunities for quality control and experimentation to enhance genetic qualities or eliminate less desirable genetic types.

B. Control over human potentialities

As has been noted, many of the new biotechnologies will look to interventions, the results of which are designed to be passed on to future generations and which will, therefore, generate new norms of human health — and new types of human beings. These procedures are designed to make human beings the major artifacts of human technology. It is helpful to list five (from among many) proposed applications of the “ladder of unnaturalness.”

1. *Amniocentesis and selective abortion*: Amniocentesis is a procedure whereby discarded fetal cells are drawn from the amniotic fluid in the womb of a pregnant woman and put through a battery of biochemical and cytological examinations to determine the presence or absence of certain genetic defects. It has now been proposed that this technique be made more sophisticated so that *carriers* of a genetic defect (not just those who actually have it) could be identified. Then all the carriers of a particular defective gene — like that responsible for cystic fibrosis or sickle cell anemia — could be eliminated by abortion. Thus over a period of about fifty or sixty years a disease like cystic fibrosis could be eliminated through the aborting of about twenty million carriers. This is a negative method of improving the human stock, culling the weak and deformed from the population. But once they are gone we shall have strengthened and improved the human genetic situation.

2. *Monitored mating*: about twenty five to thirty years ago it was proposed that reproductive cells be removed from all adolescents and stored. These adolescents would then be sterilized. The lives of these people would be monitored and eventually evaluated. The reproductive cells of those who lived “good civic lives” would then be mated. Theoretically this would lead to an improvement of the human race more reproducible than is possible with what one seemingly dyspeptic scientist has called “the roulette of random reproduction.” This proposal was rather a flight of fancy twenty-five years ago, but with the development of IVF, it can be done right now. We can successfully freeze and store sperm and ova, as well as mouse embryos. When the IVF techniques become reliable, all the technological procedures needed for monitored mating will be in place. All that will then be needed is the social will to proceed. More,

THE HUMAN LIFE REVIEW

the original proposal can be improved upon significantly. With better genetic knowledge and with far more sophisticated computers available, we can mate these reproductive cells both on social and genetic criteria.

Dr. Linus Pauling has set forth an interesting variant on this type of thinking:

. . . I have suggested that there should be tattooed on the forehead of every young person a symbol showing possession of the sickle-cell gene or whatever other similar gene . . . that he has been found to possess in a single dose. If this were done, two young people carrying the same seriously defective gene in a single dose would recognize this situation at first sight, and would refrain from falling in love with one another. It is my opinion that legislation along this line, compulsory testing for defective genes before marriage, and some form of public or semi-public display of this possession, should be adopted.⁶

3. *Nuclear transplantation, or cloning*: the nucleus of the reproductive cell (containing half of the human chromosomal content) is removed from the cell and replaced by the nucleus of a differentiated cell — say a skin cell — which possesses the total chromosomal content. Barring accident, such a reconstructed cell will eventuate in a mature individual with practically the same genetic characteristics as the donor of the differentiated cell. This technique has been used successfully with many types of plants and with one species of frogs. There has been no reported success with mammals, apart from a recently published, but not documented, account of an allegedly successful case of human nuclear transplantation. It is basically an asexual mode of human reproduction, the product of which will be almost totally predictable on the genetic level. This technique, coupled with IVF procedures, will represent, if and when perfected, one of the most revolutionary technological events in the history of the human race.

4. *Chimeras*: these are human-plant and human-animal hybrids. They represent a process of hybridization in which “suitable” plant or animal characteristics would be bred into human beings, or vice-versa. Some researchers have announced the successful mating of a single human cell with a single mouse cell. Within the last year there have been reports in the scientific literature of the successful fusion of carrot/human and tobacco mosaic virus/human cells. There will be many more reports of such fusion as experimentation proceeds. It is quite improbable that the successful introduction of gross anatomical changes in the human will be accomplished in anything like the near future. This rung on the “ladder of unnaturalness” is of no present concern except in the realm of attitudes about, and ideas of, the human.

5. *Cyborgs*: a cyborg is the ultimate Six Million Dollar Man, the symbiotic mating of a human brain with a machine body. As such it represents the ultimate stage in the technologization of the human being. Again, there is no near prospect of this happening, but attitudes are the most important ingredient in biotechnological development.

C. Control over human achievement

This area of scientific research and its technological prospects is most important, powerful, and urgent. Its procedures may well be the first of the biotechnologies to be used on a relatively wide scale — procedures such as the predictable and reproducible use of brain surgery, psychoactive drugs, psychological and physiological behavior modification techniques, and so on, to influence, enhance, and finally control those capacities which we consider to be most human: speech, thought, choice, emotion, memory, imagination, creativity, and, perhaps, spiritual vision. We can, for our purposes here, omit consideration of the behavioral approaches advocated by B. F. Skinner and his disciples, not because these approaches are unimportant, but because Skinner's techniques are far less efficient than the other developing technologies. These would include, for example, the implantation of micro-electrodes into specific areas of the brain to stimulate sensations of, say, intense pleasure, rage, relief from severe anxiety, and so on. Such a procedure can be used to alter behavioral patterns. With electronic microminiaturization, it is "technologically possible right now that the next man you meet on the street will be under radio control and you would not know it unless he parted his hair wrong this morning."⁷ At least four people have been reported in scientific literature to be under radio control for emotional well-being.

Another means for altering behavioral patterns has been introduced into clinical practice in Germany and Japan. Dr. Robert White, the renowned neurosurgeon, has stated:

There (in our surgery), without as great an understanding as we should have in terms not only of (brain) circuitry but also the expression of what the circuitry means in various loci in the brain, we can dramatically alter the performance of the brain. This alteration in the brain, in terms of its expressions and its interaction with the environment outside, including people, is so dramatic that, with a very simple operation, very small destruction, we can alter the person. Let me give you an example. It has been well demonstrated in Japan and Germany that you can take an absolute — by all tests — homosexual and destroy this particular feature of his behavior by appropriately lesioning the hypothalamus. You can't turn him or her into a heterosexual in all cases, but you can modify the drives.⁸

THE HUMAN LIFE REVIEW

Or, again, let's quote from Dr. Kenneth Moyer of Carnegie-Mellon University:

. . . one can take the wild cat *Lynx rufus rufus* which will attack with the slightest provocation and convert it to a pettable pussy cat by burning out a very small part of the brain called the amygdala. After the operation it will never be violent again. The same thing can be done with a wild Norway rat, one of the few animals which will attack without apparent provocation. If a bilateral amygdalectomy is done on a wild Norway rat . . . it will never bite again. You can pick it up and carry it around in your lab coat pocket.⁹

At present, such surgery in humans is rightly looked upon as a last resort procedure. These operations are not reversible; once the cutting is done, the patient cannot be restored to his or her pre-operative condition. If the operation is a failure, the patient has undergone brain damage to no avail. To date, these methods of psychotechnology have been used to modify emotional states and the behavior triggered by them. As of now, there is no physiological manipulation that can selectively affect learned responses; nor is such manipulation likely in the near future. Such control, i.e., control over the cognitive areas of the brain, will have to wait upon major, and as yet unpredictable, breakthroughs.

Other psychological techniques, such as brain-washing and hypnosis, are also available as methods of altering thought patterns and, consequently, behavioral patterns. The scientific exploration of the brain, however, goes on apace, and we can expect a whole series of new technologies to enhance and/or control the operation of the whole brain or certain parts of it. There has been a recent proposal, for example, that we could significantly enhance calculational capacity by implanting small computer chips directly in the brain. The proposer has predicted that this might be feasible by the end of this century or early in the next. But, as in the case of all the other procedures mentioned above, we are talking about only the *beginnings* of a technology.

No single technique mentioned here is, in itself, of overwhelming importance — except, perhaps, IVF. What is of overwhelming importance is the *meaning* of what is happening. We need less worry about individual techniques and far more awareness of the meaning of these new technological powers. The kind of society that a people builds reflects and embodies its spoken or unspoken estimate of what it means to be human.

Some Reflections On Meaning

We are now facing the greatest technological (as well as cultural) challenge we have ever known: the growing capacity to master ourselves technologically. This challenge is so powerful that for the

first time in history it must be met primarily in terms of human ends, not merely in terms of instrumentalities, as Frankel noted. In our present situation, any fascination with or over-reliance upon bioethics is misplaced, if that bioethical discussion is not based upon and supported by an understanding of ends and purposes. Bioethical (and often moral) discussions rarely proceed to questions of meaning. More often than not, they are merely pragmatic, more concerned with desires than with values, hardly concerned at all with those ideas and convictions which undergird any moral or ethical system. Thus, any understanding of our present situation must include the contemporary scientific-technological frame of mind out of which value judgments are more than likely to be made in and for society.

That scientific-technological frame of mind is basically instrumental, having grown out of a mathematical worldview. It looks on all things — human beings now included — as *essentially* quantifiable and manipulable. Michael Zimmerman has stated it quite succinctly: “For us (contemporary humanity) *to be* means *to be re-presented*, or transformed and re-arranged, according to our desires and projects.”¹⁰ As science and technology increasingly turn toward knowledge of and power over the human, this spirit of transformation and rearrangement, applied to society on a broad scale, will become increasingly worrisome. Bioethics of itself will be of little help in this challenge. It is absolutely necessary to develop a basic understanding of the human in the context of this new power.

Will our society feel that these new technologies will achieve their potential on an *ad hoc*, individual level? It seems doubtful. Rather, it is more likely that we shall decide that their full potential is achievable only through systematic application, i.e., methodical and methodological application. The “methodological” aspect must be carefully considered. A systematic technological intervention into the human requires some controlling consensus or even ideology. These new human powers, to be systematically applied on a wide-spread basis, must be tied to some dominant social system. It is important to try to discover what system is likely to be in control, to be dominant.

The principal reason for any society-wide application of biomedical or biogenetic technologies is more order, and/or less randomness, in the human situation. In considering genetic changes in the human to develop new norms of health, one is in reality considering eugenics. This word is usually (and justifiably) freighted with the horror of the policies and practices of the Third Reich. While it is not possible to put aside completely this negative reaction, for the moment let us use eugenics in the root sense, namely, well-bred. But it is necessary to be aware that the proposals being made for the use of

THE HUMAN LIFE REVIEW

biotechnological powers are directly aimed at building a eugenic society.

Any society-wide effort toward improving the human stock will inevitably demand new criteria for social judgment. As we move from concern for individuals to concern for society, or for mankind, what criteria will be applied to the use of bioscientific discovery? It is most likely — one is tempted to say necessary — that the criteria for the social applications of bioscience will be the basic canons of experimental science wedded to the desires and demands of the dominant cultural system. These three canons are simplicity, predictability, and reproducibility. In the technological mode, simplicity becomes efficiency. Any rational attempt at eugenics demands a predictable product. Without a predictable result, one might as well be content with what we have now. Moreover, if these predictable results are not reproducible, eugenics will remain a fleeting dream, because randomness will not have been overcome. As Frankel has stated:

The most astonishing question of all posed by the advent of bio-medicine, probably, is why adults of high intelligence and considerable education so regularly give themselves, on slight and doubtful provocation, to unbounded plans for remaking the race. . . What unites the Puritan radicals, the Jacobins, the Bolsheviks, the Nazis, and the Maoists is the deliberate intention to create a “new man,” *to redo the human creature by design* (italics mine). That is the modern idea of Revolution. . . It is what has lifted revolution in the modern world above purely mundane concerns like overthrowing tyranny, or putting more capable or decent people in power, and has made it a process of transcendent meaning, beyond politics or pity, and justifying any sacrifice. These are the accents with which Sir Francis Crick, still another Nobel laureate, speaks, when he states his belief that no newborn infant should be declared human until it has passed certain tests regarding its genetic endowment, and that if it fails these tests it forfeits the right to live.

The partisans of large-scale eugenics planning, the Nazis aside, have usually been people of notable humanitarian sentiments. They seem not to hear themselves. It is that other music that they hear, the music that says that there shall be nothing random in the world, nothing independent, nothing moved by its own vitality, nothing out of keeping with some idea: even our children must not be our progeny but our creation.¹¹

This “nothing random,” “nothing independent,” is the hallmark of experimental science. In the laboratory, the system under investigation must be closed as tightly as possible. No random variations can be tolerated, i.e., the results must be reproducible. If the variables cannot be accounted for and controlled, no valid experimentation is possible. The extensive (and necessarily systematic) social application of a biotechnology based on these canons demands the closing of the social system, so that no random,

independent, uncontrolled variations take place. In brief, the social system will have to become the laboratory. Spontaneities such as uncontrolled reproduction or deviant behavior of any kind — however deviant might be defined — cannot be permitted. This is essentially Aldous Huxley's vision in *Brave New World*. The almost half-century since its publication has only confirmed the validity of that vision.

The scientific canons of simplicity (efficiency), predictability, and reproducibility were developed primarily for experimentation on inanimate things. It has been the adoption of the methods of physics by the life-sciences that for the most part has triggered their sudden growth toward technological and industrial application. The use of these canons of laboratory science is premised on the total manipulability of matter, and assumes that the knowledge sought is objective and quantifiable. Laboratory science is necessarily based on quantification and thus requires complete freedom to transform and rearrange the basic structure of matter. If it is to be applied to human beings in any kind of a collective fashion, it will demand the unrestricted control of social life. Such a closing of social options is inevitable if biotechnologies are to be used to improve society or humanity. Judging from proposals now being made by many social planners — not to be confused with sociologists — these technologies will indeed be used in such systematic fashion. We can already see an example of this in the culling process of widespread abortion for “fetal indications,” to remove those who would burden society.

In brief, any widespread socially-orientated application of biotechnology will not be directed toward individual therapy — as medicine has been directed in the past. At best such application can be said to be therapeutic for society, for the “good of the species,” or some other abstraction. Rather than being therapeutic for individuals, the systematic technological intervention into the human is, in reality, a new salvation scheme — re-echoing in a different way the old duPont slogan: “better living through biology.” The notion of “nothing random in the world, nothing independent, nothing moved by its own vitality, nothing out of keeping with some idea” should alert us immediately to the source of the dominant social ideal being presented to us. The most likely social base, namely, gnostic secularism, is, of course, religious in nature.

Although the twentieth century can be characterized in many different ways, there is no doubt that it has been the bloodiest century in human history — at least in terms of the absolute number of people killed in war, purges and now in abortion clinics. It is the century that has seen many competing attempts at the secularistic redefinition of

THE HUMAN LIFE REVIEW

the human. The letting of blood and the proliferation of ideologies are clearly and intimately related. We don't march off to war anymore for more territory or wealth; now the bugle sounds for an idea. All these competing ideologies are reductively gnostic in that they are salvation schemes oriented in one way or another to that final state when justice will pervade the earth in historical time. They all represent, therefore, an immanent eschaton. We must attend to these cultural forces, since they represent, in their manifold forms, the basic vehicle for the restructuring of society. It is precisely here that the biotechnological revolution can be of overwhelming importance and have an enormous impact on society and upon social institutions.

One final point must be made in analyzing the contemporary situation. It is clear that secularism is one of the dominant social forces in our culture, if not *the* dominant force. Of its nature secularism denies the existence of a meta-temporal or supra-temporal eschaton in which all will be made harmonious. Instead it postulates the temporal perfectibility of the human and of the world — as it must. It therefore takes upon itself the temporal remedying of all ills, physical and social, and the elimination of all injustice. Upon this premise, then, it can proceed in only one of two ways. Having postulated that social ills can and must be remedied in time — thus denying the Jewish or Christian eschatological hope — then society must either totally ignore any remedy or else provide a total remedy. The mitigation of social evils is not a viable option because, reminiscent of Jewish and Christian eschatological hope, it would put off a total remedy to some indefinite future. Under its own hypothesis, this lack of total remedy would itself be a further injustice. Thus, a full, honest, consistent secular approach to reality must lead either to anarchy or to totalitarianism. And “total remedy” demands the “nothing random in the world” that Frankel mentions. We are dealing, then, with a theory of transcendent immanence, with a monism based on unity in uniformity, on the acceptance of only the predictable and reproducible. As such, it corresponds to Frankel's diagnosis of the pathology inherent in a systematic application of the technological power to restructure human beings: “that there shall be nothing random in the world.”

Consideration of IVF

IVF (and the birth of babies like Louise Brown) is an example of a specific social and moral issue of a type which will be seen more frequently in the near future. It is the result of the enormous amount of reproductive research done over the last quarter of a century. It should be recognized and treated not as an isolated achievement, but

ROBERT A. BRUNGS

as part of a chain of technological advances intended to form the basis of a new way of life, of a concept of the nature of the human being that is alien to the western philosophical, political, and legal tradition. This research program, as was said earlier, has already produced the contraceptive pill and allied technologies and stands ready to proceed toward rather sophisticated methods of eugenics.

In most recent arguments within our culture, the question has usually been set by the “innovator.” And, as one might expect, that question has always been posed in favor of the specific short-term goal of the innovator. Moreover, it is usually cast in a rather more sentimental form. For instance, take three of the great reproductive technologies (among others) of the last twenty years: contraception, abortion, and now “test-tube babies.” In none of these has the question been posed beyond short-term individual effects. The questions (with the answers implicit) have been asked as follows: “How can you even think of denying people the technology available to regulate and control the number of children they will have?”; “How can you deny a woman the right to those technologies that will guarantee her control over her own body?”; “How can you deny a married couple, deeply in love, a biological child of their own?”

There is a common thread to each of these questions. Besides being cast in a form designed to put opponents on the defensive, each in effect ignores history. They take for granted that individual acts of people (“between consenting adults,” etc.) are self-contained and have no relevance either for history or society. Nonetheless, the broader questions must be posed. The meaning of the technology involved in things like contraception, abortion, and IVF is critical. Across the biotechnological spectrum our culture has moved from “sex without babies” (contraception and abortion) to “babies without sex” (IVF and cloning). These ends of the spectrum are, of course, related.

In the case of individuals, it is true that the acceptance of the legitimacy of contraception does not automatically lead to an acceptance of the legitimacy, and even virtue, of abortion. There are very many people who accept contraception but in no way accept abortion. But on the broader social scale, it may be well to question the connection, or lack thereof, between the acceptance of a contraceptive mentality and an acceptance of abortion. Of course, in considering such linkage, we must be very careful not to proceed from a *post hoc ergo propter hoc* type of reasoning. But we can still ask whether the acceptance of a technological approach to family planning was necessary to break down the formerly strong public consensus that abortion was a heinous crime. One thing is certain in

THE HUMAN LIFE REVIEW

all this: it is necessary culturally to separate sexual activity from procreation before we can move on into a full eugenics program on a broad front. So long as the notion of babies being a natural, good, and desirable fruit of sexual union is retained, there can be no successful eugenics program.

The separation of sexual union and procreation was, and is, necessary to build a social attitude willing to consider a human being as a product of technological achievement — as we now have with the successful birth of a “test-tube baby.” For all our desires that Louise Brown grow into a lovable and loving woman, it must be recognized that she is (probably) the first example of *homo biologicus*, a term evidently coined by Jean Rostand. The technological short-circuiting of cause and effect in contraception and abortion (sexual union separated from procreation) has in her case become one of enhancing the effect “without cause” — without a “natural” cause. As has been noted, this short-circuiting — especially in terms of attitudes — has been necessary to prepare a base for a cultural acceptance of eugenics. We cannot allow ourselves to look at all these new technologies only in themselves, without connecting them to what has gone before and what will most likely come in the future. To treat them only in themselves is to forego living in history.

The reasons usually given for the use of IVF techniques are essentially these: the right to have one’s own biological child has few, if any restrictions; important knowledge can thus be obtained; it is more human to control our reproduction at all levels. These reasons cannot be lightly dismissed. Certainly the desire for children of one’s own cannot be treated lightly. And our desire for and need of more information about our bodies and their processes is good. We will always want a greater understanding of our physical composition, knowledge which can help us alleviate the evil of disease. And, finally, a case can be made that rational control over things, ourselves included, is more human — although we should not forget that rational deliberation is an essential note of evil as well as of good. But in general, the short-term individual purposes envisioned in these reasons are good.

On the other hand, some social-ethics problems have been raised. It has been argued that procedures like IVF (or heart transplants, for that matter) drain talent, money, and research time from things more directly connected to the social good. If such a procedure remains only for the use of individual couples on an individual basis, it has health ramifications no broader than the individual couple. In Britain, for example, a very large percentage of the national health budget could be spent in providing such techniques to infertile

couples — to the detriment of all other health-care recipients. At best, this would be money spent on a procedure that would directly aid only a small portion of the population.

Moreover, can we call this technique therapeutic? It is not primarily aimed at removing or curing what is wrong. It is directly and primarily aimed at the psychological and social well being of the infertile couple — at least at present. The medical procedure can, therefore, be called therapeutic only in a quite extended sense of that term. Leon Kass, M.D., of the University of Chicago, argues for the “old-fashioned view” that health is the true goal of the physician’s art. Practices such as IVF are not aimed at a patient’s health, but rather are directed toward satisfying the patient’s wishes. Although these wishes may be quite reasonable, the acts and practices “are acts not of medicine but of gratification: for consumers, not patients” —as Kass describes what is often called “cosmetic medicine.” The fact that it may require the doctor’s skill to achieve successful IVF does not make it a medical procedure, at least in an old-fashioned sense of medicine. The physical pathology has not been remedied, or even approached.

Furthermore, we are all related to each other, and events are related to other events. If the question of IVF is one of good, whose good is to be served? How wide a network of human beings is to be considered? Is it relevant to take into consideration only the parents’ interest? Only the doctors’ interest? Is it relevant to ask about the baby’s interest in this situation? Should the network of concern be extended to include the need of orphans in the U.S., in Europe, in Africa, in Asia? Who is to decide how inclusive or exclusive this network of concern ought to be?

To move very briefly into other problem areas in what can be called social ethics, there is the question of the wastage of zygotes. It must not be thought that only one egg is used in IVF procedures. Many eggs are fertilized and the one that “looks best” is chosen for implantation into the mother’s womb. The other zygotes are destroyed.

Also there is the probability of the use of surrogate mothers, i.e., of women hired to bear the baby in the place of the woman who supplied the egg. All sorts of interesting legal struggles¹² (and concepts) will be involved. What if, after the pregnancy and birth, the surrogate mother — let’s call her the womb-mother — decides that she wishes to keep the child to whom she has just given birth? Who is the baby’s real mother? Is it the womb-mother or the egg-mother? This is something that will eventually have to be decided in the courts. It will be a difficult and interesting decision. Or, what would happen if the

womb-mother, after a few months of pregnancy, should decide upon an abortion? Would this be allowed? After all, the U.S. Supreme Court has decided that abortion is merely a private matter between the pregnant woman and her doctor. The father at present has no rights in this matter, so why should the egg-mother have rights?

Although these are intriguing questions, they are not the most important ones. They remain on the level of “appliances,” to use Boardman’s language. They do not get us down to the meaning of things: the essential question facing us in the advance of biological science, technology, and industrialization is what it means to be human. This question has in one way or another faced every generation of human beings. But it has been granted to the generations now alive to preside over the beginnings of the greatest technological revolution the world has ever known. We must squarely face whatever costs to human freedom and dignity might be involved in these new technologies. IVF is not merely some benign new technique that will be used only to help some infertile couple have its own biological child; it is also a linchpin in the construction of a fully-orchestrated eugenics program. We would be naive — even blind — if we should ignore the eugenic probabilities thus opened up.

The Meaning of the Human

What does it mean to be human? Is our society going to be content to continue to view human beings as free and responsible agents, allowed spontaneity so long as they remain within the limits set by the public decency? Are the limits set by this public decency going to remain relatively wide, or are they going to be narrowed more and more? The experience of our world of the twentieth century is not such as to inspire a great deal of confidence. In the West, in the name of freedom and in the name of the liberation of women from those demands that their biology (and men) have placed upon them, abortion has become legal and is on the way to acquiring the status of a virtue. That “safe,” legalized, and relatively cheap abortion has extended the range of a woman’s personal and career options cannot be denied. Does that mean that there has been no price to pay? A child-to-be-born must now pass a double entrance exam. For those who are not healthy or who are not wanted, the limits of the public decency have become narrow indeed, excluding their living in our society. The growth of the abortion culture is a classical example of gradualism. Its message in terms of the growth of a eugenic society need not (but may) be lost on us. Each step along the biotechnological road will form the base of support for the next step. Our society still has the opportunity to decide what “definition” or description of the

human it wishes to call its own. A society based on laboratory models and techniques is not inevitable unless we choose the description of the human as essentially malleable, to be transformed, rearranged, or disposed of at will. Such a society is not inevitable unless we decide to ignore those fundamental questions which in fact do face our society. But there is sufficient momentum built into biotechnological advance to arouse serious anxiety if we do not clearly and cleanly face issues whose outcome is so momentous for us all.

Is this a call to close down the laboratories of the world because we perceive them as a threat to our freedom? By no means! It is rather a call to face and to analyze those unbounded plans to redo ourselves, to remake the human race. If we remake it, will we be created in the image of God or in the image of humanly-derived images of man? Bioscientific development is forcing us to ask again the question of the Psalmist: Who and what is man? Our answer to that question — and we must fully realize that a refusal to consider the question is already an answer — will determine the next question: What kind of a society will we have? Will we deliberately build, or at least acquiesce in, some kind of biologically collectivist society, or will we still consider the individual to be of paramount importance? There are important voices in our world who, consciously or unconsciously, are committed to the proposition that the welfare of the race must take clear priority over the welfare of the individual. Certainly, the new biological tools and their promise can be used either way. One way or another, biotechnology is going to have an enormous impact on the content and context of human society.

These new technological capabilities cut to the heart of our humanness and what we perceive as necessary to that humanness. There are at least three aspects of humanity that would seem necessary to preserve: individual integrity and worth, individual freedom and responsibility, bodily (and hence sexual) integrity.

Many voices far more eloquent than mine have warned of significant encroachments against the Western understanding of personal identity and value. There are intellectual, political, economic and social planning movements in our society that would reduce the individual to the role of an interchangeable part in the social machinery, essentially malleable and quantifiable. This reduction is seen in the equation of human perfection with biological perfection (abortion for fetal indications). It is found in those who define the human in terms of quantifiable function. As suggested earlier, the proposed uses of biotechnology look to the predictable and reproducible betterment of the human stock. They are almost exclusively considered in terms of the enhancement of social

THE HUMAN LIFE REVIEW

functioning or of the removal of the “defective” from society. Such an approach denies any intrinsic teleology and individual destiny apart from social productivity. Thus human beings would exist only to function in a larger unit, whether it be society (left vague enough to keep it acceptable), the state, or mankind. William Murray, reporting on some of the proposals being made, states:

Dr. Haldane (the late British geneticist) predicted we might breed, for one thing, a race of legless mutants with prehensile tails or feet for space travel. Other scientists would like to see women laying eggs that could be hatched or eaten; human beings with gills to facilitate underwater travel; people with two kinds of hands, one for heavy work, the other for lighter tasks. . .¹³

For anything like the foreseeable future such suggestions may be warped fantasy at worst or a bizarre put-on at best. But look at the language! These modifications are aimed either at enhancing human functions or creating new ones. They are designed to fit people to specific activities rather than to fit that activity to people. An extrinsic teleology is being proposed as the basis and rationale for technological interventions into the human. Planning rhetoric of this kind is pervasive in biotechnological literature. At stake is the liberal western conception that the individual, while he or she exists *in* a society and bears responsibility *in* it, does not exist solely *for* the society.

Without personal integrity and worth, freedom, of course, cannot exist. Are we to return to the slavery of the “Pharaonic State”? In such a state only the leader(s) is a free and responsible agent; all others exist solely as extensions of the leader’s person. If our personal worth derives from the function toward which our body (and our mind) has been orientated, we will become mere adjuncts to the social will. The harsh reality of our time is that more and more humans have been drawn into the Gulags of our century, including that one which *could* arise from a society-wide application of biotechnology.

Much less has been written on the threat to our bodily integrity. An interesting illustration of a cause for potential concern can be found in the language of neuroscientists. They sometimes speak of the body as merely the “somatic envelope” for the brain. This is a neat shorthand for their conviction that the body is merely the life-support system for the brain. There is an obvious reason for such language; those functions which we tend to consider to be most human are centered in the brain. Nonetheless, such language can be exaggerated and with much unthinking repetition can carry with it the danger of downgrading and ultimately minimizing the importance of human living of that part of the body below the neck. Perhaps such language might be neutral in an age which did not manifest such a deep hatred¹⁴

ROBERT A. BRUNGS

for any meaning (except recreation) of human bodiliness and of human sexuality. More than thirty years ago, C.S. Lewis put an expression of this hatred and distrust of bodiliness on the lips of Professor Filostrato in *That Hideous Strength*:

We must get rid of it, organic life. By little and little, of course. Slowly we learn how. Learn to make our brains live with less and less body: learn to build our bodies directly with chemicals, no longer have to stuff them full of dead brutes and weeds. Learn how to *reproduce ourselves without copulation* (italics mine) . . . You would understand if you were peasants. Who would try to work with stallions and bulls? No, no; we want geldings and oxen. There will never be peace and order and discipline so long as there is sex. When man has thrown it away, then he will become finally governable . . . ¹⁵

Perhaps it is best to let this statement of Lewis stand as a stark conclusion. Should we close the laboratories? No! Should we inhibit bioscientific discovery? No! Should we carefully monitor its extrapolation and application to our society? A resounding Yes! seems appropriate.

NOTES

1. Gerald Leach, *The Biocrats* (London: Jonathan Capt. Ltd., 1970), pp.69-98.
2. Claude Lancot, M.D., "In Vitro Fertilization: An Overview," *Fabricated Man: In Vitro Fertilization*, ITEST Proceedings, October, 1974, p. 29.
3. C.S. Lewis, *That Hideous Strength* (New York: Macmillan, 1973, 13th Printing), p. 178.
4. Charles Frankel, "The Specter of Eugenics," *Commentary*, March 1974, p. 27.
5. Harry Boardman, "Some Reflections on Science and Society: A Terrain of Mostly Cliches and Nonsense, Relieved by the Sanity of Whitehead." This lecture is available to this author only in manuscript form. Further publication data is not available.
6. Linus Pauling, "Foreword to 'Reflections on the New Biology,'" *UCLA Law Review*, 15:2 (Feb., 1968), p. 269. As quoted by Frankel, *op. cit.*, p. 28.
7. Dr. Kenneth Moyer, "Neurophysiological Interpretations and Interventions as Instruments of Social Control," ITEST Proceedings, *Technologies of Social Control*, March 1978, p. 8.
8. Robert White, M.D., ITEST Proceedings, *Brain Research—Human Consciousness*, October 1975, p. 121.
9. Moyer, *op. cit.*, pp. 5-6.
10. Michael Zimmerman, "A Brief Introduction to Heidegger's Concept of Technology," *Humanities Perspectives on Technology News*, Lehigh University, No. 2, October 1977, p. 11.
11. Frankel, *op. cit.*, pp. 32-33.
12. Cf. Dennis J. Tuchler, "Man-made Man and the Law," *Saint Louis University Law Journal*, Vol. 22, No. 2, 1978, pp. 310-325.
13. William Murray, "Genetic Engineering: Brave New Science," *Cosmopolitan*, June 1975, p. 187.
14. James Schall, S.J., "The Experience of Hatred," *The Way*, October 1977, p. 296. "With much of the more recent scientific or sociological approaches it is the historical concrete person born of woman who is hated. Population theorists are telling us that our natural structures and normal desires are wrong. Ecologists accuse us of threatening animals or of pollution by expressing our normal desires to develop as men. The very being of man becomes an object of hatred for continuing to bring forth human persons."
15. C.S. Lewis, *op. cit.*, p. 198.

Men of Feeling

Ellen Wilson

NOTWITHSTANDING Russell Baker's unique responsibilities as the *New York Times*' resident humorist (charged with breaking up the unrelenting sobriety of all those long grey lines), it is understood that his words must command respect as well. Humor in the *Times* (like news stories — or arts and leisure for that matter) acknowledges high standards: it must be intelligent, a trifle sophisticated, and conscious of life's seriousness. The insouciant slapstick of the five-frame comic strip will not do here.

As issues rise to national prominence and sink back into obscurity, Russell Baker acknowledges their existence and seals them with the seal of his column — from Vietnam to Watergate to tax reform, and now abortion (this last issue having shown an irritating survival capacity, he has had to return to it). In his Oct. 12 column, "The right to life and dying families" (*not* published by the *Times*, which was shut down by a strike), he turns his attention to the interrelated questions of abortion rights and the decline of the family.

These are heavy issues for a resident humorist to handle. Perhaps for this reason, Mr. Baker's column divides into two distinct parts, which do not so much interweave as punctiliously sidestep one another. In the more vividly-detailed and personal paragraphs he shares reminiscences of the extended family in which he grew up, a family well-stocked with eccentric uncles (such as the one who claimed to remember being born). These passages show the resident humorist in his element, setting out this odd detail and that cherished memory with loving and uncritical eye.

But it is this lack of a critical eye, this disinclination to hear evidence and deliberate and then render judgment, that disqualifies him from weighing great social questions. When he turns from his reminiscences (set down "by way of backing into the so-called right-to-life issue") to the abortion question itself, the language becomes vague, abstract, and inconclusive: "Is there life at the instant of conception? Does life end when the heart of a mindless body can be sustained only by perpetual machine operation?" These are "Tough questions to answer, except by arbitrary redefinition of the words 'life' and 'death.' "

Ellen Wilson, whose first article appeared in our Fall, '77 issue, is now a contributing editor to this review.

But *why* so tough to answer, when the first question at least has been asked and answered by philosophers, scientists, and citizens for centuries? (And my point is not affected by lack of unanimous agreement in their answers: each generation, whatever its opinion, *did* hold one, *was* convinced one way or the other.) And why must the definitions — or redefinitions — be “arbitrary”? Are there no arguments for and against, no evidence? For Baker, “arbitrary” appears to be a code word for definite, uncompromising, and herein lies his principal objection to the anti-abortionists. Those who believe that abortion is the killing of human life — not merely *potential* but *actual* life — have not only reached a decision and articulated a position, but confidently uphold its objective truth — for all people.

Why then doesn't Baker berate the pro-abortionists — who have also hazarded an opinion? The reason, I suspect, is that pro-abortionists appear to humor his decision-making phobia. Let each individual come to his/her own decision, they say, and let each refrain from imposing it upon others. But what is not sufficiently clear to Baker is that pro-abortionists can be as firmly-convinced of their position as any anti-abortionist. In addition, the former are fixing the rules of the game to favor their side. Their rhetoric implies that they are making concessions and offering compromises. After all, no one is *forced* to have an abortion. But the very nature of their position renders a universal solution unnecessary. They are not (yet) arguing that child-bearing is evil, or that all prospective mothers should be deterred, or (most of them) that procreation is harmful to society. The pro-abortionist “simply” wants permission to abort if and when she wishes to. And so at the present time — barring a few inconvenient legislative bans on government subsidies for abortion — pro-abortionists have been granted all they desired, all they demanded.

Anti-abortionists, by the very nature of *their* argument, must be unsatisfied with a non-universal solution. Laws are not needed to restrain only certain segments of the population from aborting children (as if abolitionists had campaigned to keep *themselves* from owning slaves), but to prevent abortions altogether. Unlike their opponents, anti-abortionists have been almost wholly thwarted in their object. And, insult added to injury, they must endure charges of rigidity, and an uncompromising attitude. But these common pictures of pro-abortionists as open-minded and conciliatory, anti-abortionists as dogmatic and excessively-demanding, are alike false. Both parties champion causes which they believe in, and mean to impose upon others. But then, what good is a conviction unless it is deeply-held and worthy of defense.

THE HUMAN LIFE REVIEW

That brings us back to Russell Baker, who, while tilting toward the pro-abortionists (for being “pro-choice”) declines to deliver an opinion on the personhood of the fetus, upon which rests the morality of the act. “In this business I am saddened rather than opinionated,” he explains, apparently under the delusion that to hold an opinion is to be opinionated. “Unwanted children are saddening, but so is the decline of the family impulse . . . I speak, admittedly, from personal bias” — a bias nourished by memories which catalyze moving nostalgic prose such as this:

[My 21 or 22 uncles] made up a small state all by themselves.

One, who had wrestled professionally, taught me about fraud. Another, who hadn't worked for 25 years, taught me about leisure and the virtues of the Republican Party. Some taught me about the treachery of whiskey and some about the elusiveness of money and some about how to outwit large corporations. Several even worked, some of them very hard, and one of them even liked it . . .

My uncle who remembered being born is dead now. If he were alive, he would probably remember being conceived. I am thankful they all were, although admittedly their multitude was bad for ecology.

The tragedy of the column — and of the memories themselves — is that it is deflected from catalyzing anything else, including an active commitment to the values and way of life he celebrates.

And so this nostalgia (conveniently) renders the past outmoded in the very act of celebrating it, discounting the past's claims upon the present or future, its right to teach lessons or recall us to lost truths. The opinions of different societies in various time periods are to be given equal weight, which insures that none of them will have a decisive effect. Into this authority vacuum steps the ethos of tomorrow, evolving (probably inevitably, Baker implies) from today's ethos. Such being the case, he concludes that the anti-abortion movement “does not have bright prospects. It is arguing the obligations of the family at a time when the family is declining.”

These then are the two “arguments” mustered against the anti-abortion movement: it poses hard questions; it opposes the wave of the future. And however biased towards life Mr. Baker's nostalgic inclinations may be, he is not going to allow *his* “personal bias” to interfere with the personal biases of all those women seeking abortions.

But most intriguing of all in Baker's attitude — and that of many others — is his freedom from anxiety, or any felt need to defend his fence-sitting. Instead, there is a suggestion of moral superiority in the readiness to see both sides, the ability to be “saddened” (a decorous emotion, that) by the whole abortion situation. There is the merest implication that *partisans* of one side or another are people with,

well, limited vision and narrow outlook. For his part, though confessing “personal bias” towards the family, he declines to interfere actively, committedly, “opinionatedly” with the march of history. In this way Baker the humanist and man of letters can comfortably locate himself within his society and civilization, nostalgically recalling a past whose memories, really, are quite sufficient for him, while carefully stepping aside to make room for the future.

But the assumptions of his column are by no means unique, are not anomalies in an otherwise-opinionated society. On the contrary, they are mirrored in editorials, articles, conversations at parties or on the commuter train. In colleges, defaulting on the “Big Questions” has been raised to the level of dogma, attributable in part to a confusion of philosophical influences ranging from John Stuart Mill to 20th century existentialists. (Students at St. John’s College in Annapolis, in half-frustrated, half-appreciative acknowledgement of this situation, once staged a take-off on “The Wizard of Oz” in which a bewildered but determined student sets out to find “the answers to the BIG Questions.” The professors and administrators she seeks out are variously horrified and hostile, until at last she approaches the most venerable among them and repeats her petition for “the answers to the BIG Questions.” Whereupon, in a departure from current practice, she is given them: “Yes, no, no, yes, no.”)

It must be stressed that there is no objection in the schools (or among scientists, men of letters, and other uncatalogued intellectuals) to the *asking* of questions, or even to the enumeration of possible answers. But the debate must never be closed, the discussion never concluded. And however dubious the authority for some of these proposed “answers,” a lack of discrimination among them is insisted upon with an almost superstitious fervor, as though there were truly no means of separating even more likely from less likely. This refusal by academics to consider certain questions closed after millennia-long discussion (a refusal itself dogmatic, since it arises from a conviction that we can never attain objective certitude) is akin to the refusal of a Russell Baker to answer hard questions. Too aware of the differing opinions which even good and wise men can profess, they are unprepared to assert an objective truth, binding upon all. They are unprepared to ferret out that truth and hold fast to it once found, and — not content with cherishing it — know *why* it is to be cherished. Instead, “neutral” academics join forces with benevolent men of letters to defend the gentle art of fence-sitting.

Leon Kass, doctor, scientist, and professor at the University of Chicago, is one such academic. Seven years ago he was one of the first to seriously discuss the ethics of genetic engineering in humans. More

THE HUMAN LIFE REVIEW

recently, in October 1978, he testified before HEW's Advisory Board, which was deliberating the wisdom of awarding grants to scientists experimenting on *in vitro* fertilization. Presumably the Board wanted informed opinions, even recommendations, from the experts they had invited from the presumably "relevant" fields. Prof. Kass, with great learning and civility, presented the scientific equivalent of Russell Baker's list of "hard questions." He urges consideration of:

questions about the goals and standards that will guide our interventions (e.g., In the absence of ends and standards for the use of our rationalized technique, are we truly in control, or are we really, perhaps more than ever, at the mercy of chance?); questions about changes in the concepts of being human, including embodiment, gender, love, lineage, identity, parenthood, and sexuality; questions about the responsibility of power over future generations; questions about awe, respect, humility; questions about the kind of society we will have if we follow along our present course.

He then regrets that "he cannot discuss these questions now."

The opinions which Prof. Kass does offer in his testimony are heavily qualified, diffidently expressed, and carefully balanced with respectful remarks about the opposition. Near the beginning he confesses that "My intuitions and thoughts about the wisdom of proceeding with this research are still on balance the same and negative, though less intensely so"; soon after he notes: "It is not altogether clear how best to think about the ethical issues, here or in general," proceeding to describe his own approach as primarily *descriptive* rather than *proscriptive*:

The first task, it seems to me, is not to say 'moral or immoral,' 'right or wrong,' but to try to understand the meaning and significance of the proposed procedures.

The principal explanation for this skittishness is a magnified apprehension of the influence of "subjective" impressions and personal beliefs. With scrupulous self-examination he testifies: "To the best of my knowledge, the discussion which follows is not informed by any particular sectarian or religious teaching, though it may perhaps reveal that I am a person not devoid of reverence and the capacity for awe and wonder, said by some to be the core of the 'religious' sentiment." Here is the parallel to Baker's "personal bias."

But some form of subjectivism or injection of personal belief seems inevitable to Kass if we are to have opinions at all, and so he devotes himself to weeding out the more idiosyncratic from the commonly-shared, in search of a basis for consensus. (Hence, reverence, awe and wonder become "the core of the 'religious' sentiment" — *sentiment*, note, rather than belief.) And although he admits that both blastocyst and embryo are clearly alive and distinct from the mother, other

ELLEN WILSON

subjective evidence (“It does not look like a human being nor can it do very much of what human beings do”) contributes to their relegation to the lower sub-class of the “potentially . . . mature human.” (This method of evaluation has much in common with that of euthanasia proponents, who judge whether or not someone else’s life is meaningful.)

Proceeding naturally from this subjective evaluation of the blastocyst’s humanity is a refusal to award “it” an objective right to life. “I myself tend to reject such claims,” explains Kass, though he is “impressed by the fact that many of our fellow citizens disagree: their views deserve our thoughtful consideration and respect just as much as our views deserve theirs.” Kass then explains that his own attitude toward the blastocyst evolves from the “feelings of awe and respect” which it elicits, as potentially fully human life. *Because* it elicits these feelings, and “not because it has rights or claims or sentience (which it does not have at this stage),” it qualifies for respectful treatment.

But this is a fragile foundation upon which to maintain a responsibility as potentially-demanding as “respect” toward the blastocyst. It is difficult enough to nurture such feelings toward other, full-grown human beings, which is why there are laws and dogmas that compel us to mete out respectful behavior to races, classes, groups or individuals in whom we may see little to warrant it. Prof. Kass’ confidence in human nature must be great indeed if he believes that the subjective reactions which he sees as the basis for our behavior toward the unborn are and will remain reliable and universal.

Similarly, when he considers the ethics of embryonic research, Prof. Kass turns once more to subjective criteria: we would recoil, for example, from the marketing of embryos as a food delicacy (a “‘human caviar,’” in his words). This is an indication of our deep respect for the potentially-human, and hence a deterrent from at least certain kinds of “disrespectful” embryonic research. (It may be argued that these are not really subjective or physical reactions, that the revulsion we would feel at marketed blastocysts is merely a physical reflection of our mental recognition of the unborn’s humanity. Whether or not that is true, it is not how Prof. Kass describes it. By ignoring almost entirely the philosophical or medical arguments for or against embryonic personhood, he seems to imply that these subjective “proofs” are the most reliable, or least controversial, of any available.)

Throughout his testimony before the Ethics Advisory Board, then, Leon Kass chooses avowedly-subjective criteria for evaluating embryos and embryonic research; concurrently, he shows an extreme

THE HUMAN LIFE REVIEW

consciousness of how “individual” and unreliable *certain* kinds of “subjective” perspectives — such as the religious — may be. Ultimately, he relies upon the subjective only because he sees no proven and recognized objective authority to answer his questions. And thus, like Russell Baker (who disqualifies himself — and implicitly everyone else — from decision-making because of personal bias) Kass finds it almost impossible, perhaps even undesirable, to place before the Board a clearly-defined, unambiguous judgment.

Though the impartiality and neutrality of so many doctors, lawyers, politicians, and just common folks could be attributed to an excessive dependence upon the *rational*, the very opposite seems to be the case. These neutral parties are unable to rule out any alternative or decide against any interest, such is the ease with which they are emotionally affected, and the extent to which they distrust personal opinions. Russell Baker is “*saddened* rather than opinionated” (my emphasis), his sympathies are engaged. Leon Kass experiences awe and a sense of mystery before the 8-celled blastocyst, and on this basis grants it lower-caste humanity. Not many generations earlier men were seeking to scrape every argument or judgment clean of emotional and religious content. Matthew Arnold, trying, like Kass, to isolate the core of the religious experience, defined religion as morality touched by emotion, whereupon a number of Victorians divested themselves of the emotional ornament. Many moderns attempt to retain the religious coloring (“awe,” or Baker’s nostalgic recollections of his extended family) but discard the moral injunctions.

A more credible historical parallel for the condition I have been describing is the 18th century. The unchecked and undifferentiated outpouring of sympathy toward all, a sympathy which, however little it benefits the object, warms and approves the sympathizer, is reminiscent of the cult of sensibility flourishing in the middle and latter part of the 1700’s. A good example is Laurence Sterne’s Uncle Toby in *Tristram Shandy*, who tells the fly buzzing around his head, “Go, poor devil, get thee gone, why should I hurt thee? This world surely is wide enough to hold both thee and me.” Contemporary sensitive personalities are equally willing to sidestep unpleasantness of every kind. But good and evil cannot without grave repercussions be transformed into pleasantness and unpleasantness, inoffensiveness and offensiveness. Those who make the attempt doom themselves to an existence as ineffectual as Henry Mackenzie’s *Man of Feeling*, who plays the passive observer to dozens of scenes of human pain and misery, filling chapter upon chapter, developing a delicate sensibility thereby but not otherwise doing anybody much

good (David Hume wept over the book, an awesome indication of how great the appetite for the sentimental was). As the book's title suggests, good feeling and warm, sympathetic impulses were valued high above the cool-headed, rational consideration of a situation.

But the 18th century parallel does not end with the phenomenon of benevolent neutrality itself: there are resemblances in the factors contributing to the phenomenon as well. Many and diverse forms of dissension and religious and political disagreements lent the age an acute consciousness of the fragility of the bonds holding society together. This was a century of Scottish rebellions, Protestant Evangelicals and enthusiastic sects like the Methodists and Quakers, unrest (and eventual rebellion) in the American colonies, and assorted other opportunities for upheaval. The very proliferation of creeds and political allegiances began to argue for an expansive and broadly-based toleration of differing opinions. But the basis for this toleration could hardly be philosophical — few people had yet progressed to the notion that values and opinions are subjectively realized, and at best only valid for the individual. Nevertheless, most political opinions could be endured, and theological differences minimized, if only a man's heart was in the right place. Hence, the drawing of fine distinctions, the framing of cogent argument, the meticulous elaboration of the implications of a philosophy, came to be seen by many peace-loving and well-intentioned souls as exercises both trivial and perilous.

Granted, not every member of a period which, after all, was labelled the Age of Reason reacted in this way. But they made up a substantial backwater — or perhaps backlash — in their society, attempting, with varying degrees of consciousness, to fashion a consensus based upon good feeling.

In America the assortment of parties, races, religions and nationalities has always been especially diverse — it being a nation largely populated by the least-congenial members of other nations. And lacking even a long stretch of common history, we have, at least in theory, always laid more stress than other nations on tolerance, an open mind, and compromise. I will not say that a tendency toward diffidence or even philosophical indifference is an inevitable result of this, but it is a constant danger. What begins as a convenient arrangement to insure external civility, tends to penetrate ever deeper into the psyche until one first entertains doubts about the universal validity of personal opinions, and finally sinks to a generalized and benevolent agnosticism on all important questions. Such, I believe, is the case of Baker and Kass and so many more who, in the pursuit of pluralistic goals, decline to answer "difficult" — because extremely

THE HUMAN LIFE REVIEW

controversial — questions. Unfortunately, pro-abortionists, as well as advocates of euthanasia and every type of genetic research and population control, are only too willing to fill the vacuum created by our modern men of feeling — men with a faith in the harmonious possibilities of a society of benevolent fence-sitters.

But however they try to make do with it, good feeling is not enough, and opinions usually clash on a logical plane even if their adherents tactfully ignore this. Leon Kass, in search of experiences and reactions so fundamental, so universal that only the churlish would decline agreement, must reduce religion to feelings of awe and respect — directed towards a creature. If this is our Greatest Common Factor, it may provide a spiritual diet too thin for subsistence.

Yes, pity and goodwill and an imaginative sympathy for others are goods — when they do not overthrow the authority of reason. And those of us whom the men of feeling would (regretfully) label fanatics have, perhaps, something to learn from them. But all things considered, there is something unhealthy as well as ineffectual about the consistently impartial attitude (many cannot bear the strain without some relief, and break loose in passionate allegiance to the New York Yankees, or Bach, or California). They are not *actors*, their effect is at best negative, indirect, and this, truly, hurts them even more than it hurts the rest of us. John Cardinal Newman writes somewhere on a hidden peril in novel-reading — the habitual arousing of noble impulses to action with no real object or healthy outlet. The reader accustoms himself to experiencing emotional heights and depths without needing to rouse himself to physical effort — or even, necessarily, mental judgment. And Newman argues (much like a modern-day critic of T.V.) that the novel-reader may find it difficult to shake off this torpor, may be broken of the habit of splicing right feeling to right action. He may thus allow himself to be contented with *feelings* of pity, righteous anger, charity and the like, overlooking the fact that they were meant to inform moral *acts*. Whether or not this correctly describes the novel-reader's condition, I am afraid that it corresponds to that of the men of feeling, who confuse the subjective emotions which societal conditions arouse in them (Baker's "I am saddened") with effective responses to those conditions. This is (though camouflaged) a self-approving and self-directed attitude, more preoccupied with the emotional range of the sympathizer than with the future of the sympathizee. "We are sad," explains Kass, when a woman suffers a miscarriage, "largely for *her* loss and disappointment, but perhaps also at the premature death of a life that might have been. But we do not mourn the departed fetus." It

ELLEN WILSON

is the observers, really, who claim consolation; it is Baker, after all, who is saddened by the abortion controversy and thus deserves sympathy; it is Magda Denes who braves psychological torment in the abortion mills and earns her merit badge in suffering. Unable or unwilling to acknowledge objective, universally-binding rights and wrongs, *externally*-valid reactions, they rely upon subjective, largely emotional definitions of experience --- and then modestly confine their validity to themselves. This is a solution that will not work. There is something out there, outside the self, which *is* objective, which requires us to rise above shifting emotions and say, "this is so, that is right, the contrary is wrong." For the route of the man of feeling, followed to its logical conclusions, leads to self-enclosed solipsism.

Men without Women

Michael Novak

A PECULIAR paradox emerges from recent debates about homosexuality. On the one hand, proponents of homosexuality speak of “sexual preference” and “alternative choices.” On the other hand, they speak of being “trapped,” of “having been given a different nature.” So there are really two different possibilities involved. First, if homosexuality is a matter of choice or preference, it lies in the realm of freedom. The argument then concerns whether such choices ought to be encouraged or discouraged; whether, in a word, homosexuality is a good choice. Second, if homosexuality is a matter of nature, it lies in the realm of necessity. The argument then does not reach so high a moral level. Those involved are not really free to choose an alternative. They suffer from a diminished range of freedom.

The moral argument about this second alternative is sometimes simply expressed as “Do what really comes naturally,” or “To yourself be true.” In other moral traditions, however, the limitation of freedom involved in this alternative constitutes a moral defect, like kleptomania, pyromania, or other “natural” psychic flaws. Few human bodies fulfill classical possibilities of form; so also few human psyches. Each of us carries serious flaws. In some traditions, homosexuality is such a flaw. It makes people suffer, but does not make happiness or moral courage impossible.

It is probably important to distinguish between male and female homosexuality. Male infants have a hurdle to jump — I speak as a nonscientist — which females do not have to jump: *viz.*, a transference of their sexual identity away from their mother, with her sensual closeness, to their father. A distance must be established between the male and the mother, and an identification made with the father. One must appreciate the fact that, in a percentage of cases, this transition will be handled very rudely. In addition, one anticipates the probability that the natural endowment — hormonal, neural, emotional, whatever — of a certain percentage of children will not follow the norm. Aristotle pointed out long ago that nature does not work flawlessly, but only “for the most part,” *i.e.*, with considerable looseness and randomness, producing a spectrum of individuals from

Michael Novak, theologian, philosopher, author, and newspaper columnist, is currently a resident scholar at the American Enterprise Institute in Washington. This article first appeared in *The American Spectator* (October, '78) and is reprinted here with permission.

the nearly flawless to the seriously aberrant. None of us ever chose our nature. Yet we each do become responsible for what we make of it.

When the male infant does not make a successful transfer in sexual identity to the father, the male is attracted to other males. Females may even seem to him repulsive, surrounded by an aura of conflict or disinterest. In past ages, such homosexuality was sometimes construed as a danger to the human race because it meant a) a decline in population, or b) a decline in those masculine qualities essential for survival. What happened in the socialization of the young male was perceived to be of greater significance, and of greater risk, to the race than what happened to the female. Unless I am mistaken, even today society is in a more troubled state about male homosexuality than about female homosexuality. Lesbianism may suggest infantile pleasure and regression, but it does not threaten the public, at least not to the same extent that male homosexuality does. Female handholding, public exchanges of tenderness, and the like indicate that females are permitted a more relaxed attitude than males with members of their own sex. Female homosexuality seems somehow more natural, perhaps harmless. Male homosexuality seems to represent a breakdown of an important form of socialization.

The point may need elaboration. Recent publicity about women has served to shield us from an event of far greater significance: the decline of value, status, and the need of "masculine" qualities. In modern corporate life, "mother bureaucracy" swallows the strong ego. Rewards do not come from taking risks, being aggressive, speaking out. In the rationalized, smooth world of government and corporate life, "going along to get along" wins more certain rewards.

The rules of corporate bureaucracy may be more decisive in altering sex roles than the pill. These rules weaken masculine qualities in obvious ways. Yet the male spirit leads one to put one's own body at risk; a degree of occasional physical danger is as necessary for male living as air. The modern era suffocates the male principle. (I say "male" rather than "masculine" to emphasize the high animal spirits involved, the instinctual base on which culture works.) The deep and wide-ranging changes in our experience of maleness have been too little explored. They have certainly induced vast sexual confusion.

They may also — in an odd way — help to cast light on at least part of the inexplicable rage among contemporary women. Suppose that some women, unconsciously, seek the male principle and cannot find it realized in the corporate men around them. What a vast disappointment there seems to be among women today about the men of their acquaintance. They *tell* us that we are "male chauvinist pigs." But what if they *mean* that we are not even males, that they can

THE HUMAN LIFE REVIEW

have no respect for us? The fact that so many men cave in before the rhetoric of militant feminists must only increase the rage, by proving its unconscious point.

Is it true that the number of homosexuals is multiplying in our day? Who could marvel if it were? Men find it perplexing to be male. Seeking the male principle, some women are trying to supply it themselves. It is not just that “sex-role stereotypes” are breaking down. Rather, basic systems of identity have been profoundly altered by the technology and organization of modern life. Personal confusion abounds. The problem is deeper than that of homosexuality alone.

Society has a special stake in the development of married family life. Without strong, enlightened, spiritually nourishing families, the future of society looks bleak indeed. The family is the original, and still the most effective, department of health, education, and welfare. If it fails to teach honesty, courage, a desire for excellence, and a whole host of basic skills, it is exceedingly difficult for any other agency to make up for its failures. Who would trust politicians to do the job?

More than that, society has an important stake in nourishing that special wisdom and powerful realism learned in marriage in the battle between the sexes. For thousands of years, masculine culture and feminine culture have been quite different. It is not easy for men and women to understand each other, or to learn to be honest with each other. “Honesty” may mean something different to males and females.

In addition, the raising of children is morally demanding in a special way. Most of what one learns is failure. A raw realism develops. The brute demands of running a house, of keeping order, of teaching all that one must teach, and of encountering the daily struggles of self-will and self-assertion on the part of each parent and each child are of great moral significance. Sometimes the moral life of families is taken to be conventional and easy. It is not. Moral health must be won against great odds by each couple and each family, starting from scratch, and battled for over and over. We are learning in our generation how many social supports are necessary to make family life successful. We are learning the hard way. In the *hubris* of pursuing “progress” through affluence, mobility, and the promotion of individual hedonism on a vast scale, we have destroyed most of these supports.

I must add here that I am a Catholic — not to say that other traditions do not have analogous concerns, but only to give my own comments moral concreteness. Morals do not come down to us in some universalist language of the lowest common denominator, but

MICHAEL NOVAK

in the concrete rituals, voices, affects, and symbols of long historical traditions, internalized by individuals who carry them. To my mind, the human body is a dwelling place of God, and the joining of a man's and a woman's body in matrimony is a privileged form of union with God. The relationship is not merely that of a mechanical linking, putting genitals here or there. It is a metaphor for (and an enactment of) God's union with mankind. Marital intercourse thus reenacts the basic act of creation. It celebrates the future. It acts out in the flesh a communion of two separate persons who are not, at the beginning of their marriage, or at their fifteenth or any other anniversary, nearly as united in fact as this symbol pledges them to become.

There is no doubt that women can truly love women, and that men can have profound love for other men. (Aristotle, indeed, argued that men could only be true friends with men, not with women, because friendship depends on equality, and men and women did not have equality.) In some ways, friendships are indeed easier between persons of the same sex. Sexual relations between men and women are enormously complex, so that one short lifetime is normally insufficient to plumb even one such relationship. Heterosexual relations are full of terror. They are not as rosy and cheerful as *Playboy* and *Penthouse* would puff for our infantile fantasies.

Men have done most of the world's writing, so we are well informed about how little, and how poorly, men understand women. It would be foolish to believe — all experience tells against it — that women understand men any better. (In a secret area of bias, I confess to believing that men, at least sexually, are simpler to understand. The truth is so simple, I think whimsically, that many women cannot bring themselves to believe it. They keep looking for deeper, more complicated explanations.)

Society has a great — an overwhelming — interest in the battle between the sexes, and in its successful negotiation by its millions of couples. Even given the full social supporters of an economic and cultural and spiritual system, such as we do not now have, not all couples can be expected to be successful. In a system as fantastically successful, rich, and centrifugal as ours, the casualties must be many. Democratic capitalism necessarily develops powerful contradictions, as Daniel Bell has spelled out. It is the freest system ever devised by mankind. But it sends individuals off every which way, in general moral incoherence. The effort to nourish strong families in such a system places huge burdens upon each solitary couple.

Great strides have been made in recent years — strides which I welcome — in winning tolerance for homosexuals. Tolerance for individuals does not entail moral approval, however. In a democracy,

one must live and let live. But one is free to argue against. From my point of view, homosexuals absent themselves from the most central struggle of the individual, the struggle to enter into communion with a person of the opposite sex. That is the battle most at the heart of life. Excluded from this struggle, whether by choice or by psychic endowment, the homosexual is deprived of its fruits. Those fruits are a distinctive honesty, realism and wisdom taught by each sex to the other: that complementarity in which our humanity is rejoined and fulfilled. Apart from this civilizing struggle there is a lack, an emptiness, a loss of realism. On the other hand, God knows, there are compensating riches of the spirit. Often those deprived in one way are the most sensitive and creative in others. Fulfillment does not depend on being heterosexual, or married, or familial. But the marital ideal nourishes every other ideal we have.

Psychiatrists have ceased calling homosexuality a sickness, or a lack, but one is not sure that they — or others — have ceased thinking that way about it (or that they should). There are three features in the very structure of homosexual life that tell against it. The first is a preoccupation with one's own sex. Half the human mystery is evaded. The second is the instability of homosexual relationships, an instability that arises from the lack of the full dimension of raising a family. Apart from having and raising children, a couple can hardly help a degree of self-preoccupation. The structure of family life — the same onerous structure that feels like a "trap" — places the married couple in a context larger than themselves, shields them from one another, so to speak, and opens up new avenues of realism and honesty. It is an especially important experience to exercise the authority of a parent, having rebelled against mother, or father, or both, for so many years. Only thus does one see things from the other side.

Thirdly, the homosexual faces a particular sort of solipsism, which is difficult to escape simply through companionship. Homosexual love is somehow apart from the fundamental mystery of bringing life into the world, and sharing in the birth and death of the generations. It is self-centered in a way that is structural, independent of the goodwill of the individual. Marital love has a structural role in continuing the human race that is independent of the failures of the individuals who share it.

There are also particular dangers in homosexuality. If it is true that the homosexual is lacking something that nature usually intends, then that lack is bound to be felt, at least unconsciously. A certain rage against nature is likely to be felt, and perhaps internalized and directed at the self. Of course, it is often argued that nature has made no mistake, that the homosexual is fully endowed, and that it is

MICHAEL NOVAK

society that is the cheat. The rage will then be directed against society. Yet even in this case, one will expect to see the rage turned inward, and one will not really expect it to be assuaged by public approval. Indeed, the more the public might seem to approve of homosexuality, the more one would expect homosexuals to begin punishing themselves. For the source of this rage is not merely an anger at being different; it is deeper than that. One knows one has been left out of something. One wishes to be accepted for what one is. But one does not wish to be told lies in the process. One can make something heroic out of a flaw in oneself, but not by lying.

In fact, the climate of the last ten years — just the years in which tolerance and “understanding” have been growing in unprecedented ways — has encouraged the growth of rage against society. Negativism and hostility are in the air. For homosexuals, however, rage against society will not alleviate rage against the self. That rage must be dealt with by the self. Self-fulfillment is at stake. (This does not mean mere self-expression, or doing what one feels like doing.) Self-fulfillment is doubly difficult for the homosexual; it is hard enough for everybody. But the married person with family has so many demands made by others upon the self that many painful blows are struck from outside-in, so to speak, and this is an inestimable advantage. (Edward Albee’s hideous play about marriage, *Who’s Afraid of Virginia Woolf?*, only appeared to be about a man and wife; the dialogue was unmistakably that of the soul in rage against itself. The play is an almost perfect metaphor for the rage of the homosexual against himself.)

Second, a peculiar sickness fell upon the rhetoric of blacks during the past decade. It was duly reported by the media as authentic. Incredible poses were struck, rage was faked, pantomime was acted out. Instead of seeing this charade for what it was, many good liberals employed a double standard: Blacks act “funny,” so this play-acting must be true. Then everyone who wished to gain the benefits accruing to the “oppressed” through the media began aping militant blacks of that period (now already out of style). “The student as nigger” was the first act. “Women’s liberation” was the second. “Gay Power” came third upon the stage. Howsoever poignant the stories to be told, they now come out as canned, bowdlerized, third-rate imitations. Can anyone doubt the inevitable result if this charade continues, long after the public has seen through the symbolic form? Demonstrations of fist-waving homosexuals carrying placards fulfill stereotypes in the public mind surrealistically.

The politicizing of almost everything — I call it “Nixonizing” — is a symptom of civil corruption. Politics is a clumsy instrument for the

teaching of tolerance or the spreading of moral enlightenment. Other social forces (the arts, the schools, the churches) can do such things; not politics. Not only is politics a blunt and destructive instrument, supplanting precise reason with slogans, stereotypes, namecalling, and other campaign necessities. It is, in addition, an awakener of fierce counteraction. If one is seeking tolerance and solid shifts in underlying values, politics defeats one's efforts by stimulating and crystallizing opposition. Politics awakens irrational forces. It is not a wholly rational sphere.

That there are, and always will be, homosexuals among us (among our friends, in our families, among those we work with, throughout society) is certain. That they are often among our most talented, creative, and successful citizens is obvious. Yet the homosexual condition offers rather more inner suffering and sorrow, even with its normal quotient of human happiness, than I would wish for my children or for others. Heterosexuality is the full and complete human ideal. Homosexuality is not a preference of equal moral weight. Still, it would be good for laws specifically aimed against homosexuality to be stricken from the books, so that the coercions of the state do not enter into private life. Similarly, no one should be coerced by the state into giving approval for a way of life of which he does not approve. The state should be kept as much as possible outside such questions.

Homosexuals have psychic desert enough without adding to it. As often happens in life, their own inner sources of adversity are often transformed by courage into unusual creativity. Homosexuals know that powerful social pressures may induce behavior otherwise not freely chosen. Yet no social system completely determines behavior, and in any healthy social system there must be room to experiment and to live in many different ways. Society has a strong interest, in private and in public, in encouraging heterosexuality and in discouraging homosexuality. To do so without injuring those homosexuals who are without choice, and to establish conditions in which their lives may be tolerably creative and satisfying, is an important social task. I am in favor of a tolerant and open system. I am not in favor of one that treats heterosexuality and homosexuality as equals, or as matters of indifference. Individuals (and societies) can make their own moral vision clear without undue coercion upon those who do not, or who cannot, share it. For the good of all of us, homosexuals included, it is well that society should prefer heterosexuality and specially nourish it. The future depends on it. But it is also good for all of us to lighten the burdens of homosexuals, as we would have them lightened for ourselves.

What Makes the Law the Law?

Harold O. J. Brown

Reflections on the Sources of Law with Reference to The Questions of Abortion and Homosexual Rights

Non ex regula jus sumatur, sed ex jure quod est regula fiat.

“Justice is not derived from the rule, but on the contrary, that which is the rule comes into being on the basis of justice.” These words of a third-century pagan Roman jurist, Julius Paulus,¹ express what was once the universal human understanding of the source of positive or man-made laws and regulations (*leges, regulae*). Law has been traditionally divided into two categories: eternal or divine law on the one hand and temporal or positive (from Latin *positus*, set or placed), i.e. man-made law, on the other. The category of eternal law may be broken down into divinely revealed law, such as the Torah of the Jews, and natural law, perceived by human reason. To the extent that man’s reason was seen as a gift of the Creator, natural law may also be thought of as in a way divinely revealed: this is what the Declaration of Independence implies in speaking of “the laws of Nature and of Nature’s God.” The term “laws of Nature,” used in the Declaration to refer to fundamental principles of human justice ultimately derived from God, can also mean scientific laws, such as the laws of physics. “Natural law” is currently more commonly used to designate principles of human justice, and laws of nature refer to the laws of the natural science. “Natural laws” of both kinds have this in common: they are not *made* by man, but are to be taught to him or discovered by him: the law of gravity by the scientist, Newton; the law against murder revealed by God to Noah (Genesis 9:5-6) and to Moses (Exodus 20:13), and declared by Moses to the elders of Israel on Mt. Sinai (Exodus 24:3). This “eternal law” against murder explicitly revealed to and accepted by the elders at Sinai has also been discovered and universally received in other human societies whether or not they claimed to derive it from revelation — a fact noted by Paul in his discussion of the Torah (Romans 2:14-15). Although the example used here, the Torah of the Jews, is a particular one, the concept of an eternal natural law antedates all human law codes.

Positive, i.e. man-made, laws were thought of as expressing and reflecting natural law, or otherwise as being “unlawful laws,” indeed

Harold O. J. Brown is currently a professor of theology at Trinity Evangelical Divinity School in Deerfield, Illinois; he was formerly an associate editor of this review.

no laws at all. Every society has a concept parallel to the Indo-Aryan “law of the Medes and the Persians, which altereth not” (Daniel 6:8). The reason that Darius, the “King of Kings” of the ancient Persian Empire, might not alter a law he himself had made was because of the conviction that in making the “firm decree,” the great Shah en-Shah was merely recognizing and publicizing an eternally valid principle. This is law in the sense of justice, Latin *jus*, Old English *riht*, in other European languages such as French, German, and Italian, *droit*, *Recht*, *diritto*. Law in the sense of man-made regulation is Latin *lex*, modern European law, *loi*, *Gesetz*, *legge*. (The German term *Gesetz* is derived from the participle *gesetzt*, set or placed, the exact equivalent of the Latin participle *positus* from which we derive the term *positive* law.) As F. A. Hayek rightly observes, law is older than legislation, the deliberate making of law.²

The concept that human beings can “make” law in the sense of determining of themselves what is to be right signifies a profound break with the older and virtually universal understanding of law, aptly expressed in the quotation from Julius Paulus.

All societies have regulations and social conventions, but it is a relatively new thing for human beings to think that *fundamental* principles of justice represent *nothing more* than social convention — whether that convention be determined by habit, by deliberative assembly, by a dictator, or even by the United States Constitution. The late eighteenth century produced the impressive ethical system of Immanuel Kant (1724-1804), who believed that eternally and universally valid principles of human conduct can be derived from reason alone — a development of traditional natural-law views. Nevertheless, the shift from Christian theism with its concept of biblical revelation to deism with its distant, uncommunicative Great Architect facilitated the application of historical relativism and, as a logical consequence of the Social Contract theory, positivism to law. The study of law became a social science, the study of the development of human social patterns and institutions. The specific patterns of biblical law, although they were preserved in practice well into our own day, were no longer put forward as divinely revealed eternal law, but as products of human progress. Since the study of law ceased to be an inquiry into what is right and became a critical and comparative study of what has been enacted, lawmaking began to take the place of what is meant by the older, Latin expression *legislation* (from *lex*, law, and *latus*, moved or carried). The legislator of the past *found* the law, whether in the Bible or in reason, and *moved* it over into the statute books. The new law-maker *makes* it as he sees fit.

Much of the legislative and judicial perplexity in America today results from an inability to decide whether our nation's laws, from tax regulations to the Constitution, are supposed to reflect fundamental principles of justice or mere social convention. Are they discovered or made? In enacting a law, or handing down a decision, is the lawmaker or judge attempting to discover and declare what is in itself right and just, or, by that very decision, to make right or justice? In an early postwar German study, Bernard Rehfeld writes:

The emergence of the phenomenon of lawmaking . . . signifies the *invention* [emphasis added] of the art of *making* justice and injustice. Until then, people did not presume to create justice, but only to apply the justice that had always existed. Considered in this light, the invention of lawmaking may be the most fateful discovery ever made — more fateful than the discovery of fire or gunpowder — because it has placed the destiny of man more firmly in his hand than all the others.³

From Law-Finding to Lawmaking: Positive Law

The concept that norms of conduct might be established by lawmaking appeared briefly in later Greek and Roman history, but became dormant until the rediscovery of codified Roman law at the beginning of the modern era and the accompanying rise of absolute monarchy. “The proposition that all law is the command of a sovereign is a postulate engendered by the democratic ideology of the French Revolution that all law had to emanate from the duly elected representatives of the people. It is not, however, a true description of reality, least of all in the countries of the Anglo-Saxon Common Law.”⁴ As the great nineteenth-century Roman historian Theodor Mommsen pointed out, “Even in conjunction with the citizenry, the [Roman] magistrate by no means had a free hand with respect to the existing order of justice. On the contrary, this order was acknowledged to be not the product of the *comitia* [assemblies], nor to be dependent on their pleasure, but rather as eternal and unchangeable.”⁵

Two major intellectual currents contributed to the declining interest in revealed and natural law and to the emphasis on positive law: critical philosophy and Idealism on the one hand, and the evolutionary world view with its historical and cultural relativism on the other. Immanuel Kant, as we have noted, presupposed that all moral concepts have their basis in *a priori* thought and can be derived from reason alone without reference to experience. Consequently, Kantian ethics is every bit as absolute and universalistic in its claims as is traditional natural law theory. However, it is not based on a universal human “common sense,” but on a very distinctive analysis of thought, peculiar to Kantians alone. In consequence, Kant's

THE HUMAN LIFE REVIEW

defense of universal principles in reality undermined them. By the mid-nineteenth century, the trend was to abandon the idea of absolute, eternal principles of justice, whether revealed by God, learned inductively from observation of the natural order, or deduced from supposedly absolute principles of thought. This legal relativism paralleled the evolutionary view which Charles Darwin was introducing; in fact, Darwin's theory was preceded by numerous theories of the evolution of society and of law. After Darwin biological evolution came to be seen almost as a proof of social evolution, although the latter theory is older. As a consequence, the characteristic features of particular cultures, including their laws, came to be seen relativistically, as stages in an ongoing evolutionary process. Legal scholarship centered largely on the analysis of actual, man-made laws as illustrations of the accommodation process by which social evolution is produced. It followed that laws derived their validity not from any supposed conformity with an eternal or natural law, but simply from the will of the sovereign, whether *princeps* or *plebs*. More importantly, the mere passage of time automatically makes old law invalid. The concept of an "outmoded" or obsolete law is possible only when law-making has totally replaced law-finding.

The inevitable consequence of replacing universalistic eternal law with relativistic man-made law is the concept that right rises from, or is created by, whatever rules society establishes. Right is no longer an eternal principle, but a social convention. One of the greatest luminaries of American law, Oliver Wendell Holmes, was quite explicit in holding that even sanctions against murder are simply a matter of social convention, not of an eternal natural or divine Law.⁶ This is the principle that law is its own standard, in German, *Gesetz ist Gesetz* (Law is Law). This strange view of law was considered "scientific" and "realistic" in the light of Darwinistic evolution. Such crass legal relativism may have appeared innocuous in American society as it then existed (pervaded if not ruled by biblical ethics and a generally accepted moral consensus). In practice, natural and revealed law still exerted influence, though in legal theory, positive law (exemplified by Holmes) was extolled as the essence of law. Sir Norman Anderson describes the British-American attitude thus:

Here it is notorious that most jurists in England or America have little time for theories of "natural law" and concentrate almost exclusively on the positive law of statutory legislation, judicial decisions, and such customary practice as is regarded as obligatory.

But this positivistic attitude is tolerable only when a generally acceptable level of justice prevails. When it breaks down — as happened in World War II — men must seek firmer ground than

positive law. As Aristotle had already pointed out, "It is impossible for a voted resolution to be a universal rule."⁸ When judgment is required across national and political boundaries, clearly no "voted resolution" can be an adequate standard. Anderson explains where and why the interest in positive law can prevail, and when it must yield to the quest for something stronger and more ultimate:

Indeed, this attitude of mind seems to be characteristic of lawyers who live under a constitution which is accepted as basically just, or in a country and an era in which the "rule of law" normally prevails. But it seems to be equally true that when the rule of law is effectively suppressed, and when a despotic government proceeds to enact and enforce laws which are both cruel and oppressive, men's minds instinctively turn to a law of eternal validity by reference to which all positive law may be evaluated and judged.⁹

This is precisely what happened during and after World War II. The war was launched by governments legally established and acting "legally," in accordance with their own positive laws. The obedience of their citizens was required by "the law of the land"; disobedience would have been illegal. The post-war attempt, by means of war crimes trials, to call individuals to account for deeds, however atrocious-seeming, performed in accordance with the law of the land, clearly represents an appeal to a higher standard, to a universally binding Law that supersedes all man-made law. For the British and American participants, this represented a break with their own preoccupation with positive law, a break made necessary by the inescapable enormity of the crimes with which the tribunals sought to deal. When we are faced with atrocities that are formally legal (*Gesetz ist Gesetz*), we are inevitably thrown back upon a "law of eternal validity, by reference to which a positive law may be evaluated and judged." In late twentieth-century America, minds are indeed instinctively turning to such a law. Those who contest the *status quo* on abortion (anti-abortionists) and on homosexual rights ("gay rights" advocates) are demanding a searching examination of American positive law in the light of a higher law. The primary question is not what the verdict of such higher law will be, but whether such a critical examination will be tolerated by our present legal and judicial authorities. Clearly the legal establishment in our country — as Sir Norman indicates — resists such a searching critique of positive law. If this resistance is ultimately successful, then indeed we are subscribing to the maxim of positive law, *Gesetz ist Gesetz*. Those hanged at Nuremberg then appear the victims of a miscarriage of justice — for all that they did was legal. They deserve posthumous pardons and expiatory monuments erected in their memory. Anyone who is unwilling to accept this posthumous

rehabilitation of war criminals should acknowledge that the war crimes trials presuppose the existence of a natural law, “written in the heart” (Romans 2:14). If no such law exists, the Nazi bosses should never have been tried. If such a law exists — as I am persuaded it does — then even the greatest of positivistic law-making bodies, the United States Supreme Court, and its decisions must be subject to review and possible correction in the light of this higher law.

The Supreme Court ostensibly bases its decisions on “constitutional principles,” i.e. on positive law. In reality, however, every competent observer recognizes that in many decisions of fundamental significance, the Court first attempts to discover where justice lies, and then seeks a “constitutional principle” to justify its discovery. This is clearly what happened in two of the most sweeping decisions of the third quarter of our century, *Brown v. Board of Education*, 1954, and *Roe v. Wade*, 1973.

Although many of those who call *Roe v. Wade* an evil decision would accept *Brown v. Board of Education* as good, in both cases the Court ultimately appealed not to existing positive law (the Constitution) but to its own concepts of what is fundamentally right (natural law?). Procedurally, both decisions were more than a trifle fraudulent, as both ostensibly appealed to positive law (“constitutional principles”) to cover something that in fact it did not at the time cover. Procedurally, both decisions created laws where previously none had existed. Morally, *Brown v. Board of Education* is defensible because it placed true equality above formal equality (“separate but equal”). *Roe v. Wade* is not merely procedurally bad, but morally bad as well because it violated good procedure not in order to recognize the claims of a higher law, but to silence them. It placed a derivative, formal right, the right to privacy — not even explicit in the Constitution — above the fundamental, natural-law right to life.¹⁰

Is there a “law of eternal validity,” as the War Crimes Trials explicitly presupposed? Or is the arbitrary sovereign will, i.e. positive law, the ultimate and only standard, as Associate Justice Blackmun appears to believe in *Roe v. Wade*? In the long run, our society cannot live with the ultimate primacy of positive law, for — as human experience through the centuries has shown — positive law can be atrociously destructive of all human dignity, of all values, indeed of life itself. Unfortunately, current American practice seems to treat a rather brief piece of positive law, the United States Constitution, as though it were a law of eternal validity. This legal fiction may have worked well enough in the past, when positive laws of our country were by and large interpreted in the light of widely-perceived eternal

principles of justice (as, despite a number of problems, in *Brown v. Board of Education*). It becomes very dangerous when the positive laws are treated as those eternal principles — or that which establishes them.

The confusion between the positive law of the Constitution and eternal principles of justice is illustrated by the mystifying argument of Civil Rights Commissioner Arthur Flemming that amending the Constitution by the process provided in the Constitution would violate the Constitution. As the 1975 report of the United States Commission on Civil Rights, *Constitutional Implications of the Right to Limit Childbearing* appears to imply, and Commissioner Flemming explicitly articulated in conversations with the late Professor David W. Louisell and myself, the Constitution, once subjected to interpretation by the Supreme Court, is unamendable. Or, to quote the Commissioner's argument, once a right has been "discovered" by the Court in the Constitution — the right to privacy, in this case — it may not be abrogated by the insertion of any other right (e.g. the right to life) into the Constitution by the people. This is reminiscent of the Roman view that the law is eternal, and not made by human beings, but discovered. The difference is that this seemingly immutable eternal Law is in fact a written document of human positive law that explicitly claims the will of the people as its authority. To argue as Flemming does makes sense only if the Constitution, as currently understood and without substantial modification by new amendments, already represents a law of eternal validity. If the Constitution is perceived as a mere positive law, it can logically enough be altered by man. If it is a human formulation of what has been discovered to be *jus naturale*, natural law, then, being human, it will necessarily be incomplete and imperfect, and not merely may but ought to be continually reexamined in the light of reason and experience. To say that it can neither be examined and judged by any higher standard of revealed or natural law nor — at least in the case of abortion — be changed by the will of the lawmakers, is really to say that the law is responsive neither to reason nor to the will of the people but solely to the preferences of those possessing the actual power to promulgate it. Under such circumstances positive law becomes not the expression of justice but its extinction.

To say that the Constitution is positive law pure and simple, that it represents the consensus of the popular will and nothing more, may sound realistic and sophisticated; nevertheless, it is potentially destructive of the most cherished American values. Let us imagine the introduction — perfectly proper under the Constitution — of an

amendment abolishing the present Fifth Amendment and *requiring* those summoned to court to incriminate themselves if guilty (or even whether guilty or not). Such a proposal would be hotly rejected, not as unconstitutional — which it could not be, if “constitutionally” adopted — but as *wrong*. Yet how could it be wrong if not contrary to the will of the people?

No matter what the people’s wishes, such an amendment would be an abomination in the eyes of all but the most consistent defenders of positive law. It would be wrong in itself, because it is contrary to the nature of man and to principles of justice that transcend the positive law of the Constitution. That the Supreme Court in reality frequently appeals to principles behind the Constitution everyone acknowledges. However, as long as we maintain the fiction that no such appeal is made, the identity of these principles remains clouded in the darkest obscurity. In *Roe v. Wade*, the enlightened monotheistic ethic of the Hippocratic Oath as well as our culturally predominant Judeo-Christian tradition were explicitly rejected, but what took their place was not stated. The fiction that it was the positive law of the Constitution itself may have convinced the justices of the majority, but this argument clearly does not persuade abortion advocates, who defend *Roe v. Wade* not because it reflects “constitutional principles” but because it reflects their *own* principles. Otherwise it would make no sense to oppose an anti-abortion amendment, which if enacted would by definition reflect the popular will and hence the highest standard to which positive law can appeal.

When a celebrated evangelist punctuates his messages with the claim, “The Bible says . . .,” he is clearly appealing to something more than a mere printed book. When a noted defender of unrestricted abortion freedom and government financing of abortions punctuates *his* addresses with the slogan “The Court has decreed . . .,” in the very nature of the thing he is appealing to something that he considers higher and more fundamental than the mere positive opinion of seven men. To say “The Court has decreed . . .” at best tells us what the law currently *is*, not what it ought to be or will be. To permit no moral appeal beyond the Court’s decree is the moral equivalent of “*Gesetz ist Gesetz*.” It replaces fidelity to justice with adherence to regulations; like “*Gesetz ist Gesetz*,” it has the potential to “justify” anything that the “lawmaker,” be it a dictator or the sovereign people, may choose to do. If our society is willing to abide by what “the Court has decreed” without reference to any superior standard or norm we may momentarily have “better” rules than Nazi Germany did, but there will be no way to ensure this, since the rules themselves will be the ultimate standard.

Archibald Cox has faulted the Supreme Court in *Roe v. Wade* for failing to confront the fundamental issue at stake in abortion, namely the sanctity of human life. If we recognize the “sanctity” or “inviolability” of human life in any sense, this must be in the light of divine or natural law. Man cannot give sanctity to his own life by legislation, for if so, another legislature could just as easily withdraw it. *Roe v. Wade* exhibits three fateful faults: scientific, moral, and procedural. It exhibits the scientific fault of professing ignorance that human life exists where every scientist knows that it does. It exhibits the moral fault of seeking only formal correctness, rather than justice. And finally — as Cox charges — it commits the procedural fault of failing to deal with the most substantial question at stake, namely, the value of human life. The refusal to face these three challenges means that the Court, at least by implication, *is* saying “*Gesetz ist Gesetz*”; it is claiming to make justice rather than to determine whether certain actions accord with a justice higher than any merely human court.

The principle “*Gesetz ist Gesetz*” has its American equivalent in the slogan, “It’s the law of the land.” As an operating maxim, this slogan may simply mean that the law is in effect throughout the land and should be obeyed until amended. Even this view is foreign to both Christian and common law tradition, which assert that a law contrary to natural laws is not merely bad, but not a law at all. The familiar absolutization of the “law of the land” seems to go farther, and to imply that the law and the law alone creates what is good.

For centuries philosophers and theologians have questioned whether God wills good because it is good (Thomas Aquinas) or whether what He wills is good because He wills it (William of Occam). The Occamists held that there exists nothing higher than God by which he can be judged; hence, His will is the sole standard of what is good. Most theologians have followed Aquinas, who was unwilling to imagine even God himself arbitrarily creating good by divine fiat without regard to any natural order of values. If most thinkers were unwilling to ascribe even to God the power arbitrarily to establish the good by decree, to delegate such transcendent power to a human agency seems not only foolish but idolatrous. And, in fact, no one consistently does so. Some may profess to do it, but only in the specific case in which they are happy with that agency’s decision. Otherwise an appeal is inevitably made to a higher standard.

If the Supreme Court, in *Roe v. Wade*, had found for the personhood of the unborn child, we can be certain that pro-abortionists would be appealing *against* the “law of the land” to the “natural rights” of woman. The real question is not whether there is any standard other than human decree, but what that standard is and

how it should be applied. This question cannot be escaped, but it can be ignored; unless it is answered, law will degenerate into nothing but expression of the current thinking of those in power.

Momentous as the *effects* of *Roe v. Wade* have already been and will continue to be, more momentous still is the implied prejudgment on which it rests: that human beings, and especially the Supreme Court, may make whatever laws they wish, and by so making them make justice itself. We may well say about *Roe v. Wade* what Robert Nisbet wrote a quarter-century ago:

The formal, overt judgments of liberalism have rested, historically, not merely upon processes of conscious reason and verification, but upon certain prejudgments that have seldom been drawn up for critical analysis until the most recent times. And these prejudgments have, in turn, been closely linked with a set of social relationships within which their symbolic fires have been constantly kept lighted through all the normal processes of work, function, and belief. It is the disruption of the relationship among judgment, prejudgment, and social context that confronts us at the present time [1953!] — a disruption caused in very large part, as I believe, by the cultural mechanization and sterilization that have accompanied modern centralization of power.¹¹

In short, the Court and the American public generally are failing to recognize the relationship between a particular judgment (*Roe v. Wade*) and the prejudgment that positive law is ultimate. If this lack of recognition — or disruption, as Nisbet calls it — results from mechanization and sterilization of values, we can only predict still further mechanization and sterilization, in which human beings, far from decreeing unto themselves sanctity, will make themselves the lawful — in the precise sense of the word — prey of centralized power.

Another Example: “Civil Rights” for Homosexuals

The fact that ultimate moral questions cannot be resolved to the general satisfaction on the basis of positive law alone is shown by the question of civil rights for openly-practicing homosexuals. A number of critical questions arise in connection with both the question and the response of the media, government bodies, and the general public. The claim of homosexuals and some of their patrons to special legal protection rests in part on the fallacy — or the deliberate fiction — that the primary fact to be considered about practicing homosexuals is that they constitute a minority, and more particularly a disadvantaged and oppressed minority. The following syllogism results:

Major Premise: Society should protect the rights of minorities.

Minor Premise: Homosexuals are a minority.

Conclusion: Therefore society should protect the rights of homosexuals.

The fallacy in this syllogism lies in the major premise, that society should protect the rights of minorities, if its terms are not more clearly defined. Are “rights” natural rights or positive law rights? If they are only positive law rights, then the question concerns only the means of empowering the lawmaker to make the desired law: it is a question of power, nothing more.

When the Dade County Board of Commissioners enacted a homosexual rights ordinance early in 1977, the majority apparently assumed popular support, and reacted with indifference to appeals to the Bible and natural law by opponents of the ordinance. However, in June of that year a popular referendum overturned the ordinance. Need we add that as soon as this happened, the referendum was challenged, and not, of course, on positive law grounds (although one positive law effort to reinstate the ordinance was attempted, unsuccessfully). Instead, the advocates of homosexual civil rights keep returning to the theme that “rights” are being denied, and that this constitutes a “wrong” that requires redress. But whence are these “rights” derived? Certainly not from any source of divine revelation, especially not the one that has culturally normative validity in our society, the Bible. From “natural law”? Only if one argues that whatever can occur in nature is therefore permissible — which proves too much, as murder and other violent deeds also occur in nature. From “positive law”? But positive law, via the Dade County referendum, *denies* precisely what the homosexual activists are demanding.

If I may venture a guess, I suspect that what is at stake here is a kind of selective canonization of positive law. When the Constitution was adopted in 1789, the Founding Fathers thought, like Julius Paulus, that they were deriving their new rule from eternal principles. However, since America no longer subscribes to such a natural-law view, we today accept the Constitution as “the will of the people” — in other words, as positive law. Nevertheless, in an effort to resolve fundamental issues, such as those involving abortion and homosexuality, the judges do *not* consult the will of the people — expressed negatively on abortion in Michigan and North Dakota referenda in 1972 and on homosexual rights in Dade County in 1977 and 1978. Instead, they seek “constitutional principles.” When the people have already spoken or can be consulted by a referendum, to appeal to “principles” to reverse their decision is clearly to appeal to a higher standard — and thus to a form of natural law. Calling this standard “constitutional,” i.e. positive law, is deceptive and thoroughly muddles the issue, for if “constitutional” merely meant positive law, the logical thing to do would be to consult the lawmaker (i.e. the legislature and people) by resolution or referendum.

THE HUMAN LIFE REVIEW

Implications

Both our lawmakers and our judges, as well as our executive, sedulously avoid analyzing or defining the law that is behind positive law, although — as we have seen — no one could be content with pure positive law in an unjust and violent world. This now traditional vagueness — a tribute to what I have elsewhere called the “double vision” of American political theory¹² — is simply inadequate to deal with fundamental moral questions touching the very heart of human personhood, as in abortion, and of the family and human society, as in homosexuality. Unfortunately for the clarity and probable outcome of the debate, the greatest source of our wisdom in the discussion of values, our Judeo-Christian heritage, is increasingly excluded by definition, because it is religious in origin. This exclusion has been not unwisely called sterilization:

Ours is a society characterized increasingly, as we have seen, by the sterilization of group differences — local, class regional, and associative — which lie outside the administrative framework of the State.¹³

The certain outcome of sterilization is, after one generation, extinction. I believe that it is not unfair to say that the sterilization of the greatest source of value definition in America, biblical religion, will result in the extinction, within the foreseeable future, of all that people of our generation are prepared to recognize as valuable: happiness, liberty, and even life.

NOTES

1. Julius Paulus, *Digests* 50:17:1.
2. F. A. Hayek, *Law, Legislation, and Liberty. Vol. I, Rules and Order* (Chicago: University of Chicago, 1973), p. 72.
3. Bernard Rehfeld, *Die Wurzeln des Rechts* (Berlin, 1951), p. 67.
4. Max Rheinstein, “Process and Change in the Cultural Spectrum . . .” in C. H. Kraeling and R. M. Adams, eds., *City Invincible* (Chicago: University of Chicago, 1960), p. 117.
5. Theodor Mommsen, *Abriss des römischen Staatsrechts* (Leipzig, 1893), p. 319.
6. Cited by Erik von Kuehnelt-Leddihn, “The Problem of Homosexuality, a Christian View,” *The Human Life Review*, Vol. IV, No. 2, Spring 1978, p. 68. C. f. Oliver Wendell Holmes in *American Law Review*, Vol. 5, 1871, p. 534.
7. J. N. D. Anderson, *Morality, Law, and Grace* (London: Tyndale, and Downers Grove: Inter-Varsity, 1973), pp. 64-65.
8. Aristotle, *Politics*, IV, iv, 4: 129a.
9. Anderson, *op. cit.*, p. 65.
10. The formal similarity between *Brown* and *Roe* as well as the egregious failure of the Supreme Court to deal with the fundamental moral issue in *Roe* is brilliantly set forth by Archibald Cox in *The Role of the Supreme Court in American Government* (New York: Oxford, 1976), esp. p. 52.
11. Robert A. Nisbet, *The Quest for Community* (New York: Oxford, 1953), p. 222.
12. Harold O. J. Brown, *The Reconstruction of the Republic* (New York: Arlington, 1977).
13. Nisbet, *op. cit.*, p. 255.

The Liberty to Stand Aloof

Germain Grisez and Joseph M. Boyle, Jr.

ALTHOUGH THE enactment of a human life amendment along the lines that we or others have proposed¹ might be difficult, the concept of such an amendment is easy in comparison with the concept of an amendment to remedy the infringements and threatened infringements on liberty which we have noticed. The difficulty here, primarily, is that the Supreme Court of the United States, which has itself determined that secular humanism and other non-theistic world views are religious, tends to treat the secular humanist view with its consequentialist ethic as if this view merely gave neutral form to the common principles of American society. In doing this — for example in *Roe v. Wade* — the Court, as we have argued, is establishing a religion and judging according to its sectarian tenets.

Leo Pfeffer, a professor of political science at Long Island University, serves as special counsel to the American Jewish Congress. He is a noted practitioner of constitutional law, especially in the domain of church-state relationships, and has argued many cases successfully before the United States Supreme Court, urging separation between religion and government, the exclusion of religion from the public schools, and the denial of public funds to non-public schools. In 1975 Pfeffer published a book concerning church-state relationships and the Court as referee in these relationships. This work is remarkable because of what it concedes from the point of view of a person who is both knowledgeable and friendly — or, at least, not hostile — to the direction which the Supreme Court has taken in recent years.

[We have pointed out that] government interests in the field of birth control and abortion go beyond a permissive attitude taken out of respect for liberty — invoked by the Court under the title of “privacy.” In fact, the government has extensively promoted birth control, both at home and abroad; abortion also in various ways has become an instrumentality of public policy to deal with the welfare

Germain Grisez is the author of *Abortion: the Myths, the Realities, and the Arguments* which, although published three years before the U.S. Supreme Court's 1973 *Abortion Cases*, remains a definitive study of the abortion issue. **Joseph M. Boyle, Jr.** is an assistant professor of philosophy at the College of St. Thomas in Minnesota. This article is excerpted from the forthcoming book *Life and Death with Liberty and Justice: a Contribution to the Euthanasia Debate*, which will be published this year by the University of Notre Dame Press (reprinted with permission, © The University of Notre Dame Press).

THE HUMAN LIFE REVIEW

problem. Euthanasia already is seen by some as an extension of this approach to human problems.

Pfeffer offers a similar analysis of the Court's decisions concerning contraception and abortion.

The anti-contraception laws were not a real obstacle to the liberty of persons who wished to use contraception. But they were an obstacle to a state policy encouraging contraception. Pfeffer notes:

The middle income and the affluent, married and unmarried, use contraceptives; the poor have babies. When the poor, often racial minorities, are on the welfare rolls, taxpaying Americans rebel and expect the state to do something about it.²

Other solutions being unacceptable, the practical way to limit the costs of public welfare programs was to get the poor to control births. Although the national government already was taking this approach in foreign aid programs, the states were obstructed by their own laws against contraception. Pfeffer speculates that the reason the Supreme Court struck down these laws as unconstitutional "may lie in the fact that the justices recognized the need to get the laws off the books" so that either the states themselves or private agencies could openly promote birth control. Pfeffer then adds a remarkable statement, which agrees entirely with the views of the most severe critics of the Court's decisions concerning abortion:

In this respect the nine justices on the Supreme Court, being immune to political reprisal since they serve for life, may be performing a significant though quite controversial function; they may be compelling the people to accept what the judges think is good for them but which they would not accept from elected legislators.³

In other words, the Court is legislating, and in legislating is imposing on the people the Justices' own conceptions of what is good and right. Pfeffer does not observe one important implication: that in so acting the Court is usurping a power which does not rightfully belong to it to place itself above the law, and infringe upon the liberty of the people.

Pfeffer extends his explanation of the Court's decisions from birth control to abortion. After mentioning other reasons why the Court may have legalized abortion, he adds:

All this is true, yet it is probable that a major factor here, as in the case of contraceptive birth control, is the taxpayers' revolt against rising welfare rolls and costs. Legalization of contraception not having worked to an acceptable degree, and other measures . . . proving too Draconian for public acceptance, permissible abortion, encouraged by the state, is the next logical step.⁴

The Court's first dealing with the abortion laws, in *United States v. Vuitch*, was inconclusive, because this decision allowed the laws to

remain in force, although it limited their effectiveness. Apart from other inadequacies, Pfeffer notes,

. . . and perhaps more important, the decision did not meet the needs of the poor who receive their medical services from municipal and county hospitals and clinics. So long as an anti-abortion law was in the State's criminal code, the physicians and nurses were not likely to perform an abortion or even counsel one where the only reason for it was that the mother was a welfare recipient with seven children and no husband.⁵

Again, after summarizing the argumentation in *Roe v. Wade* and *Doe v. Bolton*, Pfeffer says that it "is difficult to escape the conclusion that nonlegal factors significantly influenced the decisions: our socioeconomic situation calls for the availability of abortion as a birth-prevention technique . . ."; but, Pfeffer adds, the legislatures were unable to act to repeal the abortion laws because of the "image of Catholic political power."

Actually, as everyone involved in the matter knows, the opposition to repeal was broadly based, and by 1973 it was beginning to become effective in many places where the Catholic contribution was a negligible factor. However that may be, Pfeffer concludes that "the Court had to do what had to be done and did it." He concludes the discussion on abortion with a parenthetical note regarding a 1973 New York City study which indicated that abortion had kept 24,000 children off the city's welfare rolls.⁶

Subsequently, in considering the efforts to repeal anti-homosexuality laws, Pfeffer, reiterating his explanation of the contraception and abortion decisions, says that in the case of homosexuality those who advocate decriminalization "lack the most potent motivating factor possessed by the abortion reform movement, the economic factor. Homosexuality is not a practical or effective means of curbing the fruitfulness of welfare recipients."⁷

On June 20, 1977, the United States Supreme Court decided three cases related to the institutionalization of abortion. A whole series of lower court decisions had compelled the states to fund abortion under Medicaid and public hospitals to provide facilities for performing abortions.⁸ Two of the 1977 cases concerned a Pennsylvania statute and a Connecticut Welfare Department regulation which limited state payment for abortion to those cases certified to involve medical necessity, thus to exclude payment for elective, nontherapeutic abortions.⁹ The third concerned a directive by the mayor of St. Louis prohibiting abortions in public hospitals in the city except when there was a threat of serious physiological — not merely psychological — injury or death to the mother.¹⁰

The lower federal court decisions would have compelled

THE HUMAN LIFE REVIEW

Pennsylvania and Connecticut to remove their restrictions on funding and St. Louis to facilitate abortions in its city hospitals. The United States Supreme Court reversed these holdings to permit governments at the various levels to settle through the political process to what extent abortion would be carried out as a state action. Thus, the Court recognized the distinction between the liberty of persons to have and to do abortions without criminal sanctions and the supposed right of such persons to the cooperation of the public at large, including those who consider abortion to be the killing of unborn persons and who for that reason find it utterly repugnant. In other words, the Court refrained from holding that the Constitution *requires* everyone to participate in the killing of the unborn.

However, the Court did not reach its conclusions on the basis of the liberty of those who consider abortion abhorrent to stand aloof from such killing. Rather, the Court merely denied that equal protection of the laws *requires* that the public facilitate abortion to the same extent that it facilitates childbirth. On the Court's analysis, Pennsylvania, Connecticut, and the city of St. Louis had adopted a policy favoring childbirth. The Court held that the public could adopt such a policy without violating the Constitution, but the Court also said that nothing prohibited the adoption of a public policy funding and facilitating abortion.¹¹

Those who oppose both abortion and the drafting into cooperation with it of the public at large could take some satisfaction in the Court's refusal to impose the institutionalization of abortion as a matter of constitutional obligation on every jurisdiction in the United States.

However, despite their disappointment and frustration, proponents of abortion as an instrument of public policy did not lose much of what they gained by the abortion decisions of 1973. In many places, abortion has become institutionalized and what has been done will not be undone. Furthermore, private agencies, such as Planned Parenthood, can devote much of their resources to funding abortion and seek increased governmental support to replace such funds diverted from their other activities.

At the same time, the liberty of persons to have and to perform abortions is recognized and protected by the Court, while the liberty of others to stand aloof is ignored. Had the Court carried through an adequate and consistent libertarian treatment of the issues, even without reversing its 1973 decisions, it should have held that while the state cannot interfere with abortion, neither can it facilitate it. The former violates the liberty the Court has ascribed to pregnant women and physicians, but the latter, in the absence of an overriding public

necessity, violates the liberty to stand aloof of all who consider abortion abhorrent and who in no way consent to its inclusion in the activities conducted by a government which must derive its just powers from the consent of the governed.

One of the most interesting aspects of the 1977 decisions is that they contain explicit statements in the dissenting opinions of Justices Blackmun, Brennan, and Marshall which support Pfeffer's interpretation of the 1973 abortion decisions.

Brennan's remarks are the least telling of the three. He merely states that the 1977 decisions "can only result as a practical matter in forcing penniless pregnant women to have children they would not have borne if the State had not weighted the scales to make their choice to have abortions substantially more onerous."¹² Blackmun in a brief dissent denies the distinction between a liberty and a right to have an abortion, speaks of the plight of poor women, and attacks the people of St. Louis for electing a mayor who ran on a platform promising to close the city's hospitals to nontherapeutic abortion. The people of St. Louis, according to Blackmun, "impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-hindmost." The Court had argued that jurisdictions have their own priorities and must be allowed to spend limited funds in accord with them. To this argument Blackmun replies:

The Court's financial argument, of course, is specious. To be sure, welfare funds are limited and welfare must be spread perhaps as best meets the community's concept of its needs. But the cost of a nontherapeutic abortion is far less than the cost of maternity care and delivery, and holds no comparison whatsoever with the welfare costs that will burden the State for the new indigents and their support in the long, long years ahead.

Blackmun concludes his dissenting opinion by noting the existence of another world "out there," thus to appeal to the public policy considerations which prevailed over the principles of legality in the 1973 decisions. He says: "And so the cancer of poverty will continue to grow."¹³

Perhaps it is not surprising that Blackmun accepts as a strategy for a public war on poverty the elimination of this cancer by the elimination of the poor who are its victims. Of course, this rationale is terrifying when one thinks of its application to the problems which we have been examining, because all of the human misery which is involved in conditions which some regard as constituting a poor quality of life can finally be eliminated only in one way, by killing the miserable and afflicted. This one perfect and final solution also has

THE HUMAN LIFE REVIEW

the essential cost-benefit feature which Blackmun points out in respect to abortion.

What is surprising, however, is that Marshall is no less clear on his views:

The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many thousands of unwanted minority and mixed race children now spend blighted lives in foster homes, orphanages, and "reform" schools. Many children of the poor will sadly attend second-rate segregated schools. And opposition remains strong against increasing AFDC benefits for impoverished mothers and children, so that there is little chance for the children to grow up in a decent environment. I am appalled at the ethical bankruptcy of those who preach a "right to life" that means, under present social policies, a bare existence in utter misery for so many poor women and their children [citations omitted].³⁴

Marshall obviously *accepts* the evils he describes as inevitable and unalterable. He sees them as evils, but fails to see them as challenges to be overcome. Poor black people who exist in utter misery are to be saved from misery by being killed before birth.

Someone who did not know otherwise might suppose that Marshall was an unreconstructed racist. One who does know better must suspect that while the United States Supreme Court is located only a few blocks from the Washington, D.C. ghetto, a man who has achieved the status of a member of the Court is so far alienated from the people of the ghetto that he can burn with hatred at the evils from which the people suffer without ever feeling true compassion for the people who suffer these evils, so that he has embraced the solution of the upper-middle class establishment, which has set itself against the social change necessary if America is to be transformed into a good and just society. Or perhaps Marshall speaks from some dark depth of depression, disillusion, and despair, a melancholy which can no longer believe that children who are scorned can yet receive the respect they deserve, that children whose lives are blighted can yet know the love of which they are deprived, that children who attend second-rate segregated schools can yet enjoy the educational opportunities to which they are entitled, that children of poverty can yet be helped to grow in a minimally decent environment, that those who live a bare existence in utter misery need not even now be deprived of that bare existence to be redeemed from that utter misery.

Whatever Marshall's personal views, his dissenting statement together with the statements of the others provide fresh evidence that Pfeffer's explanation of the 1973 decisions was a sound hypothesis. The Court has been "compelling the people to accept what the judges think is good for them." Fortunately, in this instance the Chief Justice and Justices Powell and Stewart were unwilling to impose public

support of abortion to the extent that Brennan, Marshall, and Blackmun would have imposed such support. However, Blackmun's resentment against the legitimate policy decision of the people of St. Louis, who elected a mayor committed to excluding abortion from the city's hospitals, means that citizens cannot refuse to cooperate in killing the children of needy minorities, because this refusal amounts to imposing the people's "own concepts of the socially desirable, the publicly acceptable, and the morally sound."

Blackmun obviously thinks that only the elite who sit at the bench of the high Court, far above the mass of the people who live on the land below, are entitled to impose their own concepts of the socially desirable, the publicly acceptable, and the morally sound. And from the Olympus of the Court, these few men have the power to hand down their personal convictions, shaped by a secular humanist world view with its consequentialist ethic, not merely as advice, not merely as ordinary law, but as constitutional requirements — as the supreme and very difficult to amend law of the land.

It is hard to know how best to proceed in trying to disestablish the world view which the Court is effectively establishing. Congress and the various States are forbidden to establish a religion, but the Supreme Court cannot be prevented from doing so while it pretends that the world view it accepts is no more than the commonly held principles of liberty and justice which constitute the minimal public morality without which government would lack legitimacy. Nevertheless, a constitutional amendment would make clear at least that secular humanism and other non-theistic world views are on a par with traditional religions, and could direct the Court to avoid confusing the moral convictions of its own membership with the minimal public morality.

Further . . . a truly pluralistic society must avoid so far as possible making into public activities in which all must participate modes of action to which many citizens take profound conscientious objection. In some cases, society must act despite the conscientious objections of a minority of its members. But such action is only justifiable if there is a substantial public purpose, recognized as such even by the objecting minority, to which the mode of action they find abhorrent seems to be a suitable and even necessary means, and if the adoption of this mode of action is by a general consensus reached by the majority despite its awareness of and respect for the views of the dissenting minority.

These conditions were fulfilled by World War II, to which strict pacifists objected on grounds of conscience. They were hardly clearly fulfilled at any stage of the Vietnam war, and clearly were not fulfilled by the end of 1966. The conditions likewise clearly are not fulfilled by

THE HUMAN LIFE REVIEW

the use of abortion to eliminate misery by eliminating the miserable. Yet abortion is more or less extensively done by state action throughout the United States.¹⁵ And there is every reason to expect that euthanasia will deeply involve public action, primarily to make it safe for those who do not wish to be killed and who are powerful enough to ensure that the state will protect them, secondarily to make it effective alongside contraception and abortion as an instrument for solving the problems of those who live miserably in public institutions at great expense to productive taxpaying citizens.

Thus, it seems to us, there is a need for constitutional recognition of the liberty to stand aloof, a declaration of the narrow conditions under which the state should proceed with forms of action to which some citizens conscientiously object, and a provision for the protection of such citizens from any more intimate involvement than necessary in the actions they find abhorrent. The diminishing foundation of consensus about goods other than liberty and justice themselves makes increasingly necessary provision for conscientious objection if there is to be any possibility of maintaining social unity with a government having even a plausible appearance of legitimacy.

NOTES

1. See James L. Buckley, "A Human Life Amendment," *The Human Life Review*, Vol. I, No. 1, Winter 1975, pp. 7-20; John T. Noonan, Jr., "Why a Constitutional Amendment?" *The Human Life Review*, Vol. I, No. 1, Winter 1975, pp. 26-43; Robert M. Byrn, "A Human Life Amendment: What Would It Mean?" *The Human Life Review*, Vol. I, No. 2, Spring 1975, pp. 50-76 and 102-103; David W. Louisell, "The Burdick Proposal: A Life-Support Amendment," *The Human Life Review*, Vol. I, No. 4, Fall 1975, pp. 9-16; Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *The Human Life Review*, Vol. II, No. 4, Fall 1976, pp. 30-108; Jesse Helms, "A Human Life Amendment," *The Human Life Review*, Vol. III, No. 2, Spring 1977, pp. 7-42.
2. Leo Pfeffer, *God, Caesar, and the Constitution: The Court as Referee of Church-State Confrontation* (Boston: Beacon Press, 1975), p. 96.
3. *Ibid.*, p. 97.
4. *Ibid.*, pp. 99-100.
5. *Ibid.*, p. 101.
6. *Ibid.*, p. 104.
7. *Ibid.*, p. 111.
8. Jane Finn, "State Limitations upon the Availability and Accessibility of Abortions after *Wade* and *Bolton*," *Kansas Law Review*, 25 (1976), pp. 87-107.
9. *Beal v. Doe*, 97 S.Ct. 2366 (1977), the Pennsylvania case, was not decided on constitutional grounds; *Maher v. Roe*, 97 S.Ct. 2376 (1977), the Connecticut case, was.
10. *Poelker v. Doe*, 97 S.Ct. 2391 (1977).
11. Cf. John T. Noonan, Jr., "A Half-Step Forward: The Justices Retreat on Abortion," *The Human Life Review*, Vol. III, No. 4, Fall 1977, pp. 11-18; Robert M. Byrn, "Which Way for Judicial Imperialism?" *The Human Life Review*, Vol. III, No. 4, Fall 1977, pp. 19-35.
12. Brennan, dissenting, in *Beal v. Doe*, at 2376.
13. Blackmun, joined by Brennan and Marshall, dissenting in *Beal v. Doe*, *Maher v. Roe*, and *Poelker v. Doe*, at 2398-2399.
14. Marshall, dissenting in *Beal v. Doe*, *Maher v. Roe*, and *Poelker v. Doe*, at 2395-2396.
15. Those urging the institutionalization of abortion have argued for an extremely inclusive concept of

GERMAIN GRISEZ AND JOSEPH M. BOYLE, JR.

state action, so that the acts of any private entity which receives public funding would be state action. See Jane Finn, *loc. cit.*; Harriet Pilpel and Dorothy E. Patton, "Abortion, Conscience and the Constitution: An Examination of Federal Institutional Conscience Clauses," *Columbia Human Rights Law Review*, 6 (1974-1975), pp. 279-305; and especially Marc D. Stern, "Abortion Conscience Clauses," *Columbia Journal of Law and Social Problems*, 11 (1975), pp. 571-627. Their point was to require abortion cooperation on the theory that anyone involved in state action could not abridge the woman's "right" to an abortion. Our point is that on their theory, most abortions involve state action: the people at large are compelled to cooperate in what many regard as murder of unborn persons. This is an infringement on liberty to stand aloof.

IMPORTANT NOTICE

THE HUMAN LIFE REVIEW accepts regular subscriptions at the rate of \$12 for four issues (one year). Please address all subscription orders to:

**The Human Life Foundation, Inc.
Subscription Dept., Room 840
150 East 35th Street
New York, New York 10016**

and enclose payment with order. You may enter gift subscriptions for friends, libraries, or schools at \$12 each.

How to order previous issues:

This issue — No. 1 of Volume V — is the 17th issue published to date. You may order single copies of this issue — or the 16 previous issues — by sending \$3 per issue to the above address. Simply designate copies desired by asking for any issue(s) by number: # 1-4 (1975), # 5-8 (1976), # 9-12 (1977), # 13-16 (1978), # 17 (the current issue). You pay only the copy price (\$3); we pay all postage and handling involved.

Bound Volumes: we now have available (in permanent, library-style hardcover editions, with gold lettering, etc.) sets of Vols. # 1 (1975), # 2 (1976), # 3 (1977), and # 4 (1978). *All volumes are completely indexed*, and are available postpaid at \$30 per volume, or all four volumes for \$100. Separate copies of each index are also available at \$.50 per copy.

Bulk orders: while our supply of back issues lasts, we will supply 10 or more copies of any issue at \$2 each; 100 or more copies at \$1 each. Please indicate quantities per issue desired and include payment in full with order.

Address all orders to:

**The Human Life Foundation, Inc.
150 East 35th Street
New York, New York 10016**

