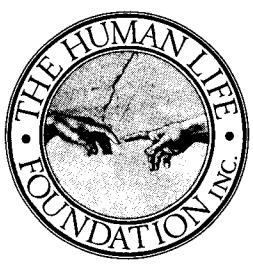
the HUMAN LIFE REVIEW



SUMMER 1981

Featured in this issue:

Ellen Wilson on..... Freedom among the Ruins

John Muggeridge on.....Abortion in Canada

Jonas Robitscher, M.D. on .. How Psychiatrists Usurp Authority

Chilton Williamson Jr. on ..... Love of Life

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Jerome Lejeune, M.D. on..... New Humans

John T. Noonan Jr. on ..The 'Human Life Bill'

Also in this issue:

Henry Hyde • George F. Will • William F. Buckley Jr.
Stephen Galebach • Robert H. Bork

Published by:

The Human Life Foundation, Inc.

New York, N.Y.

Vol. VII No. 3 $3.00 a copy

. . . FROM THE PUBLISHER

Herewith our 27th issue, which follows our now-regular pattern of mixing new, old, and "borrowed" material on a growing variety of subjects. We hope you will enjoy it all.

Many readers evidently appreciated the unusual "Letter from Czechoslovakia" which we published in our last (Spring) issue; we noted then that — because it was in effect smuggled out of that Communist nation — we could not "certify its authenticity." Well, our translator (Mr. V. Chalupa of Chicago) writes us that Mr. Radomír Hubálek is not only real but, at last word, alive and living in Zubrí, a small town in Moravia (close to Brno, the capital). We will try to contact him there, and report results if and when available.

The article by the late Jonas Robitscher, M.D. is a chapter taken from his book *The Powers of Psychiatry* (Houghton Mifflin Company, 2 Park Street, Boston, Mass. 02107). It is reprinted here with permission. The appendix that includes William Buckley, Stephen Galebach and Robert Bork discussing the Human Life Bill is a transcript of Buckley's "Firing Line" T.V. program. It too is printed with permission. Official transcripts of all "Firing Line" telecasts are available for $1.00 each from the Southern Educational Communications Association (928 Woodrow Street, P.O. Box 5966, Columbia, South Carolina 29250).

As usual we remind our readers that all previous issues (and bound volumes of the years 1975-80) remain available; see the inside back cover for details. We also have available, in booklet form, the now-famous Stephen Galebach article, "A Human Life Statute," at $1.00 per copy. Finally, *The Human Life Review* is available in microform from both University Microfilm International (300 N. Zeeb Road, Ann Arbor, Michigan 48106) and Bell & Howell (Micro-Photo Division, Old Mansfield Road, Wooster, Ohio 44691).

EDWARD A. CAPANO
Publisher

THE HUMAN LIFE REVIEW

SUMMER 1981

Published by THE HUMAN LIFE FOUNDATION, INC. Editorial Office, Room 540, 150 East 35th St., New York, N.Y. 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 permission) should be sent directly to the editorial office. Subscription price: $12 per year; single copy, $3. Bulk prices on request.

Vol. VII. No. 3 ©1981 by THE HUMAN LIFE FOUNDATION, INC. Printed in the U.S.A.

INTRODUCTION

"I THINK IT would be true to say that for the secular American heirs of the Judeo-Christian ethic, the Constitution has replaced the Decalogue as the Law which instructs, defines, and ultimately liberates man in society. But because the modern liberal denies the Constitution transcendental meaning, let alone derivation, he must shore it up with pure faith and desire."

So writes Ellen Wilson, in our lead article. The quotation outlines the central concern of her (beautifully written, we'd say) essay, which in turn serves as a suitable preface for this issue. There is a great deal here about the law, the Constitution, belief, and the meaning of it all. As so often before, many of the arguments revolve around the ever-present abortion issue. Miss Wilson, true, says rather little about abortion. Her main point is that secular liberals, as personified by "ACLU types," take a decidedly black-and-white attitude when arguing (in and out of the courts) that all questions are, and must ever remain, grey. But it is precisely this blurring of the old moral and philosophical distinctions that has allowed abortion and its attendant evils to become a national disaster in less than a single decade.

But we are not alone. Mr. John Muggeridge, a Canadian writer and teacher, explains how things stand to the north. The answer is mixed: Canada, it seems, enjoys a much lower abortion *rate*, but the abortion "liberty" is in the process of becoming so deeply embedded in the *law* that those Canadians trying to protect the unborn have little prospect of legal victories (e.g., Canadian versions of a Hyde Amendment or Human Life Bill are virtually impossible to achieve). A great problem, there as here, is the judicial support for abortion: Muggeridge quotes from a recent decision in which the judge wrote that "A person is such not because he is human, but because rights and duties are ascribed to him." Substitute "him or her" (or "to a person"?) for the taboo "him," and the judge's statement matches American rhetoric now all too familiar.

There is, however, some hope, or at least some delay: at the time Mr. Muggeridge wrote his original article, it seemed that Canada's new constitution — which would virtually guarantee legalized abortion — would go into effect on July 1. But as we go to press, Canada's Supreme Court seems to have evaded that timetable; it remains uncertain just when the new law will go into effect, or whether changes (perhaps even some *in re* abortion) can or will be made. So we expect a further report in due course.

Next we have a most unusual article, by an unusual man. The late Dr. Jonas Robitscher was a doctor, lawyer, and, we think, a master of the psychology of psychiatry. We print here a fascinating chapter from the book he completed just before his death earlier this year. We never met Dr. Robitscher, but did have considerable contact with him (by mail and, later, telephone) in recent years. We greatly valued his opinion on almost anything we discussed, and that included a wide variety of subjects. Without question he was a recognized expert in his own chosen fields. What you will read here is typical of what made him not only a penetrating but also a controversial professional commentator on many matters, e.g., his conclusion here: "The psychiatrists who deviate from professional standards in order to achieve humane social ends are relying on their own subjective definitions of humanity and are utilizing techniques that are also capable of being used for political purposes that may be the opposite of humane." He could have said much the same (and did, to us) about judges, and others.

A final note: we ran one other article by Dr. Robitscher (in our *Fall*, '79 issue); we asked him often to do another. He always said he would, when he could. When we last spoke to him, we asked again; that time he replied: "I won't be able to now." We took him to mean "just then." He said nothing of his illness. He died shortly thereafter.

Mr. Chilton Williamson has also appeared once before in these pages (*Spring* '79). We asked him to do another piece for us too. He certainly *has*: now living much of the time in Wyoming, he seems to have compressed some frontier fires into his latest thoughts on abortion and other social matters. The reader will learn in no uncertain terms what Mr. Williamson thinks of those who speak in defense of "life" but mean not unborn humans but rather condemned criminals at best, and at worst "forests, pampas, wetlands, deserts, and every form of topography." They are, he concludes, nothing more than "the new sentimentalists," who cannot rationally contemplate the real meaning of life. (We hope some reader will feel that his arguments demand an answer — we'd love to see such an answer!)

Next we move directly into the current abortion controversy, which at the moment revolves in large part around the so-called "Human Life Bill," which in turn is based on the article by Mr. Stephen Galebach in our

Winter '81 issue. Recently the arguments on both sides have, to use the current term, escalated. Proponents of abortion now argue that the current efforts to reverse the Supreme Court's *Abortion Cases*, by statute or amendment, would outlaw contraception as well. Not so, replies Professor Basile Uddo, who quotes chapter and verse for his argument that, in legal terms at least, abortion has nothing to do with "birth control" or any facet thereof. Indeed, he believes that those who put forward such arguments do so only to confuse things, in the hope of frightening off those who would otherwise support the anti-abortion position. He also has much to say about new developments that we found fascinating — and which we haven't found elsewhere (at least not in plain English). We hope that you too will find it all highly informative.

Many more arguments have been presented in Washington, where Senator John P. East chaired Senate subcommittee hearings (from April 23 through June 18) on Senator Jesse Helms' version (known as S 158) of the Human Life Bill. The extensive hearings were not only verbally lively but produced a huge amount of printed testimony. We cannot possibly — even if we had many times the space available — provide fully representative selections; when the hearings are finally published, they should fill several large volumes. But two particular texts seemed to us, if not representative of the whole, at least among the most striking examples. The first is by Dr. Jerome Lejeune, a world-renowned expert in genetics who works and teaches in Paris. He is also an eloquent speaker capable of providing almost poetic descriptions of life in the womb. A sample: "The baby plays, so to speak, trampoline! . . . soars up, and falls down again . . . he does not feel gravity and performs his dance in a very slow, graceful, and elegant way, impossible in any other place on the earth . . . only astronauts . . . can achieve such gentleness of motion . . . Looking closely, you would see the palm creases and a fortune teller would read the good adventure of that tiny person. With a good magnifier the fingerprints could be detected. Every document is available for a national identity card." There is much more as well. Don't miss it.

Finally we reprint herein the full testimony of Professor John T. Noonan, Jr., in behalf of the proposed legislation. Professor Noonan is well known to our readers (and has been on our editorial board from the beginning); he is a legal scholar and a fine writer; he is also an eloquent advocate. We wish we had recorded his testimony in elaboration of his printed text (and hope that it will appear in the record of Senator East's hearings). What we have here is, we'd say, the most comprehensive legal testimony we've yet seen on the Human Life Bill, and thus we were anxious to make it a part of our own continuing chronicle of the "life issues" we have been concerned with for a good many years now (the next issue will complete our seventh year of publication).

As is our wont, we've selected what we hope are interesting items for our appendices. The first (Appendix A) is a letter sent by Congressman Henry Hyde to the Washington *Post* (with a thoughtful copy to us); it is in reply to a column by William Raspberry, and in defense of Senator East. The *Post* evidently did not see fit to publish it; we think it very fitting. It will certainly give you some idea of the *heat* generated by the hearings; again, we think it ought to be part of our record. Appendix B is a column by Mr. George Will; in our judgment all of Mr. Will's columns make fine reading; this one has particular relevance to much that precedes it here — indeed, one has the feeling that Will might have read Dr. Lejeune, or even Mr. Hyde. Surely he has been following the East hearings, and we think he addresses the most crucial point involved.

Appendix C is also related to the Human Life Bill — so closely that it pits author Stephen Galebach against Professor Robert Bork, probably the most prominent legal expert who is at once *against* Galebach's proposal *and* against the *Abortion Cases*. Again, it is the best (and we'd add fairest) public discussion we've seen of the whole controversy. It provides a considerable amount of background information as well.

If you have followed us thus far, you yourself may feel expert on the great questions involved. Not that we won't provide you with more such in coming issues: the more we print, the more we find the supply to be inexhaustible! But we promise as much variety as possible next time, and thereafter.

J. P. MCFADDEN
Editor

Freedom among the Ruins

Ellen Wilson

A PORNOGRAPHIC MOVIEMAKER was brought to trial in New York recently for employing child actors in sex acts on the screen. The trial judge decided that the court could not take the age of the children into account; the defendant could only be prosecuted under ordinary obscenity laws. Since these laws indulge the representation of a wide variety of sex acts on the screen, the filmmaker could only have been convicted if the children's activities were pornographic by adult standards. A bolder or more imaginative producer, willing to employ children in acts of bestiality or snuff films or the like, could have found himself in jail. But his more "conservative" colleague, content to dish up something more commonplace, remains a law-abiding member of the community.

Predictably, this case drew a great deal of attention from news channels and local papers. Ellen Goodman contributed a syndicated column in which she described a debate between feminist activist Andrea Dworkin and Harvard professor of law Alan Dershowitz on the merits of the decision. Both were freedom-loving liberals trapped in the unyielding logic of ideology, though the feminist, having a smaller investment in the system, kicked harder against the goad: "Dworkin condemned the anti-female politics of pornography and its deliberate systematic violence against women and children." Ellen Goodman vented her frustration at the First Amendment box society finds itself in ("If the First Amendment issue is tricky, then perhaps we can, as Dershowitz suggested, amend child labor laws"), but she did not question the liberal interpretation of free speech rights. By default she aligned herself with those ACLU-style liberals who see swastikas in every attempt to qualify or refine an absolutist interpretation of the right of free expression. In desperation, she argued for roundabout "solutions" to the child pornography problem such as handling it under child labor laws.

We saw a similar — though more doctrinaire — reaction when the American Civil Liberties Union was confronted with the threa-

Ellen Wilson is a regular contributor to this review; a collection of her essays (*An Even Dozen*) is due out in the Fall.

tened Nazi march in Skokie a year or two ago. Though claiming to be disgusted by the Nazis' anti-Semitic philosophy and provocative style, the ACLU leadership nonetheless argued that permitting the march to take place was necessary for the preservation of First Amendment rights. This was no cagey experiment in psychology: however much they may have hoped and believed that broader exposure would only increase opposition to the American Nazi Party, the ACLU was making a philosophical rather than a pragmatic point. Any abridgement of our constitutional liberties threatens to steer America toward a totalitarian course which, if unaltered, will eventually abolish our civil liberties entirely. Allowing Nazis to march in Skokie was a self-preserving act to save America from fascism, and that was the best punishment one could inflict on the American Nazi Party.

The liberal, ACLU-style attitude toward the Bill of Rights resembles the Aztecs' attitude toward the god demanding human sacrifice: they weren't exactly sure why the god demanded it, but they weren't in a position to ask questions. Similarly, it is hard to say why the First Amendment would demand Skokie or the sacrifice of children to pornographers, but who are we to question the First Amendment?

If we are not to question the First Amendment — or any other except perhaps the 2nd and the 10th — then that means we accept them as mandating near-absolute liberties. Society being imperfect, our approach to that absolute will be asymptotic at best; anxiously on the lookout for infringements on the exercise of this or that right, we shall of course find them, and our response will be to push and strain and struggle to make these rights as absolute as possible, to ensure that not the tiniest chink is left open to the forces of tyranny.

Something like this underlies the arguments against pornography statutes, feeding the fears of the Alan Dershowitzes and even infecting the Ellen Goodmans, until these fears grow to unmanageable proportions. This is one reason why modern liberals earlier opposed the Burger Court's ruling on pornography — because this ruling, finding a place for local standards and local juries, was potentially more restrictive. This is why the ACLU felt that Skokie *had* to grant a march permit to the American Nazi Party. They were not merely agreeing with Jefferson's observation that American society can afford to tolerate certain excesses, certain objectionable displays, because of its fundamental stability. In a sense they maintained the inverse: that Americans could not afford *not* to tolerate such dis-

plays. They felt, in other words, that freedom of speech and assembly are undilutable rights, and that the Constitution, when it safeguarded them, thereby made them absolute.

Of course, pervading this absolutist interpretation of the Bill of Rights is a strong distrust of democracy. The Founding Fathers, for all their precautions against democratic excesses, still demonstrated greater faith in the American people: it was those *outside* the Philadelphia Convention hall who demanded that the Bill of Rights be appended to the Constitution. The Framers had concluded that there was no need to itemize rights which all acknowledged were man's moral birthright and the basis of a free republic. In contrast, it is difficult to come up with any important judgment the ACLU crowd would willingly surrender to democratic decision, barring trivialities such as the election of presidents. I have already mentioned that they oppose granting local communities the right to set obscenity standards. They have also fought the rights of local school districts to determine curricula, to set and enforce codes of dress and behavior, to permit prayers or religion-contaminated ethics courses, to forbid high school students from attending school proms in homosexual pairs. They oppose parental rights in a number of cases, including sex education and abortion notification. There are few areas of life seemingly "safe" enough to surrender to democracies, and wherever the ACLU crowd support the restriction of democratic decision-making, they point to the Constitution as justification.

Let us turn, then, for a moment, to the Constitution. All of us were taught in school civics courses that we are a nation of laws, and not of men, and that the Constitution is the supreme law of the land. We were taught that the United States was designed as a republic, not as a pure democracy; that the reasons for our elaborate system of checks and balances, for indirect election of senators and electoral colleges and all the other departures from pure representational democracy were to restrain the headlong passions, self-interest, or ambition of the people and allow time for reason to reassert itself. Additionally, these provisions were intended to safeguard the rights of minorities, which might otherwise be swallowed up. But where the ACLU and related groups depart from the civics-book interpretation is in exaggerating the distinction between "the people" and the Constitution: in the depth of their distrust of the former, and reverence for the latter.

Now, this combination of democratic suspicion and constitutional reverence looks very curious when considered more closely. The distrust, as we have seen, surpasses that of the Framers, who incorporated into their Constitution (as yet unadorned, remember, with a Bill of Rights) mechanisms for its amendment by the people's elected officials. It was the much-maligned people who, through their state legislators, proceeded to clamor for incorporation of a Bill of Rights; it was the people, several generations later, who authorized passage of the 13th, 14th, and 15th amendments — hardly an objectionable piece of work, one would think. Finally, it was the people who from the first were empowered by that very Constitution to subvert constitutional rights, if they had wished to, through amendments. What, after all, has kept them from doing so during these past two centuries, if not conscience or perceived self-interest? The Constitution is sovereign because the citizens permit it to be, and that Constitution is itself the creation of earlier generations of citizens. On what do our constitutional rights depend, if not the people?

To pose this question to Constitution-venerators is to expose the true nature of the Emperor's new clothes. We all know that the Framers derived our rights from natural law — "the laws of Nature and Nature's God." This formulation itself suggests a justification for democratic "input": natural law is recognizable in part by its reasonableness — by its ability to make sense to any one capable of following a simple argument. But on the other hand, natural law theorists would deny that natural laws were simply dreamed up by mankind, or voted through as part of legislative packages, or evolved over millenia. Instead, our Founding Fathers located their source and their authority in "Nature's God," who communicated them to man.

But modern man cannot accept natural law theory. This is what makes his attitude toward the Constitution seem, at first glance, so curious. For why should modern man confide greatest trust in the Constitution just when his faith and trust in its dual foundations —"Nature" (understood as man's common moral inheritance) and "Nature's God" — are at their lowest?

The answer is not logical but psychological. Modern liberal man professes the constitutional faith so fervently precisely because, for him, there *is* nothing holding it up but sheer faith, which he himself must provide. There is no sure foundation in God (Who is probably

dead) or man (who is responsible for atrocities like the Holocaust). Professor Jacob Neusner notes disapprovingly that, for the modern Jew, the Holocaust has replaced Mt. Sinai as the central defining event in Jewish history. I think it would be true to say that for the secular American heirs of the Judeo-Christian ethic, the Constitution has replaced the Decalogue as the Law which instructs, defines and ultimately liberates man in society. But because the modern liberal denies the Constitution transcendental meaning, let alone derivation, he must shore it up with pure faith and desire. It is a combination of optical illusion and wish fulfillment; yet another of those existential traps set for us by this century — perhaps the first century for which man has undertaken full responsibility. Objects, institutions, and pursuits are invested with meaning by man —hence the ACLU, perceiving the Bill of Rights as the surest guardian minorities have against victimization by majorities or oligarchies, labors tirelessly to invest the Bill of Rights with authoritative meaning.

It is perhaps less clear why that "meaning" must be absolute in the other sense, why the rights those first 10 Amendments created may not be abridged or qualified when they collide with other rights, other goods. Why, for example, do modern liberals view freedom of expression myopically, unwilling to see how it may conflict with a parent's right to rear his children free from the contamination of obscenity, or with a society's responsibility to safeguard its fledgling citizens from grave psychological harm? Granted that these are "absolute" freedoms in the sense that, by definition, a free society "absolutely" must have them, how can the modern liberal protest even modest restrictions, qualifications, or dilutions?

This kind of absolutism has two roots: one stemming from fear, and one from an inability to define or discriminate. The fear surfaces in an almost paranoiac assertion that you've got to stand up for your rights, and, as I mentioned, this is related to the Emperor's-new-clothes discovery that no upper-case Justice lies behind them. But the fear is also related to an almost Hobbesian perception of every man being at war with every other man. Thus the pregnant woman seeking an abortion brushes aside the child's right to life or the father's right to concern himself with the fate of his child. The press, hot on the trail of a story or preening itself on its role as a second government, unconcernedly tramples on the rights of defendants to the conditions of a just trial, or the right of prosecutors

to subpoena information. States and legal agencies, wishing to defend children's rights or dilute the influence of outmoded points of view, rescind parents' rights. Before us, like a panoramic scene from a movie spectacular, appears a vast marketplace of rights, with people buying and selling, haggling over prices, and jealously clutching their purchases as they separately make their way home. In this atmosphere of self-interest and suspicion, the holy faith and hallowed language of the ACLU liberal is especially impressive.

I mentioned that a second explanation for absolutist definitions of constitutional liberties is a growing difficulty — and perhaps disinclination for — defining rights or adjudicating among them. With the abandonment of belief in natural law and the kind of fixed, ascertainable truths that underpin it, modern man lacks not only a Supreme Being as the ultimate source of his laws but also supreme truths by which to interpret them. A Platonist might say that we have abandoned belief in the Ideal Forms of liberty, and hence lack a fixed and perfect standard against which to measure our all too imperfect practices. We push our freedoms to the limit because we don't know what that limit is.

But, what is perhaps the same thing, we have also lost a conviction of the *purposefulness* of our rights, a belief that they promote certain ends, and can be judged according to their success in achieving these ends. It seems almost indecent to entertain the notion that our liberties could be evaluated in so utilitarian a fashion — we think and talk so much of freedom being a good in itself, displaying a hazy faith in the superiority of free societies and toasting the Shakespeares they are said to foster. But the Founding Fathers matter-of-factly recognized the utility of freedom even as they traced its divine pedigree. They saw no reason why God should have been oblivious to the practical benefits of freedom responsibly used; nor — knowing the ancient Greek and Roman historians as well as they did — could they see any way to deny the deleterious effects of freedom irresponsibly used. The doctrine of the Fall seemed to be clear on both points.

Confident of their ability to discriminate public goods from public evils, they could comfortably discriminate healthy societies from sick ones, and healthy acts from sick acts. They understood that freedom of speech and press only create the conditions under which a public can become educated and informed, and check the Byzantine propensities of government. Though, *pace* Jefferson, American

statesmen have described a large circle around the area of civil liberties, a perimeter *does* exist. It is that perimeter which perplexes and annoys and even shocks modern liberals, who perceive it as an arbitrary limitation. This is understandable, because they have lost the capacity, or perhaps the will, to define the purposes of society, and hence the standard by which to measure improvement. To them, progress is reduced to a sustained attempt to distend the limits of the circle. This unceasing effort will, they believe, make for a freer and freer society, but all this bustle and activity, all these many court cases and New York *Times* Op-Ed pieces, drown out the question "Freedom for what?" If it could be heard, no doubt the answer would be, "Why, freedom for freedom's sake." Freedom for moviemakers to introduce children to sexual activity.

All too many items on the ACLU's list of activities testify to this mental block about means and ends, and to a corresponding inability to adjust the level of response to the seriousness of the challenge to freedom. The Skokie scare demonstrates their helplessness to understand what separates a free society "under law" from a totalitarian and even genocidal one. It is not a matter of parade permits, or the freedom to sample pornographic movies; it is more a matter of certain shared values, a common concept of justice, and sensitivity to the weaker and more defenseless members of society. For laws and constitutional amendments can be revoked, amended, or quietly winked at; in the long run, no matter how much the modern liberal may shrink from risking his cherished freedoms to "local standards," it is the people and their moral character that will determine the balance of freedom. It is the outraged opposition of those opposing the Nazi march in Skokie that more surely protects the United States from fascist takeover; it is the capacity to distinguish between the presentation of a viewpoint and deliberate provocation, between harmless self-expression and attempted intimidation — it is this capacity to make distinctions that will enable a nation committed to securing liberty for its citizens to retain its sense of purpose. For without that sense of purpose — that understanding of the potential of human freedom when employed for good ends, and a corresponding perception of man's historical tendency toward the perversion and misuse of freedom — we will be unable to oppose the abuse and promote the use of freedom.

Only those willing to make such judgments will understand that "excessive freedom" differs in kind and not merely in degree from

freedom. The Nazi shouting his genocidal slogans to a crowd is not a regrettably intemperate explicator of an academic theory; a line has been crossed, separating use from abuse. That line may be difficult to determine in individual cases, but it will never be determined by those who doubt or deny its existence.

Abortion rights are another example of absolutism as a failure to discriminate, for Justice Blackmun's 1973 decision was predicated on the judiciary's refusal to decide whether the unborn was a human person. Since the most basic obligation of any government is to protect the lives of its citizens, this confession of helplessness even to identify those citizens betrays the plight of the modern liberal, and aids our understanding of his resort to blind faith in legal codes. What can't be found in or inferred from such documents cannot matter very much.

One reason those favoring abortion rights so strenuously resist an answer to the question "What is man?" is that they would then witness one of those collisions of rights which upset the equilibrium of their constitutional theories. If they admit that the unborn are human and hence possess a right to life, they would then have to balance this right against a right to privacy. Such conflicts cut at the very heart of ACLU absolutism, which manages, in the main, to avoid these confrontations by semantic sidestepping. We saw in the Skokie case that the ACLU convinced itself that upholding the American Nazis' right to march actually enhanced the rights of other citizens. The child pornography decision (which may, of course, be reversed by a higher court) presents a similar choice: if we close our eyes to a child's right to be spared severe psychological abuse, then we can view the maker of dirty movies as a fellow exerciser of "freedom of expression," however much we may disapprove of what he chooses to express. But abortion exposes the fiction of non-colliding rights, once we take the unborn's life into account. Therefore the admission is fiercely resisted, for in ACLU terms it is that sin against the Holy Spirit which shall not be forgiven them: it throws into doubt the whole edifice of absolute rights as ends-in-themselves.

Perhaps I have seemed to handle the complicated issues brought up by some of these free expression cases too cavalierly, and assumed conclusions in individual cases which I have not proved. It is possible for someone who is not an ACLU-style liberal to carefully consider the arguments in a Skokie case or in the general run of

obscenity cases or in other great constitutional questions, and come down on the side of greater laxity. But such a person would not deny the possibility or even the likelihood of rights conflicting, nor would he doubt the feasibility of arriving at a successful mediation of their respective claims. He would simply conclude that in this or that case the danger to the public welfare was not extreme enough or the offense egregious enough to warrant restraint. In the tradition of Jefferson, he would be willing to tolerate a wide range of expression of opinion — even opinions that, if accepted by the mass of the citizenry, would undermine the commonwealth — because of his trust in the good sense and good dispositions of his countrymen. But deliberations such as these, which estimate dangers and weigh risks, differ from those of the modern liberal, even when they issue in a similar final judgment. For the modern liberal will be helpless to draw those limits that another may grant the necessity to draw at some point. He will be a stranger to arguments about means and ends, about the functions of rights and the goals of governments. Like a tone-deaf man listening to a debate on the relative merits of Beethoven and Mozart, he will be unable to comprehend the terms of the discussion.

But there will be this difference. *Un*like the tone-deaf man, the ACLU-style liberal is likely to question the validity of the discussion itself, the reality of the terms defined and the degrees of difference discriminated. Despite his talk of a world that cannot be broken down into blacks and whites, good and evil, a world of greys where one man's obscenity is another man's redeeming social value, he will maintain a black and white conception of the rights he defends so unconditionally. Since freedom of expression is a good unreservedly, any exercise of it is good in that respect, and any restriction upon it evil; any exercise of a right to privacy is good, any restriction on it evil.

For, even disregarding philosophical differences, the modern liberal will ask who is to be trusted with this subtle task of drawing limits. But the question really should be, not who can be trusted, but who will *have* to be trusted. And the answer then follows, the nation's citizens. After all, it was they who ratified those original rights; it is they who, over the years, have managed the narrow tightrope-walk between tyranny and license, sometimes swaying to one side and sometimes to the other, but never yet losing balance. These people recognize the common sense ruling of Justice Holmes

that certain abuses of free expression, such as yelling "Fire!" in a crowded theater, cannot be tolerated by any society, however free. Their confidence unnerves those unconfident liberals who have argued themselves into a position from which they couldn't distinguish "I Am Curious Yellow" from *Hamlet*, but it is this confidence which will protect our rights if anything can, because it will enable us to reconcile conflicts between them. For if we lose this faith in our ability to determine which rights have right of way at which times and why, then we are well on our way to sacrificing our particular freedoms on the altar of a hazily-conceived Freedom; then we will have no defense, moral or philosophical, against the stormtrooper in the street.

How Canada Got a Human Death Amendment

John Muggeridge

CANADIANS NOW ENJOY their very own Abortion Liberty. Two years ago *Roe* v. *Wade* officially crossed the border when the Honorable Mr. Justice Robins of the Supreme Court of Ontario, in dismissing a class action on behalf of abortion victims in two Ottawa hospitals, brought by the Ottawa lawyer and long-time anti-abortion activist David Dehler, quoted Justice Blackmun's comment that "the unborn have never been recognized in the law as persons in the whole sense." For Robins, whether they are human or not is beside the point. "A person is such," he argues, "not because he is human, but because rights and duties are ascribed to him." Being incapable of having rights and duties ascribed to them, the unborn are less than persons; in Robins' opinion, therefore, the 1969 amendment of the Canadian Criminal Code establishing the circumstances under which they may be aborted is constitutional. What happened in 1969, as Robins sees it, was that Parliament "balanced in a manner it thought proper a concern for fetal life on the one hand, and for the life and health of an expectant mother on the other." According to Robins, those who feel that this legally-drawn line between child-killing and maternal well-being is not being properly adhered to should contact the police, while those who would like to see it redrawn, rather than wasting time fighting hopeless court battles, should apply to the one authority competent to act as arbiter of intra-uterine life in Canada: the Federal Parliament.

But even the parliamentary route may soon be closed to hard-pressed Canadian anti-abortionists. Trudeau's Charter of Human Rights and Freedoms, part of the constitutional reform package which is currently before the Supreme Court of Canada, six of whose nine members are Trudeau appointees, makes no mention of the unborn. What it *implies*, however, is that they are a non-protected species. Anti-abortion innuendoes were painstakingly removed from its language at the committee stage. "To alleviate concerns," as

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Canadian Press put it, "that right to life groups might use a section of the Charter to claim prosecution for fetuses," the first word in the sentence, "*Everyone* is equal before and under the law . . ." was changed to the more explicitly post-natal *Every Individual.* To head off, moreover, the awful prospect of a Canadian version of the Human Life Bill, the Government rejected an opposition amendment providing that "nothing in this Charter affects the authority of Parliament to legislate in respect to abortion . . ." The point is that under the 1969 Criminal Code amendment, Canadians already *have* a legislated right to abortion. Section 26 of the Charter which provides that "the guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada" turns it into a constitutional one.

Nor is it simply the wording of certain sections in the Charter which militates against the unborn. Its positivist tone is at odds with the whole idea that human life is sacred. In 1979, before Justice Robins, Dehler supported his claim that Parliament was powerless to ordain the taking of innocent human life by appealing from "man-made laws" to "fundamental human justice." Under the Trudeau Charter such a distinction becomes meaningless. In the light of that document fundamental human justice is itself man-made. "The Canadian Charter of Human Rights and Freedoms guarantees the rights and freedoms set out in it . . ." What you see is what there is. The fact that the rights of the unborn are not specified means that they do not exist. The fact that under the affirmative action provision of the Charter discrimination is permissible when it takes the form of "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups . . ." means that when it takes the form of anti-abortion laws which "discriminate" against women, but seek to ameliorate the conditions only of disadvantaged *non*-individuals (i.e. unborn ones), it is *not* permissible.

But the feature of the Charter which bodes worst for unborn Canadians is its unrelenting modernism. The Charter rejects the traditional value system on which all anti-abortion thinking ultimately rests. An acknowledgement of the supremacy of God was put into the Charter at the last moment, but only as an afterthought. Nowhere does it make a connection between the enjoyment of rights and the existence of a Supreme Being. It says nothing, for example, about Canadians having been endowed by their Creator with certain

inalienable rights. The Government turned down a Conservative amendment which would have made Section 1 affirm "that the Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free individuals and free institutions . . . also that individuals and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of the law." According to Robert Kaplan, Trudeau's Solicitor General, the principles set forth in the amendment, though commendable in themselves, "do not go far enough in respecting other national values, such as linguistic duality, multi-culturalism and the contributions of native peoples."

This is the new pluralism, which in reality, as Edward Norman points out, marks the transition to a new orthodoxy. The idea that law has a moral and spiritual basis cannot at the same time be commendable and inadequate. Kaplan considers it inadequate. The message his statement signals is that henceforth belief in God, family, and Natural Law is sectarian. The fact that Canada is a free country obliges us to tolerate those who hold such a belief but certainly not to use it as a philosophical framework for writing a constitution. In Trudeau's brave new Canada human rights are in the gift not of God, but of the state. The power to define and uphold them is subject, as Section 1 of the Charter makes clear, "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The mandate from heaven to rebuild Canada must be exercised by Ottawa with due respect to the democratic decencies.

This restriction, however, does not affect the nature of what heaven has mandated. Canada's self-appointed founding parents are upper-and lower-case liberals. The Constitution they have written turns liberalism into a national orthodoxy. Conservatives who continue to argue against welfare statism are henceforth arguing against Canada. Interventionist economics are Canadian economics. Section 34 of the Charter imposes a constitutional obligation on all Canadian governments to promote "equal opportunities for the well-being of Canadians," to further "economic development to reduce disparity in opportunities" and to provide "essential public services of reasonable quality to all Canadians"; subsection 2 of 34 puts Ottawa's commitment to help fund provincial welfare programs beyond the power of Parliament or the courts to revoke; no

wonder the leftwing New Democratic Party supported Trudeau's constitutional reform package in the federal parliament. The price of its support, which Trudeau had no hesitation in paying, was inclusion in the Charter of a section which makes all the rights enumerated in it apply equally to women as well as men. We already have a federal agency dealing with the status of women; now, no doubt, we shall have to create one to take care of the status of men. What the new constitution turns into an article of national belief is the notion, dear to the hearts of all left-of-center Canadians, that the best government is the government that governs most.

That means government which sees its role not as that of protector of individual rights, but as that of solver of social problems. And one of these social problems, it now transpires, is abortion. This is made clear in a recent statement by the Quebec abortionist, Henry Morgenthaler, who in 1975 actually went to prison for committing an illegal abortion, thus becoming Canada's abortion folk-hero *extraordinaire*. Abortion, according to Morgenthaler, should be thought of not as "an issue of morality," but as "a question of public health." Ottawa, moreover, agrees with this definition, as it showed recently when, in response to a petition with over a million signatures demanding greater protection for the unborn, it set up a committee, not to investigate the claims of the petitioners, but to report on how the revised abortion statute is being administered. This was the famous Badgeley Committee which, after 18 months of interviewing and brief-collecting, duly begged the abortion question by concluding that facilities for killing unborn Canadians are indeed unevenly distributed across Canada. This might be put down as just another case of bureaucratic myopia (like giving the weather report without first checking to see what is actually happening outside), except that under the Charter of Rights Badgeley's blinkered vision becomes constitutionally enforceable. Section 34 makes Ottawa responsible for ensuring "reasonably comparable levels of public services at reasonably comparable levels of taxation." If Morgenthaler and Ottawa are right, and abortion *is* a public service, then Canadians have a Trudeau-given right to state-supported *abortoria*. A Canadian version of the Hyde Amendment would require rewriting the constitution.

Why have we let this happen to us? How is it that Canadians, famous for their conservative-mindedness, over one third of whom are Roman Catholic, have not resisted the Trudeau revolution? One

explanation lies in the character and background of Trudeau himself. Nobody among Canadian public figures is better qualified for the role of respectable revolutionary. He is rich, with a reputation for "identifying" with the working class (his post-graduate studies combined Harvard Law School with the London School of Economics where he sat at the feet of Harold Laski); he is a Catholic, and at the same time a modernist, our only prime minister to have been a member both of the Club and of the Church of Rome. In the fifties he took up the fight to free Quebec from the "dead hand" of "Church domination," quoting with equal emphasis Thomas Aquinas, Mao Tse-Tung, Frantz Fanon and Thomas Jefferson. He made fun of the Catholic teaching that the right to govern is God-given, arguing in true statist fashion that ". . . any given political authority exists only because men consent to obey it. In this sense what exists is not so much the authority as the obedience." In the sixties he entered federal politics with the express purpose of transforming the Canadian system into an instrument for achieving social change without doing violence to its loyalist tradition. His idea was, in fact, to make commitment to social change a form of loyalism, or, as he put it to magazine editor Peter Newman, perhaps his greatest adulator, "to move the framework of society slightly ahead of the times, so there is no curtailment of intellectual or physical liberty." Thus it was that, though a self-confessed socialist, he consistently opposes *doctrinaire* socialism. In 1961, for example, he wrote of socialism's need for tacticians as well as theorists. He sees himself as preeminently a tactician, his carefully crafted public image being not that of an ideologue but that of what *MacLean*'s magazine calls "an intellectual in action."

Canadians got their first taste of Trudeau-style intellectual activism when he was Federal Minister of Justice in the late sixties. From the very beginning of his tenure of that office he used it not only to oversee the administration of federal justice, but also to change its ground rules. His approach was piecemeal and involved exploiting the educational impact of one law reform before introducing another. First he addressed himself to Canada's "archaic" divorce law, which allowed married couples to be legally sundered only on the grounds of adultery. Trudeau added "mental and physical cruelty" as well as a provision which permitted automatic divorce after three years of separation. He won over Canada's Roman Catholic bishops, thanks to the solid phalanx of Catholic

legislators from Quebec and other parts of the country, always a potentially formidable force in Canadian public life, with the argument that we live in a changing world, and, though personally opposed to divorce, they should not impede the will of the nation as a whole on this matter. Then, in 1968, Canadians were presented with Trudeau's judicial masterpiece, the Omnibus Bill, which includes such a dazzling variety of law reforms — ranging from compulsory breathalizer tests to the legalization of homosexuality and abortion — that no one with any pretensions to social-mindedness could possibly object to all of its clauses, while opponents of individual ones inevitably found themselves cast in the role of narrow-minded anti-progressives. This, of course, was exactly where Trudeau wanted them. It was also precisely where he wanted the Bishops, whose half-hearted resistance to the abortion clause (at one point they were reduced simply to asking for a delay so that the subject could be further studied) stems in large part from the difficulty they had in refuting Trudeau's steadily repeated argument that, having decided *not* to obstruct progress in the case of divorce, they should logically do the same over abortion.

But Trudeau showed his finest form as a progressive tactician in the way in which he presented his bill. He made certain from the start that it would be debated along sociological rather than moral lines. As John Turner (the Minister taking responsibility for piloting the Omnibus Bill through Parliament) put it: "the government is endeavouring to have the Criminal Law reflect the attitude of what most persons believe to be reasonable and necessary for the well-being of our society, or, to put it another way, to bring the law into line with the times." This statement set the tone for the whole debate. Friends of legal abortion (everyone realized that that was the heart of the bill) argued with New Democratic Party spokesman Stanley Knowles that it was not a moral issue but "a human and social problem to be dealt with in a humanitarian way," while its enemies, such as former Progressive Conservative Prime Minister, John Diefenbaker, and Catholic loyalists in the right-wing *Creditist* party from Quebec who quoted the Bible and Papal Encyclicals in defense of the unborn, were dismissed as members of a "dinosaur class" in need, as one Liberal Member of Parliament put it, of being "invited into the twentieth century." The *Creditistes* at one point organized a filibuster against the Omnibus Bill, which they characteristically dubbed "le bill des fesses," but this tactic only burdened

them with the added obloquy of having tried not only to put the clock back, but to obstruct democracy. Diefenbaker persisted in his opposition until the end, but his Progressive Conservative Party having a few months previously fallen under more "liberal" leadership — the new Tory chief, in what must be a high point in oratorical fatuity, argued that the revised statute would *cut down* the number of abortions — decided to allow a free vote. With the Liberal Party Whip having been applied, Diefenbaker and the *Creditistes* being in the wrong century, and the Bishops looking the other way, the result was inevitable. Progress and legalized baby-killing triumphed over reactionary-mindedness and superstition.

Trudeau, however, could have done nothing without the Liberal Party. That most powerful and enduring of all Canadian political organizations — it has held office for 49 of the last sixty years, and shows no sign of surrendering it — had, long before Trudeau entered public life in the middle sixties, made itself master of progressivist tactics. At least since 1921 it has sought to make its particular brand of genteel leftism synonymous with Canadianism. When Trudeau, for example, first announced his plan to introduce an Omnibus Bill in 1967, abortion had already been surrounded, by Liberal Party tacticians, with an aura of respectability and enlightenment. The Canadian Bar Association had passed a resolution in its favor; so had the Canadian Medical Association, but most importantly of all it had received an Old Country *imprimatur* from the Wolfenden Report on homosexuality commissioned by the British House of Lords in 1957 which upheld the legality of sexual acts voluntarily committed in private, thus explicitly proclaiming the right to privacy which, as *Roe* v. *Wade* shows, is the cornerstone of all pro-abortion jurisprudence. By the time the great Omnibus Bill debate took place, therefore, the battle to legitimize abortion may have already been won.

What Trudeau and his party are the instruments of is the liberal "consensus," which exists in all western democracies. In Canada it has a name and a habitation in the Liberal Party which, with the constitution having been put into place, will become in effect the Canadian Party. Few outside the anti-abortion movement have drawn attention to this revolutionary development. Stirling Lyon, Prime Minister of the Province of Manitoba, is a notable exception; he, more than anyone else, deserves (but does not receive) the title of premier Canadian conservative. But as far as "enlightened" opinion

is concerned, Lyon is irrelevant. Irrelevance, in fact, is the usual fate of those who, like Lyon, attack the *ideological* implications of the new constitution. This may be why so few in academia support him. Nobody enjoys being read out of his intellectual community. It is all very well to accuse Trudeau of end-running the provinces, but there is something irresistibly un-Canadian about calling him a closet revolutionary. Loyalism is so inbred in the Canadian psyche that resisting the *status quo* must always be a wrenching experience. Our nationhood was achieved through *refusing* to join those who defied the way things were at the end of the eighteenth century. The considerable sacrifice involved in winning our War of Dependence has made us temperamentally more leery than others about joining the Resistance and rhetorically if not militarily taking up arms against established authority.

We are, then, a people of the consensus — which today happens to be a liberal and pro-abortionist one. Perhaps the most extraordinary example of this consensus at work is the statement issued last April by Cardinal Emmett Carter of Toronto, in which he gives a guarded blessing to Trudeau's Charter of Human Rights. Said Cardinal Carter in a statement published in his diocesan newspaper on April 4, 1981: "While I am not satisfied with the protection accorded the unborn, I do not consider the proposed charter as worsening the position [on abortion] and, because of its many positive values, I do not oppose its passage on moral or religious grounds." With the bloodgates having opened under the 1969 legislation, and every indication pointing to an even greater carnage with the new constitution in place, he has cleared the conscience of Trudeau's Catholic supporters. Hardly was the ink dry on the Cardinal's statement before Ursula Appolloni, the most prominent Liberal anti-abortionist in the Federal Parliament, had sent out a memorandum to her Toronto constituents reproducing the Cardinal's words and using them to justify her voting for the Charter. Thus once again liberalism conquers all; the idea of progress and the idea of Canada are made to be synonymous. As Frank Underhill, Canada's most perceptive political scientist, once remarked of the way the political system works in this country: *"Plus c'est la meme chose, plus ca change."*

How Psychiatrists Usurp Authority: Abortion and the Draft

Jonas Robitscher

THE EFFECT OF PSYCHIATRIC determinations during the last two hundred years, first in court and later also out of court, has been generally to liberalize and "humanize" social attitudes and policy. The earliest testifying psychiatrists enlarged the definition of criminal irresponsibility and made more people not responsible for actions that otherwise would have been considered criminal. Psychiatrists went on to find excuses for abrogating contracts. They developed theories by which deserting soldiers would be held sick rather than traitorous. They developed theories by which scared and frightened people could get financial damages for torts, although formerly a physical cause would have been required to recover damages. They liberalized the interpretation of workmen's compensation laws so more conditions could be included. These changes were accomplished by psychiatrists who presented "scientific" evidence to enlarge the definition of "sickness." Psychiatrists were relied on outside the courtroom to give opinions that would influence the decisions of individual administrators and for testimony in administrative hearings.

When psychiatrists found that they had this much influence, they sometimes began to give opinions that were designed to achieve a desired social end rather than to express scientific fact finding. Thomas Szasz has said that there has been a consistent bootlegging of humanistic values into the social scene through reliance on psychiatry. If capital punishment seemed like too extreme a penalty, some psychiatrists could be found to testify that a defendant had been suffering from temporary insanity, and on this basis the penalty could be circumvented. Sometimes the testifying psychiatrist would be more influenced by sympathy for the defendant or his distaste for the law under which the defendant might be executed

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than by psychiatric indications that there had truly been insanity. Crimes committed by juveniles are often held to be evidences of psychological disequilibrium and so to be distinguished from similar crimes that are to be punished when committed by other juveniles. Sometimes the availability of a psychiatrist makes all the difference, and sometimes the psychiatrist is not concerned with mental state but with some other factor — perhaps his belief that detention would not be in the best interest of the juvenile, or perhaps a belief that marijuana should be decriminalized and that therefore an offender should not be penalized.

Two instances in recent years, psychiatric assistance for women in securing abortions and psychiatric help in obtaining deferments for draft-eligible men, represent deviation from scientific standards by psychiatrists so that social goals could be achieved — a more liberal abortion policy and a decreased support for an unpopular war. The determinations made by psychiatrists were not medical, they were political, but they were not challenged because the social aims were so generally acceptable. The psychiatrists themselves justified their deviation from medical standards because it was in the service of a "higher morality."

Abortion, before its liberalization by the Supreme Court's decision, and draft deferment during the Vietnam War represented moral controversies. In both cases psychiatry took its stand on the liberal side of the issues and used its influence first to help people evade the law then in force and then to promote a change in the law. Abortion was the first of these issues to surface. Prior to 1967, most states had highly restrictive abortion laws. These laws sought to protect the life of the fetus, and they prohibited women from patronizing nonmedical abortionists or aborting themselves. Abortions were required to be done by physicians and only on the grounds specified in the statutes, usually to save the life or preserve the health of the mother. A few states prohibited abortion entirely, but in prosecutions for criminal abortion, courts even in these states recognized a clear threat to the life of the mother as a valid defense. In 1967, California, Colorado, and North Carolina liberalized their laws, giving additional grounds for certifying an abortion, and in succeeding years a number of other states followed. In 1973 the Supreme Court promulgated a national policy of unrestricted abortion for the first six months of pregnancy.[1]

Until the late 1940's, internists and obstetrician-gynecologists

could easily certify that women with rheumatic heart disease, kidney disease, and some other illnesses needed an abortion to save or preserve their lives. When women had no medical grounds for abortion, a psychiatrist could certify that the pregnancy had made the woman so depressed that she had become a suicidal risk, and the abortion would thus "save" or "preserve" her life.

Many women had no medical grounds for abortion, and even for women with major medical problems, the introduction of antibiotics, kidney dialysis, and improved care of heart patients made it increasingly difficult to justify an abortion on strictly medical grounds. Psychiatric indications then became the main reasons for abortion.

Psychiatrists certified abortions for women who were not psychiatrically ill and did not meet the psychiatric criteria for abortion. They did this not only out of sympathy for women who wanted an abortion and had no other way to procure one legally, but also as a protest against an abortion policy they considered too restrictive. The certifications were made after only a brief interview, on the basis of which mental illness severe enough to threaten life was imputed to women who did not have such illness. The women were pleased to be declared mentally ill. They understood that this labeling was based on convenience and that they were not considered really ill. Before the psychiatric evaluation they were often coached by their referring doctors to describe suicidal preoccupations. The obstetricians and gynecologists who referred the patients to the psychiatrists for certification were happy to have psychiatrists take responsibility for the abortion and to have the way paved for it. Psychiatrists who saw the abortion laws as too restrictive were pleased to provide this service in the interest of a liberalized abortion policy and to be able to make a political gesture for which they also received pay. Deliberate mislabeling on a wide scale was continued over a period of years, until a change in the legal system no longer made health a factor in securing abortions.

Most of the data available on psychiatric need for abortion was imprecise, but it indicated that even a woman seriously threatening suicide if she had to carry a baby to term almost never acted out this threat. Daniel Callahan, the philosopher-medical ethicist, stated that though a number of psychiatrists stressed the possibility of suicide on the basis of attempts or threats, the evidence of the actual incidence of suicide was in fact very rare, even in women who were

denied abortion after threatening suicide. In 1970 Callahan wrote, "So far as I can judge from the literature, there are no data to support a view that suicide for refused abortion, or as the result of pregnancy, is significant anywhere."[2] The likelihood of a severe neurosis or of a psychosis if the pregnancy were carried to term was also remote.

In addition to traditional psychiatric factors, psychiatrists took into consideration socioeconomic factors that had not before been considered medical — the number of previous children, the wish of the patient regarding this pregnancy, whether there were other family problems, and the family's financial situation. When all these are included as health reasons for an abortion, it becomes easy for a psychiatrist who favored abortion to say that it would preserve life, and even easier for him to say that it would preserve health (in the states that broadened their criteria to include this).

Callahan, who favored a liberalized abortion policy, thought it was appropriate for psychiatrists to take all these nonpsychiatric factors into consideration in view of a "general trend in medicine to see health in the broadest possible terms." The concern of the psychiatrist, Callahan said, was to help people function in their social and cultural environment. "The judgment, for instance, whether a person should be committed to a mental institution, whether he should be given certain drugs, whether he should be given intensive or relatively relaxed treatment, will be very much determined by a psychiatrist's consideration of the broadest context of a person's life."[3] This is a position that gives the widest discretion to psychiatrists, since everything becomes a factor to be included in a psychiatric determination.

Most psychiatrists who certified abortion were not basing their decisions on a belief that they were practicing a new kind of holistic medicine. They were giving false diagnoses and prognoses out of sympathy for the plight of women who otherwise might have been forced into an illegal abortion.

Fuller Torrey, an antipsychiatric psychiatrist, believes that the widening definition of psychiatric illness will lead inexorably to "psychiatric fascism," where psychiatrists, justified by reliance on the medical model, would be given control over almost every phase of human life. He cites the abortion determinations as an example of "a social problem" that "became psychiatrized." The decision concerning abortion was left to psychiatrists, he says, and "we in

turn justified our decision by value statements about the mental 'health' of the woman . . . It was all a sham, a shift of responsibility from society to psychiatrists." Torrey, like many other psychiatrists, both pro- and antiabortion, was glad when abortion reform took the decision out of the hands of the psychiatrists and made the psychiatrist honest once again, or at least took him out of this kind of dishonest psychiatric practice.[4]

Many psychiatrists did not go along with this deviation from the psychiatric tradition of a scientific and factual basis for diagnoses. Those who opposed abortion on moral grounds or because they did not want psychiatry to take on the responsibility for making such obviously nonmedical decisions did not readily certify abortion. If they did it at all, it was for the rare patient with schizophrenia, manic-depressive psychosis, or some other serious psychiatric illness that might be aggravated by the continuation of the pregnancy. But in every community the proabortion psychiatrists quickly became known, and the medical community had a sure source of certification of abortions for their patients. The typical woman who was certified for abortion by proabortion psychiatrists had never seen a psychiatrist before she consulted one to secure the abortion, and once it was granted she had no need to see one again. In the period before liberalized abortion statutes and policy, the number of legal abortions certified on medical and mental grounds rose to twenty thousand to twenty-five thousand yearly.

During the same period, there were an estimated two hundred thousand to 1 million illegal abortions done yearly in the United States, some of which resulted in infection and death. The fact that affluent patients could easily find psychiatrists to certify their abortions but ward and charity patients were usually not granted them became one of the main arguments for doing away with abortion restrictions entirely. (This was a strange social and economic phenomenon explainable only in part by the fact that teaching hospitals that took care of poorer patients had higher standards and were subject to more scrutiny than other hospitals.)

Psychiatrists promoted a change of attitude by certifying abortions and by preaching a more relaxed point of view. Some psychoanalysts saw it as a crucial decision that carried the possibility of great unconscious guilt, but many psychiatrists began to argue that the conflict involved in having an abortion had been overstated in the older psychiatric literature. These were influential factors lead-

ing to legislative and judicial action to liberalize and finally to end restrictions on abortion.

Because psychiatry is largely practiced outside public scrutiny, it had been possible for psychiatrists to promulgate their own policies. In this they were very much in the position of a district attorney who has the power to decide whether or not he considers an offense serious enough to prosecute. But the district attorney's discretionary power is not ostensibly decided on scientific grounds, not made outside public awareness, and does not usurp authority that properly belongs elsewhere in society. The usurpation of authority here was at the expense of legislatures that had devised abortion policies that psychiatrists then circumvented.

The liberalization of abortion laws was paralleled by a liberalization of psychiatric thought. In 1967 only 23 percent of responding members of the American Psychiatric Association favored abortion on demand; two years later an amazing change had taken place and 72 percent of 2041 psychiatrists surveyed approved of abortion on request.[5]

Psychiatry can be used not only to procure abortions but to shape attitudes about abortion. When Hawaiian operating-room nurses working under a liberalized state law found themselves nauseated, depressed, and made anxious by their participation in abortions, psychiatrists called these reactions neurotic — although that was a value-laden judgment — and required that the nurses go into group therapy, in which they could come to accept the fact that their reactions were inappropriate — especially so, because, in the words of one of the psychiatrists called in to deal with the problem, "what is aborted is a protoplasmic mass" and not a real live individual.[6]

When a decrease in morale on the wards where abortions were performed at the hospital of the University of Pennsylvania led to an increase in nursing turnover, two psychiatrists helped form groups so that nurses could "come to term with their feelings." The nurses felt that the "dirty work" of saline-induced abortions was left to them, because the doctors injected the amniotic sac with saline and left the rest of the process to the nurses. Sometimes the aborted fetus had a heartbeat, and the nurses felt a conflict between their traditional role and that of assistants at abortion. They resented young unmarried mothers who were forcing them to take responsibility for "cleaning up their mess." Group therapy ventilation turned out not to be a help — in fact, the head nurse left her job after

participating in nine sessions. The psychiatrists changed their tactics and got medical personnel who had a positive attitude toward the abortion procedure involved in the groups. They also made policy recommendations to improve the abortion service. They recommended that the procedure should be done earlier so that the fetus is less recognizable as a human being, and that older female nurses and male nurses be used on the abortion wards, since nurses in their twenties, who were often unmarried and childless, were too sensitive to the issues involved in abortion.[7]

Discomfort in the role of assisting at abortion, which would have been seen a decade earlier as a normal emotional reaction, had been redefined as immature and neurotic. The interest of the smooth functioning of the abortion ward had taken precedence over feelings, which, if they had not impeded hospital routine, would have been "worked with," but now had to be stamped out. By 1979 medical feeling on abortion had become so fixed in the proabortion position that medical-school graduates who opposed abortion were being denied obstetrics-gynecology residencies for their views, and applicants to some medical schools were quizzed on abortion views and were denied admission on the basis of an antiabortion position.[8]

For a period of three years, from the Supreme Court's abortion decision in 1973 until Congress passed the Hyde Amendment on the Health, Education, and Welfare Appropriation Bill in 1976,[9] psychiatrists had no need to be involved with abortion. The Hyde Amendment brought psychiatry back into the picture again by prohibiting federal funds for Medicaid abortions "except where the life of the mother would be endangered if the fetus were carried to term." The Supreme Court later ruled that when the life of the mother is not endangered, the state is not required to pay for abortion.[10] The "1978 Hyde Amendment"[11] superseded and somewhat liberalized the "1977 Hyde Amendment" and allowed federal funding for Medicaid abortion "where the life of the mother would be endangered if the fetus were carried to term," for victims of rape or incest, and when severe and long-lasting physical health damage would result from carrying the pregnancy to term. As a result of the Hyde Amendments, the psychiatrist was again in a position of authority, able to certify abortion on the ground that suicide threatened. Their certification now had a different impact: The abortion was legal without certification, but only the psychiatrist's certification could qualify it for federal funding. Now, however, so much publicity

focused on abortion certification that psychiatrists were more reluctant to bend the law as they previously had.

During the Vietnam War there was an equally glaring example of psychiatric mislabeling of people as sick in order to enable them to circumvent the force of a law that they found onerous, and this involved exemption from the draft. Once again, as in the abortion process, the psychiatrist used his labeling power to confer an excuse and thus assumed authority that had never been granted to him. Like abortion certification, psychiatric deferment of draft-eligible men had a racist connotation. In both cases, minority-group members and the poor were not given the advantage of the psychiatric excuse. Sophisticated and affluent men, many of them college-educated, learned how easy it was to find a psychiatrist who would say they were neurotic and thus allow them to be deferred. Their places in draft quotas would be filled by the less sophisticated, less affluent, and less well educated, who were not as adept at circumventing the system or had less desire to be relieved of their legal obligation.

During the Vietnam War the law required every man subject to the draft to register at eighteen and the policy was to draft men nineteen and over. Beginning in 1970, a lottery system was instituted in which every nineteen-year-old male was assigned a random number based on his birthdate. The lottery system represented the decision by the government not to continue to try for a fair draft system. Henceforth, instead of equality of sacrifice, the emphasis would be on luck or fate. Under this system, a man with no deferment who was not called on his nineteenth birthday or a deferred man who was not called during the first year in which he was subject to the draft was home free, without further obligation.

The system produced a huge pool of draft registrants that funneled down to comparatively few drafted men. Out of a manpower pool of 27 million men there were almost 9 million enlistees and 2 million draftees. There were 2,150,000 who went to Vietnam and 46,000 who died from enemy action (of a total of 108,000 deaths). Fewer than 1 percent of all draft-age men were needed for combat duty in Vietnam at any one time.[12] The element of luck involved in the draft and the inequity of sacrifice led to widespread desire to escape the draft. Sometimes those who did not use every means to avoid being drafted, no matter how contrived, were seen as stupid or "square." More than 15 million men avoided the draft either

because they were lucky in the lottery (over 4 million of these) or because they were disqualified, deferred until the risk of being drafted was over, or exempted. The variety of reasons for deferments and exemptions was broad: conscientious objection, student status, elected official, hardship, marriage, fatherhood, status as a sole surviving son, and occupational status as a minister, teacher, engineer, or farmer. But the way that most men avoided the draft was to be exempted because of a physical, mental, psychiatric, or moral disqualification. More than 5 million men avoided it in this way, by failing either their preinduction or induction physical examination. Of these, there were 255,000 exemptions for psychiatric defect and 1,360,000 for mental defect.[13]

The preinduction physical examinations were done at seventy-four Armed Forces Entrance and Examination Stations throughout the country. These stations augmented their medical staffs by contracting with local doctors. The psychiatric consultants, who received sixty dollars a day, were usually traditionalists who felt assisting the military to fulfill its manpower requirements was also a fulfillment of their own patriotic duty, and they favored passing, rather than failing, inductees. But as conformist physicians, they placed a great deal of reliance on the recommendations of their fellow doctors if the inductee carried with him a medical certificate stating he should not serve.

There was another and more valid reason for the consulting psychiatrists to rely on the physician certificate that the inductee presented: A man labeled by an outside psychiatrist as neurotic and unfit for service, if drafted and later psychiatrically disabled, would be a continuing charge on the government for the remainder of his life. Less severe disability could cause inadequate performance in the service, leading to less-than-honorable discharges, dishonorable discharges, possibly court martials, assignments to rehabilitation programs, and other expensive and inefficient alternatives to satisfactory service. Consulting psychiatrists tended to disbelieve the stories of neurosis and psychiatric disability of registrants who did not have a physician certificate and to believe without reservation the word of a fellow psychiatrist that disability was present.

The knowledgeable registrant had a great advantage in attempting to manipulate the system. If he wanted to join the service, he could suppress evidence of a psychiatric disorder, and many men, particularly those from blue-collar backgrounds, where failing to

serve was considered unmanly, did suppress evidence of psychiatric disorder. On the other hand, if the registrant wanted to be exempted from service, he could present a physician's certificate, even though the history of psychiatric problems may have been exaggerated or fabricated. The registrant had months to prepare his story and build up a history of psychiatric illness; the examination station consultant had only a brief interview.

Most psychiatrists did not readily certify draft-eligible men as too mentally ill to be drafted, but some who were opposed to the Vietnam War and wanted to do all they could to hamper its prosecution took action by letting draft-counseling agencies and antiwar organizations know that they would cooperate with anyone who wanted to evade the draft through a psychiatric basis for exemption. (The only problem with this gesture of opposition is that the place of the psychiatrically deferred man would be taken by someone else who did not want to take advantage of a psychiatric exemption or was not knowledgeable enough to find the path to one, and so the policy of easy psychiatric deferment did not save lives — it only meant that another person would assume the risk or hardship.)

The Selective Service System invited efforts to beat the system by listing so many grounds for exemption that a knowing inductee had a wide choice of which route he wanted to follow — being a conscientious objector, exhibiting an obscene tattoo, being in the process of having orthodontic braces fitted, having a food or bee sting allergy, having asthma, severe ingrown toenail, hemorrhoids, itchy scalp, insomnia, or hay fever, and being ugly or underweight were only a few. If none of these applied, there was always the psychiatric excuse. The Selective Service guidelines on "Psychoses, Psychoneuroses, and Personality Disorders" were vague, and broad enough to cover any enterprising registrants who wished to "go the psychiatric route." Besides a history of serious psychiatric illness, they included history of a psychoneurotic behavior that impaired school or work efficiency; a history of a brief psychoneurotic reaction within the preceding twelve months sufficiently severe to require medical attention or some brief absence from work or school; character and behavior disorders evidencing an impaired characterological capacity to adapt to the military service; overt homosexuality; other deviant sexual practices such as voyeurism, exhibitionism, and transvestism; alcohol or drug addiction; characterological disorders characterized by immaturity, instability, and personal inadequacy

and dependency; and other symptomatic immaturity reactions such as bed-wetting, stammering, or stuttering. One Pennsylvania doctor said, "There's no young man so well that we can't find something to disqualify him from serving."[14] A draft counselor said, "No one is so healthy that he cannot be an army reject."[15] A researcher looking into draft exemptions wrote: "Almost anyone, at one time or another, could qualify for exemption under at least one of these."[16]

As public opinion against the Vietnam War strengthened, some doctors began to act as if they were performing a moral act by finding ways for men to evade the draft. The Medical Committee on Human Rights coached doctors in writing convincing letters to examination station doctors. One recommended method was to concentrate not on the inequity of army service for the registrant but the disadvantage to the service of drafting the registrant.[17]

Some doctors with antiwar sympathies rationalized the exaggeration of symptoms by peculiar logic. The registrant seeking help in evading the draft is a patient, they said (although most people would not see this as a doctor-patient relationship), and the problem for which he seeks medical help is not the allergy, asthma, or insomnia, which may only be marginally present, but the threat of being drafted, which is imminent and real; therefore the function of the doctor is to help the patient in every way he can to spare him the threat of the draft. An Oregon doctor, writing to the *New England Journal of Medicine*, put this position in words that are as unequivocal as they are logically and ethically dubious. Traditional medical ethics, he said, clearly set forth "the obligation of the physician to help the patient in front of him in any legal way he can."[18] These doctors represented a minority of medical opinion. Most doctors would have seen their role differently. But draft-resisting patients were drawn to draft-opposing doctors.

Draft board policy gave doctors extraordinary power. If a registrant presented a doctor's letter but the examining station doctor thought he was malingering, he would often still be rejected on the ground that a malingerer was not a good psychological risk for the armed services. Not all draft boards were as acquiescent, and the counseling of registrants eventually developed into a fine art that included the evaluation of which draft boards accepted what kinds of reasons for deferment.

Examination Station psychiatrists were suspicious of claims of homosexuality, since this was one of the popular choices for men

seeking exemption, and they were often disbelieving, even when the claim was true. Many homosexuals were drafted. But claims for exemption on other psychiatric grounds, supported by a doctor's letter, tended to be believed. One army authority on medical standards said, "Even when we suspect malingering, it is impossible to prove it. The standing rule is to believe the letter brought by the examinee. If a doctor says the man has a debilitating illness, then we have no choice but to say he's out." At least one examining station gave everyone with a letter from a doctor an exemption,[19] and many others rarely questioned a letter. Most registrants preferred a physical rather than a psychiatric reason for being rejected, and the psychiatric exemptions accounted for only about 7 percent of those based on physical and psychiatric defect, but as antiwar sentiment mounted, the psychiatric exemptions increased in popularity, particularly when psychiatrists learned their recommendations were being so readily accepted.

In addition to the attempts by some psychiatrists to help men who had not been patients to avoid the draft, many psychiatrists wrote letters documenting the need for exemption for their therapy patients. The main motive for a patient's entering therapy may have been the anxiety caused by the imminence of the draft. The therapy may have been a legitimate effort to deal with the threats of separation and death caused by the draft or it may possibly have been a less legitimate effort to build up a history of treatment for a psychoneurosis in order to justify deferment. We do not know how frequently doctors wrote letters for patients in treatment — legal psychiatry operates in an atmosphere of low visibility, and we lack statistics and hard data on most subjects — but we do know that many psychiatrists wrote draft letters for a few of their patients, and some specialists in the treatment of adolescents wrote letters for many of their patients. A few analysts, conscious of the transference meaning of helping a patient remain in therapy, asked their patients to see another psychiatrist to evaluate them and write the letters. In this way they hoped to keep the transference from being "contaminated." (The suggestion to see another psychiatrist was itself contaminating, but this seemed to some classical analysts the lesser contamination.)

Like the women certified for abortion, men evaluated for draft exemption who had not been in psychiatric treatment usually did not consider themselves sick. The recommendation would some-

times be made for continuing therapy after the exemption had been secured, but both parties in this transaction knew that it would probably not be followed. Fear of induction was the "disease," and the exemption was the "cure."

One New York psychiatrist, according to *Time*, wrote as many as seventy-five letters a week, charging up to $250 for each letter, to certify men as psychiatrically unfit. Eventually examination station doctors learned to recognize her bias and to ignore her recommendations.[20] (A psychiatrist who could see seventy-five registrants and write letters for all of them at $250 per letter could earn $18,750 for a week's work.) Some psychiatrists did not accept fees for their evaluations, seeing this activity as part of their antiwar effort.

Antiwar psychiatrists felt there was no need to be objective, because the war was unjust. Peter Roemer wrote in a letter to the *American Journal of Psychiatry* that he had seen over 100 men who were looking for a way out of the draft, and he had not felt that in writing any of the letters for these men that he had any need to profess objectivity about his antiwar and antiestablishment value system. Criticizing an article that had discussed the position of the doctor writing letters for draft exemption, he said, "The authors would like to maintain that it is possible for a psychiatrist to be objective. I think this is naive . . . I do not think it is possible for one man to confront another's pressing need (in this case a letter) and not have his perceptions of that individual distorted by his feelings; certainly, his feeling about satisfying that need would distort his perceptions."[21] Peter Bourne, writing free draft exemption letters in Atlanta, was chagrined to find that some of the registrants he helped, instead of being grateful, "acted as though all doctors had a moral obligation to help them dodge the draft for nothing."[22]

Very few writers of dubious letters were challenged. When several were reported to the United States surgeon general, he was not able to decide whether there was any authority to act against them.[23] It would have been difficult for the Justice Department to prosecute physicians successfully for impeding the draft, since "clinical judgment" provides a wide scope for the decision maker, and so the doctor could always plead this was his honest clinical opinion. Local medical societies could have brought disciplinary actions such as suspension from the society, but that would not have interfered with the ability to continue to practice, and in any case there is no report

that any disciplinary action was brought against any physicians for fraudulent documentation to help evade the draft.

Influenced by the growing activism of antiwar physicians, the rejection rate for the draft went from 29.9 percent in 1968[24] to 36 percent in 1969[25] to 46 percent by July 1970.[26] In Philadelphia it rose to almost 60 percent. As draft boards became less sympathetic to conscientious objector claims and as teacher and graduate student deferments were phased out, the number of medical, and particularly psychiatric, claims for deferment increased. Commented psychiatrist Benjamin Pasamanick in 1974, "During the Vietnam conflict of the last ten years a unique finding in U.S. military history was observed. For the first time rates of rejection from the armed forces were higher for white persons than for black persons. It was apparent that the white middle-and upper-class men (rejected largely, as usual, on psychiatric grounds) were able to pay for civilian psychiatric opinions that, oddly enough, coincided with the judgments of the psychiatrists on the draft boards. The black men, on the other hand, either because they were unable to pay for such independent psychiatric opinions or because they were largely unemployed and found military service the only mode of life, also had their judgments of their own psychiatric fitness coincide highly with those of the draft boards."[27]

Leslie Fiedler wrote that he had "never known a single family that had lost a son in Vietnam, or indeed, one with a son wounded, missing in action, or held prisoner of war" and that, talking to friends, he found they "all say the same."[28] In 1965, blacks accounted for 24 percent of all combat deaths.[29]

A student who was at Harvard during the time he was subject to the draft has written about his efforts to avoid being drafted. James Fallows — later President Carter's chief speech writer — wanted to secure his deferment on the grounds of being underweight. He was six feet one inch tall, and he hoped through rigid dieting to bring his weight down to less than 120 pounds. He had been advised to do this by Harvard medical students who were engaged in helping college students beat the draft. They had also advised that he try fainting spells, but he had decided that he could not fake these successfully. He was disappointed when he was put on the scales to find he weighed 122, and he persuaded the orderly to write down 120 pounds instead. Then he was sent to a final meeting with the "fatherly physician" who ruled on marginal cases. He wrote:

> I stood there in socks and underwear, arms wrapped around me in the chilly building. I knew as I looked at the doctor's face that he understood exactly what I was doing.
>
> "Have you ever contemplated suicide?" he asked after he finished looking over my chart. My eyes darted up to his. "Oh, suicide — yes, I've been feeling very unstable and unreliable recently." He looked at me staring until I returned my eyes to the ground. He wrote "unqualified" on my folder, turned on his heel, and left. I was overcome by a wave of relief, which for the first time revealed to me how great my terror had been, and by the beginning of the sense of shame that remains with me to this day.

Fallows wrote how, while the men from Harvard were deliberately failing their color-blindness tests, buses from the Chelsea district draft board drove up. In contrast to the Harvard contingent, these were "thick, dark-haired young men, the white proles of Boston."

> Most of them were younger than us, since they had just left high school, and it had clearly never occurred to them that there might be a way around the draft. They walked through the examination lines like so many cattle off to slaughter. I tried to avoid noticing, but the results were inescapable. While perhaps four out of five of my friends from Harvard were being deferred, just the opposite was happening to the Chelsea boys.

Fallows described how he and his friends returned to Cambridge in a high-spirited mood, but with something close to the surface that no one wanted to mention — "We knew now who would be killed . . ."[30]

In the sparse psychiatric literature dealing with the role of the psychiatrist certifying for draft exemption, the authors of one study indicated that single-interview psychiatric evaluations for draft purposes were so cursory that they tended to discredit psychiatry.[31] But the psychiatrist-authors of another study stated that a single interview lasting forty-five to sixty minutes was enough for the psychiatric determination in 93 percent (136 out of 147) of the cases they reviewed. (They recommended that all but five of the men they saw receive deferments; they said that "civilian psychiatrists have a responsibility to maintain their patient's health, which is often incompatible with military service.")[32] Other psychiatrists did not spend even forty-five minutes with the men they were evaluating, or if they did spend that time on the evaluation, they did this for legal reasons, to document the reliability of their certification, not to elicit a more accurate psychiatric story. One student tells of obtaining a letter from an antiwar psychiatrist in New York City in 1970. He visited the psychiatrist three times to have the diagnosis made,

and the recommendation look professionally and conscientiously conducted, but in fact the total time spent in talking with the psychiatrist was less than fifteen minutes.[33]

With the connivance of a poorly conceived governmental policy and a legal system that would allow appeals to drag through the courts for so many years that the issue had lost its relevancy, physicians and psychiatrists had helped middle-class and educated men escape from the draft. What were the long-term social and political effects of their overzealousness? Fallows has suggested that it prolonged the war, that it permitted the opposition to Vietnam involvement to operate with less urgency than it would have if the burden of service had been more equally distributed. He says, "The more we guaranteed we would end up neither in uniform nor behind bars, the more we made sure that *our* class of people would be spared the real cost of the war. The children of the bright, good parents were spared the more immediate sort of suffering that our inferiors were undergoing. And because of that, when our parents were opposed to the war, they were opposed in a bloodless, theoretical fashion, as they might be opposed to political corruption or racism in South Africa"[34] Dr. Howard Waitzkin, who participated for two years in assisting draft resisters to secure deferments, describes the social effect as being consistent with the wishes of the armed forces, which is an explanation of why it was allowed to flourish.

> The sick role is a convenient mechanism of social control for institutions like the Selective Service System. The military offers the sick role as a controllable mode of deviance for those who are unwilling to co-operate fully with the system but who will not — once granted medical exemption — actively work to overthrow the system . . . From this perspective, the sick role appears to support the institutional status quo. Physicians, often eager to satisfy the needs of individual patients, tend to expand their certification of the sick role in such institutional settings as the military draft. This apparently beneficient act on the physician's part may result in unintended conservative and perhaps counter-revolutionary consequences for social change.[35]

The false certification of mental disability produced a guilty class of influential men who had evaded the draft, and through rationalizing this decision, found it necessary to be negativistic and destructive toward many other phases of American life as well. It kept an articulate and concerned kind of potential observer, the civilian soldier and officer who might write home and mobilize opinion, out of the fighting zone, and so let laxity, cruelty, and atrocities go unreported and uncorrected. It increased the division between social

classes. It lowered respect for physicians, and especially psychiatrists, as impartial and scientific professional people. If physicians can shape their decisions in one area to accord with their political views, they can do it in other areas as well.

In one of the few public discussions of draft resistance and its relationship to medical practice, Peter Elias wrote in an article in the *New England Journal of Medicine* of his eventual disillusionment with the role he was playing, and some letters to the editor in reply provided a brief flurry of reaction. Elias reported that many physicians working with the antiwar movement or helping registrants escape the draft became unhappy as they realized two important truths that somehow had previously escaped them — that many of the men for whom they secured rejections were not opposed to the war or the draft but were motivated by selfish and personal goals, and that the benefits of the policy accrued to the advantaged and their burden was shifted to the disadvantaged.[36]

But one doctor wrote in reply to Elias to express pleasure with the role he had played in using his medical authority to circumvent the draft. Mark Sicherman said, "It has been an immensely satisfying method of protesting an immoral war and disordered governmental priorities. It has helped to alleviate my sense of powerlessness much more than the multiplicity of marches, rallies, letter-writing campaigns, tax resistances, etc., with which I have been involved. It seems to me that ceasing to be a participant in medical draft resistance because of its potential social consequence is analogous to believing that antiwar protests served to prolong the war."[37]

In certifying abortions and draft exemption, psychiatrists had proven how effective their interventions could be, how established social policy could be circumvented by their diagnoses and recommendations. But the certification of abortion has not been a major problem since legalization, although it still has significance as a method of securing abortions for Medicaid recipients. And the draft is gone. These particular exercises of psychiatric power have faded from the scene. But they remain symbolic of larger issues: the efficacy of psychiatry in winning exemptions from society's rules, the way that psychiatrists will lend themselves to causes that they see as just and alter their diagnostic techniques to achieve social ends, and the lack of both self-criticism and outside criticism of psychiatry or even of conceptualizing the role of psychiatry when it undertakes such social interventions.

Psychiatrists in the United States have criticized psychiatrists in totalitarian countries for being tools of the state and bending psychiatric diagnoses to serve a social purpose. They do not criticize themselves when they become tools either of the state or of movements that are in opposition to the policies of the state. Many Russian psychiatrists at least are sincere when they label a political dissident as psychiatrically ill, for they may believe that nonconformity is a symptom of diagnosable mental disease. The American psychiatrist who uses his labeling authority politically is often being deliberately dishonest.

The same potential for social usefulness in evading society's rules that was demonstrated concerning the draft and abortion is ready to show itself when other issues requiring exemptions from state policy arise. It manifests itself now in less obvious ways, as psychiatrists provide excuses for all the civil and criminal transgressions that require a letter from a psychiatrist or an opinion from a psychiatrist to help a person avoid some unpleasantness that he faces.

The same manipulations that were used against state policy on abortion and draft are available to be used both against the state and in its service. As we shall see, an attorney general of the United States — Robert Kennedy — and a president — Richard Nixon — attempted to make use of the labeling power of psychiatrists in efforts to discredit their enemies.[38] The psychiatrists who deviate from professional standards in order to achieve humane social ends are relying on their own subjective definitions of humanity and are utilizing techniques that are also capable of being used for political purposes that may be the opposite of humane.

NOTES

1. *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 1979 (1973).
2. Daniel Callahan, *Abortion: Law, Choice and Morality* (New York: Macmillan, 1970), p. 62.
3. *Ibid.*, p. 64.
4. E. Fuller Torrey, *The Death of Psychiatry* (Radnor, Pa: Chilton Book Co., 1974), pp. 105-6.
5. Eric Pfeiffer, *Archives of General Psychiatry* 23 (1970): 405.
6. Walter Char and John McDermott, "Abortions and Acute Identity Crisis in Nurses," *American Journal of Psychiatry* 128 (1972): 952-57.
7. Kenneth Kessler and Theodore Weiss, "Ward Staff Problems with Abortions," *International Journal of Psychiatry in Medicine* 5, No. 2 (1974): 97-103.
8. Chris Connell in *Atlanta Journal*, Jan. 3, 1979.
9. §209, Pub. L. 94-439 (1976).
10. *Beal* v. *Doe*, 432 U.S. 438 (1977) and *Maher* v. *Roe*, 432 U.S. 464 (1977).
11. Superseding rider to Pub. L. 95-205 (1977).
12. Lawrence Baskir and William Strauss, *Chance and Circumstance: the Draft, the War and the Vietnam Generation* (New York: Vintage Books, 1978), p. 14.

13. *Ibid.*, Fig. 1 (p. 5), Fig. 2 (pp. 30-31).
14. William Mandell, "The Institutionalization of Draft Resistance," *Philadelphia Magazine*, Sept. 1970, pp. 96, 178.
15. David Suttler, quoted in "Physical Disqualification for Armed Forces," *Modern Medicine*, Oct. 5, 1970, pp. 77, 84.
16. David Ingram, "Psychiatric Deferment from the Military," Villanova University School of Law, 1970 (unpublished).
17. Mandell, "Institutionalization of Draft Resistance," p. 182.
18. Craig Leman, "Letters to Editor," *New England Journal of Medicine*, 288 (1973): 1305-6.
19. Baskir and Strauss, *Chance and Circumstance*, p. 47.
20. "Draft-Defying Doctors," *Time*, Nov. 16, 1970, p. 67.
21. Peter A. Roemer, "Letters to the Editor," *American Journal of Psychiatry* 127 (1971): 1236-37.
22. Baskir and Strauss, *Chance and Circumstance*, p. 49.
23. *Time*, Nov. 16, 1970.
24. *Ibid.*
25. "Physical Disqualification for Armed Forces," *Modern Medicine*, Oct. 5, 1970, p. 81.
26. *Time*, Nov. 16, 1970.
27. Benjamin Pasamanick, "Letters to the Editor," *American Journal of Psychiatry* 131 (Jan. 1974): 107.
28. Leslie Fiedler, "Who Really Died in Vietnam?" *Saturday Review*, Nov. 18, 1972, p. 41.
29. Baskir and Strauss, *Chance and Circumstance*, p. 8.
30. James Fallows, "Vietnam — the Class War," *National Observer*, Feb. 21, 1976, p. 14.
31. Ira Frank and Frederick Hoedemaker, "The Civilian Psychiatrist and the Draft," *American Journal of Psychiatry* 127 (1970): 497-503.
32. Robert Liberman, Stephen Sonnenberg, and Melvin Stern, "Psychiatric Evaluations for Young Men Facing the Draft: A Report of 147 Cases," *American Journal of Psychiatry* 128 (1971): 147-52.
33. Personal account of exempted registrant.
34. Fallows, "Vietnam."
35. Howard Waitzkin, "Letters to the Editor," *New England Journal of Medicine*, 288 (1973): 1306.
36. Peter Elias, "Medical Draft Resistance," *New England Journal of Medicine*, 228 (1973): 399-402.
37. Mark J. Sicherman, "Letters to the Editor," *New England Journal of Medicine*, 288 (1973): 1306.
38. The General Walker and Daniel Ellsberg cases are described in Chapter 18 of *The Powers of Psychiatry* (Boston, Houghton Mifflin, 1980).

Love of Life

Chilton Williamson Jr.

BY A MACABRE COINCIDENCE the flowering of a pro-abortion ideology has occurred in an era which to a greater degree than any other in the history of Western Society is characterized by undiscriminating solicitousness for "Life." Although critics of modern capitalism have for generations been accusing it of making a bourgeois fetish of romantic Love through the engine of Hollywood, they are continually conspiring to do the same for Life. The phrases "reverence for Life" and "sanctity of Life" are endlessly iterated by people for whom reverence is a foreign and even sinister sensation and who do not believe in the idea of sanctity in the formal sense at all. "Reverence for Life" has in fact become so much a cant phrase in politics and journalism that we shall soon be obliged to dismiss it as the last refuge of a scoundrel.

One of the few exchanges in the abortion debate to generate real humor occurs when a pro-abortionist accuses an anti-abortionist of holding a position that is based on superstition, irrationality, and sentimentality. The anti-abortionist, his opponent insists, is mired in simplistic, emotional thinking: he is incapable of logical thought and he is incapable of making distinctions. His stock-in-trade is prejudice; his prejudices come in unsplittable and indigestible combinations. He is the unhappy remnant of the pre-modern mind, roaming lost like a white whale through primeval seas and capable of horribly upsetting the barques of enlightened people.

It is somewhat like listening to a witchdoctor telling a Sloan-Kettering surgeon that his practices are based on voodoo. Let us assume (as proponents of abortion usually do) that the typical anti-abortionist is "R.C.," or perhaps a reasonably educated member of one of the more theologically-rigorous Protestant sects, and that his likely challenger in debate is religiously "enlightened." On the one hand stands a person whose arguments, while they are extra-rational to the degree that they are founded upon divinely-revealed commandments, have been shaped over a couple of millennia by

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some of the best, most systematic, and most rigorous philosophers, logicians, and humanists of the Western intellectual tradition (and which not even the most inflexible secular humanist would think of deposing from the curriculum). On the other stands a person who believes that all systems of ontological and moral beliefs are suspect, if not vain, and who by his own admission counts upon intuition, ad-libbing, emoting, and nose-counting to arrive at his moral and practical conclusions.

Whatever the root-and-branch validity of the anti-abortionist's tenets, it must be obvious that he at least *thinks* logically, and that he respects and has faith in logic. Question his *a priori* and his Q.E.D. if you like, but you have at least to admit that a respectable mental process is at work that is every bit as rigorous as the scientific and materialist one. This "superstitious" man can tell you why he thinks abortion is wrong, and how he thinks it is wrong. He can discuss confidently the origin of man and his condition; he can explain clearly the rules governing human life and the risks incurred by breaching them. He has a fully developed metaphysic in which everything in creation has a place and a function, and there is within him an inborn and inbred knowledge that is no less real for being in certain specifics inarticulate. Generalizations come easily to him, for he does not believe that every question is an open question; but he is reasonably adept, as a result of his moral and intellectual training, at making distinctions. Distinctions in fact are his meat, as they were Aquinas's.

What, by contrast, can be said of the logical processes and intellectual rigor of the average pro-abortionist? Even on cursory examination his arguments turn out to be sociological superficialities drawn from the textbooks of mass education, political slogans, and appeals to social and political convenience. All of them are — often self-avowedly — *ad hoc*, and all of them are to a greater or lesser extent the product of emotion, not reason, in the sense that the conclusion demanded dictates the supply of logic required to arrive there. The pro-abortionist Wants Abortion and He Wants It Now. And he has been taught at college how to get what he wants, and how to justify it intellectually.

The deeply emotive basis of the pro-abortionist argument is partly apparent in the flagrant contradiction between his casual attitude toward the taking of fetal life and his positively debilitating reluctance to aggress against any other manifestation of Life. Abor-

tionism is often considered to be a litmus test of liberalism in full flower, yet it is clearly a perverse and willful — and dishonest — departure from it. It is an exception of which no good liberal — *almost* no good liberal — dares speak the name. It is the Dirty Little Secret of the liberal mind and the liberal agenda.

Of course, the pro-abortionist can argue that he is indeed on the side of Life in this case as in all others — he is defending the mother's life, or at least her good life. Nevertheless, it is in his emotions that he is consistent, not his logic. Faced with adjudicating the claims of two coexistent lives, he finds for the larger and more immediate one. Human emotions attach themselves most readily in loyalty and affinity to the nearer and more accessible things. Here is a lusty, healthy woman, with a blob of protoplasm in her womb. Understanding tells him — could tell him — that though the woman has a husband, an address, and a social security number, the blob, which has a complete genetic code, is as human as she is. Prejudice — and the liberal predilection for embracing the claims of the most proximate constituency of credible victims — tells him otherwise.

Although in the matter of abortion such a "liberal" proves himself capable of making an exception, he fails to show that he is able to make distinctions between the various integers, and their values, of this Life he worships. "All right," he tells his opponent, "you're opposed to abortion. Then how come you support capital punishment?" He puts this question with truly righteous indignation, and with the forceful assurance that the challenge is unanswerable. Talk about distinctions, about inflexible positions! What sort of person could equate an unborn life, innocent of personal sin, with the life of Charles Manson?

There may not, in these days of relative peace, be very many card-carrying pacifists walking around, but certainly there has never been a time when armed struggle between nations was regarded less realistically than it is today. Vietnam may have fallen to a barbaric Communist regime, the Russians may have invaded Afghanistan, and "Marxists" may be plotting mayhem in El Salvador; but still, liberal opinion registers No at the idea of sending American forces anywhere to fight for anything. It says No as much to the proposition that our enemies should lose their lives as to the suggestion that our own boys should die. "Why, if you are in favor of abortion," an anti-abortionist might ask, "are you against sending troops to shoot, or be shot by, Cubans in Angola or guerrillas in El Salvador?"

(There is, of course, no answer to *that* question: at least it never comes.)

In the United States, a blind and indiscriminate reverence for biological life has led over the past couple of generations to an anthropomorphic attitude toward nonhuman life. Animal life, according to this notion, is of the same intrinsic value as human life, is subject to the same scheme of natural law, and is even claimant to the same rights, as a whole school of Animal Rights writers, including Cleveland Amory and Peter Singer, have insisted. In company with humanity, they are part of a web of Life that is physically and intellectually, but not spiritually, differentiated. This sort of vulgarized Pantheism, which in its unsimplified Eastern form possesses a much greater moral and theological complexity, has of course nothing in common with Western Judeo-Christian philosophy and ethics, which are settled on the premise that man and beast are separate categories of the Creation. Man has been classically defined as an animal possessing rights, while an animal can be said merely to possess life as an attribute. Sin is an offense of which man alone is capable and of which he is guilty by actions which involve him in a perverse relationship either to his fellow man or to his Creator.

The holistic and sentimental view of Life seems now to be leading beyond anthropomorphism to animism. Environmental organizations like the Sierra Club have developed an attitude, and a vocabulary and syntax to go with it, which treat forests, pampas, wetlands, deserts, and every form of topography as if they have a claim upon their own existence that approaches something very close to rights. The Secretary of the Interior is under fire daily from furious environmentalists who are distressed for the fate of tens of thousands of square miles of helpless oil shale and who seem to be speaking literally when they talk of mountains being "raped" by oil drillers, canyon bottoms "bludgeoned" by four-wheel-drive vehicles. This is of course the age of the metaphor, ingeniously and ingenuously applied to the point where a poetic truth is transformed by rhetorical sleight of hand into a factual one. But somehow you get the feeling that these people mean it.

Persons who are so easily led into excesses like these — people who can condone the murder of an unborn child while weeping over the shooting of a mule deer or the bulldozing of a mountain — surely can be said to lack a clear and coherent understanding of the

Life they celebrate. We are living supposedly in the age of Science, which is inherently opposed to sentiment. We moderns are assumed to have learned to see life directly, without the interposing gauzes of supernatural belief. The erstwhile slogan of the intellectuals, "We are all Marxists now," has been altered to "We are all scientists now." The secular city has banished sentiment as an arbiter of morals and social attitudes and replaced it with educated reason. Once human life has been removed from its religious context, once it has been demystified, all the illogical, irrational, and superstitious assumptions that have determined the way men think about it are expected to untangle themselves and the conditions of life, together with the rules that govern it, to become logically accessible. Stripped of superstition, we may proceed to think sanely about this Life we carry around with us like a happy tumor.

Unhappily the notion that Religion equals Sentimentality leads directly to the erroneous idea that sentiment cannot exist apart from religious sensibility, and that secular humanism is immune to emotionalism. In every era of the modern age some vulgar inspiration has shaped the mass sentiment of the time. In the late eighteenth century it was Democracy; in the Victorian period it was Progress; today it is Life. In Charles Dickens' day popular sentimentality permitted Victorians, eminent as well as humble, to weep over the death of Little Nell and similar pitiable scenes in literature, theater, and the opera; in the final quarter of the present century, indignant newspaper readers grieve over accounts of legal executions, the killing of baby seals, and the strip-mining of the western plains. Dickens had a morally-discriminating audience which demanded that the characters for whom his readers were expected to expend their sympathy be worthy of the gesture. The new sentimentalists, by contrast, are ready to cry for anybody and everything, except the victims of the *abortoires* they support.

In theory perhaps the demystification of human life makes for a more rational attitude toward Life and its inevitable obliteration; in fact it has produced a more irrational one. When men are led to believe that in their lives and in Life itself resides the ultimate Good against which every other Good is to be measured, they can scarcely be rational in their attempts to preserve it, or even to contemplate it.

The New Pro-Abortion Rhetoric

Basile J. Uddo

RECENTLY THERE HAS BEEN a dramatic shift in the tactics of the pro-abortion movement, especially in its rhetoric, which has moved from a defense of abortion to a loud, sustained call to stop passage of a Human Life Amendment (HLA). This new emphasis relies heavily upon exaggeration, and even distortion.[1] Its primary purpose is to convince women that an HLA would ban birth control: "They say it is anti-abortion . . . but it is really anti-woman and anti-birth control."[2]

There seems to be an implicit admission in this new rhetoric: it indicates that the leading pro-abortionists have finally conceded that the American people will not support abortion on demand. They have in effect abandoned the argument that abortion is a human good, and turned instead to distorting the anti-abortion position. They want to conjure up a "parade of horribles" that would inexorably proceed from the enactment of a Human Life Amendment, a technique designed to sway many people who oppose the present abortion epidemic, but might have qualms about a constitutional amendment.

Interestingly, the new pro-abortion rhetoric accuses the anti-abortion movement of being anti-woman just when, in fact, abortion is being perceived as anything but "protective" of women. The purveyors of the new rhetoric never mention the growing data that abortion is harmful to women, even under the best of circumstances,[3] or that even one abortion threatens the woman's future reproductive capacity,[4] or that abortionists have not been the compassionate providers of "health care" that they were supposed to be after they emerged from the "back alleys."[5] To achieve their end — stopping an HLA — they are being less than candid with the women they claim to protect.

This is especially true of the attempt to tie an HLA to "birth control" by making people believe a) that the anti-abortionists really mean to outlaw contraception, and b) that this will lead to terror

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tactics to ensure that the HLA is enforced not only against abortion, but also against contraception. On the record, such changes are ludicrous. "Birth control" is not and never has been a concern of the anti-abortion movement. Additionally, the record indicates that the HLA poses no realistic threat to the use of contraceptives.

Understanding Constitutional Amendments

Constitutional amendments are not statutes. They should not attempt to incorporate the specificity of a statutory law. They are, instead, broader statements of policy or purpose, delineating the direction that the specifics should take when laws are enacted pursuant to the amendment. Consequently, no amendment is ever considered complete on its face, which is merely the best embodiment of what the framers intended. Thus the "framer's intent" is always the most critical bit of information in guiding a legislative or judicial interpretation of what an amendment means. The great constitutional phrases "due process of law," "equal protection," "freedom of speech or the press," and "free exercise of religion" have all been elucidated by reference to the framer's intent or purpose.

A Human Life Amendment will not be different. All the proposed amendments use simple and direct language. Most of them extend protection, or the power to protect, to "all human beings . . . including their unborn offspring at every stage of their biological development." The plain meaning of the language is to stop the killing of unborn human beings, yet the new rhetoric says "the intent is clear" that the amendment is "anti-birth control."[6] The best evidence of intent, however, is to be found not in what pro-abortionists say, but in what the supporters of a Human Life Amendment said they intended in hearings held before the appropriate House and Senate committees in 1974 and 1976.

Take, for example, the testimony of Senator James Buckley, author of one of the earliest forms of HLA, before the Senate subcommittee hearings chaired by Sen. Birch Bayh in 1976. Said Buckley:

> Some proponents of abortion will seek to characterize the amendment as prohibiting methods of contraception. To such charges, the answer is twofold:
>
> First, there is nothing in the amendment which would directly or indirectly, expressly or impliedly, proscribe any mode of contraception;
>
> Second, under the amendment, the test in each case will be a relatively simple one; that is, whether an "unborn offspring" may be said to be in

existence at the time when a potentially abortive technique or medicine is applied. Particular standards on this point are to be worked out in implementing legislation.[7]

Similarly, Dr. Thomas W. Hilgers of the Mayo Graduate School of Medicine, a firm opponent of abortion and strong supporter of an amendment, was asked the contraception question.

SENATOR BAYH: Would you be opposed to unnatural or medical or scientific or drug-related efforts to alter the natural course of the sperm and the egg after intercourse?

DR. HILGERS. That were truly contraceptive, you mean, as opposed to abortifacient?

SENATOR BAYH: Yes, sir.

DR. HILGERS: Mr. Chairman, I am not opposed to the development of these kinds of methods. I feel that if any individual couple has the choice to select the kind of preventive family planning which is within either his religious or moral beliefs, wherever they come from. I personally would choose a natural method at the present time, simply because I do not like to have my wife polluted with birth control pills, and the intrauterine device is not all that well liked by a large number of women; 30 to 40 percent of them have to have it removed within a year because of bleeding or pain or infection of one sort or another.

There are complications with all of these, and I think that we should not lose faith that with our technology and our ability to study reproduction, that we could provide alternative methods [other than] what we have available today.[8]

Senator Jesse Helms, co-author of another one of the proposed amendments, responded directly to the contraception question: "I do not think [the amendment] would have any application to contraceptive devices or drugs . . ." Senator Bayh pressed him on the issue. "Do you think it is a proper role of the Federal Government to tell women and families what kind of birth control devices they may or may not use?" Again Senator Helms was direct in his answer: "No, if you're talking merely about contraception."[9]

Professor Robert M. Byrn of the Fordham University Law School submitted a paper to the Senate subcommittee wherein he categorically states that "[a] Human Life Amendment reaches abortion, not contraception,"[10] a position that he affirmed in his oral testimony.

Another law professor, John T. Noonan, Jr., perhaps the best-known spokesman for the anti-abortion movement, forcefully put the contraception question in perspective:

This language does not touch *Griswold* v. *Connecticut* 381 U.S. 479 (1965).

> The bugaboo that has been paraded before the Senate Subcommittee that an Amendment would lead states to bar contraceptive devices is a piece of *ad terrorem* rhetoric. The power conferred is a power to protect the unborn, not the spermatozoon or ovum. But suppose, someone may say, that some estrogens or intrauterine devices are found to operate not to prevent conception but to cause abortion. Would they not then be open to prohibition? I answer that you have to trust the judgment of the people as to where the lines should be drawn. You are dealing with medical techniques which are changing and with the process of birth. The Constitution is not the place to draw those lines which must be drawn. It is, I suggest, a safe assumption that no state legislature in modern America will bar a technique of conception control employed by many of the citizens of that state. You cannot guarantee and should not try to guarantee by the Constitution that a particular technology be immunized from regulation by the state. You should leave to the legislative process the defense of life.[11]

The "intent" in this sampling is quite clear. No proponent of any HLA was attacking contraception, and while this is not legislative intent strictly speaking, it would form the back-drop for the development of legislative purpose in enacting an amendment. Once a Human Life Amendment gets out of committee, which Congressman or Senator will supply the anti-contraception purpose? Which state legislature will characterize the amendment as prohibiting contraception and then ratify? The answer, of course, is none. How could they, when the authors of the three principal forms of amendment, Buckley, Noonan, and Helms, were so forceful in rejecting any connection between the amendments and contraception? And this despite the fact that the issue seemed a favorite of Chairman Bayh, who apparently attempted to create a connection where one simply did not exist.

Abortifacient vs. Contraceptive

The paradigm for the new rhetoric is a NOW (National Organization for Women) pamphlet called *Stop HLA Before It Takes Your Life*. Significantly, the "Stop HLA" materials never mention the word *contraception*; they refer instead to *birth control*. A subtle but important distinction, because it indicates that NOW recognizes that anti-abortionists are *not* concerned with banning true contraceptives. Since some devices or drugs are primarily abortifacients, however, there *is* a concern with their use. The new rhetoricians have simply decided to blur the distinction to give the impression that an HLA is anti-contraception. But the distinction should not be blurred. A contraceptive device prevents fertilization of the female

ovum by the male sperm. *No life is begun, no life is destroyed.* Conversely, an abortifacient does not prevent fertilization, but does something to stop the fertilized ovum from growing naturally, either by preventing implantation in the uterus, or by forcing the expulsion of the ovum after implantation. Such devices allow the beginning of a new life, a distinct human being, and then destroy it. That is why the anti-abortion movement is not concerned about the contraceptive, but legitimately concerned about the abortifacient.

Most "birth control" methods are clearly and exclusively contraceptive. One of the most widely used forms is surgical sterilization. Others include: condoms, diaphragms, tubal occlusion bands, clips and valves, spermicidal gels, creams, foams, suppositories,[12] and "natural" family planning methods, most of which have proven up to 97% effective.[13]

But it is generally believed that at least two birth control methods are primarily abortifacients: the intrauterine device and the "morning after" pill.[14] Various forms of the contraceptive pill were thought to function as both contraceptives and abortifacients, but it now seems that the most popular forms of the Pill are clearly contraceptive.

There is no *one* birth control pill, but there are two major categories of such pills: the combined pill and the mini-pill.[15] The combined pill is, as its name suggests, a compound of estrogen and progestin. The amount of each element varies according to a patient's "needs." The so-called mini-pill contains no estrogen, only progestin. For purposes of understanding the relationship of these pills to a Human Life Amendment it is important to understand, in non-technical terms, the mode of operation of these drugs.

In the earliest days of usage very little was known about the actual mode of operation of any of the various birth-control pills. After more than twenty years of experience, however, the experts are clearer and firmer in describing what actually happens. A leading expert in this area is Richard P. Dickey, M.D., Ph.D., who has served as a Food & Drug Administration (FDA) expert on contraception, and has contributed some of the most thorough and widely-accepted explications of the modes of operation of the pill. Dr. Dickey has also authored the most widely-used physician's reference book on the pill, *Managing Contraceptive Pill Patients.*[16] Dr. Dickey no longer feels that the operation of the pill — either the combination or progestin-only — is a mystery. His research, in

essence, confirms two of the three modes of operation generally attributed to the combination pill, even in the low estrogen forms, and the mini-pill.

The conventional wisdom has always been that the combination pill acts in one or more of three ways: First, to suppress ovulation; second, to alter the cervical mucus to obstruct the movement of spermatozoa to the site of fertilization; and, third, to change the lining of the uterus to prevent implantation. In the 1980 edition of *Managing Contraceptive Pill Patients*, Dr. Dickey concludes that the prevention of implantation is without basis:

> Contraceptive activity or efficacy is the result of the combined effect of the estrogen and progestin component. Most combination pills have more than one type of contraceptive action. Ovulation is prevented because of the suppression of pituitary hormones by the estrogenic and progestational activity.
>
> Ascent of spermatozoa to the fallopian tube is prevented by the alterations of cervical mucus and endometrial secretions . . . Other possible contraceptive mechanisms include alteration of the endometrial lining, preventing implantation. *There is scant evidence for such a mechanism, since if it did occur, the incidence of ectopic pregnancy would be much higher than it is.*[17]

That last point deserves emphasis. If the combination pill were not primarily preventing fertilization, the number of ectopic or tubal pregnancies would be at least "normal" as compared with a similar group of non-pill patients. Dr. Dickey reports that in fact it is quite low. Consequently, Dr. Dickey believes that the combination pill even in its low estrogen form prevents fertilization by the first two mechanisms discussed, and that there is no evidence for the abortifacient effect.

Dr. Dickey draws essentially the same conclusions about the mini-pill; it is not an abortifacient, having its primary effect on the cervical mucus, with some anti-ovulatory effect.

The Human Life Amendment and Contraception/Birth Control

If supporters of the Human Life Amendment are really closet opponents of contraception, as the new rhetoric suggests, they have selected the most inefficient and ineffective means to achieve their end. As has been noted, it is beyond dispute that most methods of contraception would be wholly beyond even the most bizarre interpretation of a Human Life Amendment. Any drug or device that *prevented* fertilization could not possibly run afoul of the amend-

ment. Consequently, sterilization, condoms, diaphragms, spermicides in all their forms, tubal occlusion devices (and soon-to-be-developed male sperm suppressants) are not remotely at issue. Nor, of course, are natural family-planning methods.

Again, the best example of the new rhetoric is NOW's "Stop HLA" pamphlet; despite its headlines about the HLA being "anti-birth control," it really mentions only *two* forms of birth control — the low estrogen combination pill and the IUD. As the text puts it:

> Since the IUD and low estrogen birth control pills work, in some instances, by preventing the implantation of the fertilized egg, it is clear that they would have to be illegal under the HLA.[18]

With regard to the low estrogen pill, nothing could be less clear than its necessary illegality. What is clear is that NOW is arguing on the basis of antiquated data now superseded by strong evidence that the low estrogen pill is truly a *contraceptive* and not an abortifacient. The inexorable conclusion is that, as a matter of fact, even an unintended effect upon contraception would not reach the most widely used forms of the pill,[19] which gives further evidence that HLA is not anti-contraception.

Intrauterine devices (IUD's), on the other hand, pose significantly different problems, and raise interesting questions as to who is really "anti-woman." It was also a mystery as to how IUD's worked when they were first introduced to American women. Today, however, there is growing understanding and agreement as to how they work, and the conclusion is that they are abortifacients:

> The presence of an IUD inside the uterus alters a number of factors necessary for pregnancy, but most experts believe that the *primary* birth control effect is the uterine inflammatory response its presence causes — the same kind of foreign body reaction your body produces when you get a splinter in your finger, for example.
>
> The IUD is a foreign body, and the uterus responds to its presence just as it would to any other foreign material. Infection-fighting white blood cells and inflammatory cells (macrophanges) gather in the lining of the uterus and disrupt the normal structure of the uterine lining with the result that implantation of the *fertilized* egg is unlikely to occur.[20]

Consequently, an HLA *could* pose a threat to IUD's, since they are primarily devices that produce repeated abortions, a fact that has not been widely disseminated to women who use these devices. The threat, however, would be limited.

Constitutional amendments are not self-executing. They generally

grant a power or specify a right, and leave implementation to the appropriate governmental body. This is particularly true in the case of the HLA in that it creates nothing new, nor does it make anything illegal. All it would do is restore the power to the States and Congress — power never questioned until 1973 — to protect *life*, including the unborn. Consequently, even the IUD would not be rendered illegal by the HLA, but would be subject to regulation by the state and federal governments. The reach of that regulation would be only to manufacture and sale, since regulation of "use" would violate the older, more solidly-based right to privacy recognized in *Griswold* v. *Connecticut*.[21] Similarly, use of an IUD could never meet the requirements of a criminal abortion since pregnancy and its termination would be impossible to prove.

Realistically, then, an HLA would allow states and Congress to determine if the IUD is solely or primarily an abortifacient, and whether it has any valid medical use. Having determined this, governmental licensing procedures *could* be used to prohibit the manufacture and sale of IUD's, except for valid non-abortive medical reasons. The important question then becomes: how much of a loss would it be, especially to women, if the IUD were to become "illegal"? The answer is, clearly, not much.

The IUD is one of the least popular methods of birth control. Estimates vary widely, but somewhere in the range of two to three million American women use them as compared to as many as 15 million using the pill.[22] Its unpopularity is well deserved, however, when one examines the safety data.

> In the 1960s, some 20 different inert IUDs were available for sale around the world. Most were available in the United States. Today, only two of these are still available. Nearly all the rest were removed because of some undesirable side effect discovered only after they had been inserted in large numbers of women.[23]

Perhaps the most widely reported example of the hazards of the IUD was the case of the Dalkon Shield, a popular model that proved deadly for some women. "In 1973-74, 14 maternal deaths due to septic abortion occurred in women using Dalkon Shields . . . this rate of death was considered approximately three times greater than for other IUD's."[24] Eventually, despite the pressure of the IUD industry and the politics of the FDA, that agency accepted the recommendation of an advisory panel and sought the withdrawal of

the Dalkon Shield from the market. In February 1975 the manufacturer did withdraw the device from the American market.[25]

Many, no doubt, think that the Dalkon Shield incident is isolated and not reflective of the overall safety of the IUD. The data suggest that this is a naive assumption. None other than the "famous" (for calling pregnancy a "venereal disease"!) pro-abortionist Dr. Willard Cates, Jr., Chief of the Abortion Surveillance Branch of the Family Planning Evaluation Division of the Center for Disease Control, has admitted the extreme risks involved in using an IUD. In a book called *Controversies in Contraception*, Cates notes that the book's contributors paid little attention to the IUD:

> Does this imply that there are fewer unresolved questions with the IUDs, now that the Dalkon Shield is off the market? We think not![26]

The conclusions are quite disturbing:

> Women wearing IUDs are approximately 3 times more likely to have pelvic inflammatory disease (PID) compared to women without devices. Moreover, compared to pregnant women without IUDs *in situ*, those using IUDs have a 3-fold higher risk of spontaneous abortion, *a 50-fold higher risk of death from septic spontaneous abortion,* and a 6-20 times greater risk of ectopic pregnancy.[27]

And yet Cates, and others like him, will not condemn the IUD. The question must be seriously raised: Who is really anti-woman? Defending the IUD is an odd way to defend the health of women.

Because a Human Life Amendment will protect life from the beginning, the IUD is in danger. But only it, and the similarly-dangerous and little-used "morning after" pill, [28] are in danger. The safest and most popular forms of true contraception are not threatened. One has to strain mightily to call that a bad result.

A Tempest in a Teapot

It is abundantly clear that the new rhetoric is a baseless and no doubt desperate attempt to divert attention from the horror of surgical abortion, and focus it on the bogus issue of "birth control." But, even if there were merit to the concern, its days are probably numbered. Technological advances in contraception may soon render moot the issue of any HLA/contraception connection.

One recent development in particular could possibly be the "perfect" contraceptive: the micro-chip "Sexometer." Another by-product of computer technology, the "Sexometer" uses a small electronic sensor that is placed in a woman's mouth each morning to transmit

her body temperature to a miniature micro-chip computer that will store the daily information. The computer will then indicate fertile and non-fertile cycle days by use of a red or green light. The device is small and flexible enough to be "built into a necklace or incorporated into a bedside radio-alarm."[29]

For the skeptical it should be noted that this is not science fiction. The micro-chip is already in production, and is being used at family planning clinics in Britain. Moreover, in preliminary tests on 500 women it has proven to be 100 per cent effective. It was developed for the World Health Organization for use in Third World countries where most contraception programs have failed because they require more motivation and education than has often been available. Additionally, once it is mass produced it will be among the cheapest forms of contraception — 24 to 36 dollars per unit, each having an extended useful life.

The perfect contraceptive: cheap, effective, easy to use, *no* health risks, and acceptable to most religions opposed to artificial contraception. If the new rhetoricians are really concerned about women they should drop the HLA/birth-control bugaboo and commit themselves and their resources to the development of this "perfect" contraceptive, which will free women from exposing themselves to risks associated with many present methods of contraception, and let the abortion debate proceed on its own merits.

Conclusion

Understandably, the pro-abortion forces *have* become desperate. They have seen their total judicial victory constantly under attack, and now fear that it will not withstand much more. The November elections turned the tide in Congress and gave anti-abortionists substantial majorities in both Houses, along with an anti-abortion President. The effect of this is already apparent in the enormous support that the recently proposed Human Life Bill[30] has already received as an important step toward a Human Life Amendment. Even the courts have shown some signs of retreat.[31] Small wonder, then, that pro-abortion rhetoric would shift from abortion to "birth control."

But the real issue is clear. Opponents of abortion are concerned with the destruction of innocent human life, not with practices that prevent the beginning of life. It is similarly clear that state and federal legislators who would be charged with enacting an amendment, and then ratifying it in three-fourths of the states, would be

quite careful to keep sharp the distinction between abortion and contraception. And then, when an amendment is enacted, the same legislators would be charged with enacting the legislation to enforce the amendment. Which state, it might be asked, would write a statute that would outlaw contraception? Obviously none. The issue is not real, it is diversionary. It does not address the substance of the abortion debate, but attempts to distort the facts in order to frighten people. The grim statistics of abortion demand an honest debate free of the intellectual guerrilla-warfare embodied in the new rhetoric.

NOTES

1. The best example of the new rhetoric is *Stop HLA Before it Takes Your Life*, published by the National Organization for Women, Inc. (1980).

2. *Id.*

3. *The Psychological Aspects of Abortion* (Mall & Watts ed. 1979); Willke & Willke, *Handbook on Abortion*, 78-97 (1979).

4. Department of Health and Human Services, *A Prospective Study of the Effects of Induced Abortion on Subsequent Reproductive Function* (1979).

5. "The Abortion Profiteers," Chicago *Sun-Times*, Special Reprint (1978).

6. See *Stop HLA Before it Takes Your Life, supra.*

7. Hearings Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate [Hereinafter Senate Hearings], part I, p. 40, March 6, 1974.

8. Senate Hearings at, part II, pp. 528-29, July 24, 1974.

9. Senate Hearings at, part III, pp. 103-04, March 10, 1975.

10. Senate Hearings at, part IV, p. 119.

11. Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, part I, pp. 67-68, February 5, 1976.

12. In gathering data for this article the author was informed by an expert in contraceptives that very recent data suggests that those spermicides may cause birth defects and an increase in spontaneous abortions. Any reader who uses or is considering using this form of contraceptive should consider this information and seek medical advice.

13. Guest Stewart and Hatcher Stewart, *"My Body, My Health": The Concerned Woman's Guide to Gynecology* 63 (1979).

14. *Id.* at 139-141, 222-223.

15. The "morning after" pill is not considered here because it is not contraceptive in effect.

16. R. Dickey, M.D., Ph.D., *Managing Contraceptive Pill Patients* (Creative Infomatics, 2nd Edition, 1980). Among Dr. Dickey's credentials are included: Diplomate, American Boards of Reproductive Medicine and Obstetrics and Gynecology; Clinical Associate Professor, Department of Obstetrics and Gynecology, Tulane University, School of Medicine; Director, The Fertility Institute of New Orleans; former Chief of Section of Reproductive Endocrinology and Associate Professor, Obstetrics and Gynecology, Louisiana State University, School of Medicine; Member, F.D.A. Panel on the Review of Obstetrical and Gynecological Devices; Member, F.D.A. Ad Hoc Obstetrics and Gynecology Advisory Committee on the Dalkon Shield.

17. R. Dickey, M.D., Ph. D., *Managing Contraceptive Pill Patients,* 57 and 96 (Hereinafter "Managing Pill Patients"). In a telephone conversation with this writer Dr. Dickey confirmed that he does not believe there is a basis for the anti-implantation effect of either the combination pill or the no-estrogen pill. In fact, he called such an assumption "wrong."

18. *Stop HLA Before it Takes Your Life, supra.*

19. The estimates of how many American women use the pill vary widely from 6-15 million. See Guest Stewart and Hatcher Stewart, *"My Body, My Health": The Concerned Woman's Guide to Gynecology* 166 (1979), and Cooke and Dworkin, *The Ms. Guide to a Woman's Health* 39 (1979).

20. Guest Stewart and Hatcher Stewart, *"My Body, My Health": The Concerned Woman's Guide to a Gynecology* 139-41 (1979). (emphasis added).

21. 381 U.S. 479 (1965).

22. See *The Ms. Guide to a Woman's Health, supra,* at 38.

23. Dickey, "The Effect of Recent FDA Legislation on Contraceptive Development and Safety," 15 *International Journal of Gynecology and Obstetrics* 111-12 (1977).

24. *Id.*

25. *Id.* Note that the device was only withdrawn from the American market. Presumably, women world-wide are still unwittingly using the Dalkon Shield, despite the unusually high risk it presents.

For a description of the politics and pressures involved in the Dalkon Shield debate see the testimony of Richard P. Dickey, M.D., Ph.D., given before the Senate Subcommittee on Health and Administrative Practice and Procedure, January 28-29, 1975.

26. Cates and Ory, "IUD Complications: Infection, Death and Ectopic Pregnancy" in *Controversies in Contraception* (Moghissi, editor 1979) at 187.

27. *Id.* at 199 (emphasis added).

28. Morning after pills contain high dosages of estrogen compound, the most effective form being DES.

> The most serious immediate risk is abnormal blood clotting. If you have had clotting problems in the past, such as stroke, heart attack, or thrombophlebitis you must not take hormones for morning-after treatment. Don't take estrogen if you have a breast lump or unusual vaginal bleeding whose cause is not yet known. *"My Body, My Health," supra*, at 223.

> Because of the very high doses of estrogen needed for this preventive effect, all of these drugs have a high incidence of side effects such as nausea, vomiting, headache, and breast tenderness. *Long-term side effects are not known . . .*
> When taken within seventy-two hours after unprotected intercourse, DES is virtually 100 per cent effective in preventing pregnancy. But we do not consider it safe for women to use . . . DES and related compounds have been strongly associated with abnormalities in the children of women who took it in early pregnancy. In addition, DES may also be associated with an increased risk of breast cancer. So it is best to avoid it.
> Other estrogens are effective as postcoital contraceptives and are *probably* safer than DES. *As with DES, these should be used for emergencies only! Reports of congenital defects from hormones taken in pregnancy should make one worry about these powerful drugs. (emphasis partially added)*
>
> *The Ms. Guide to a Woman's Health, supra*, at 71-72.

29. Does she or doesn't she? Sexometer may help," *Times-Picayune*, Sunday January 25, 1981

30. S. 158, introduced by Senator Helms on January 5, 1981.

31. See *Harris* v. *McRae*, 100 S. Ct. 2671 (1980) (upholding the Hyde Amendment), and *H.L.* v. *Matheson*, 100 S. Ct. 1164 (1981) (upholding Utah abortion notification statute).

In Re New Humans

Jerome Lejeune

MY NAME IS JEROME LEJEUNE. Doctor in Medicine and in Science, I am in charge of the mentally defective outpatients at the Hôpital des Enfants Malades (Sick Children's Hospital of Paris). After spending ten years in full-time research, I am professor of fundamental genetics at the University René Descartes.

Some twenty-three years ago I described the first chromosomal disease in our species, the extra chromosome 21, typical of mongolism. For this work I had the privilege of receiving the Kennedy award from the late President and the William Allen memorial medal from the American Academy of Arts and Sciences.

With my colleagues at the Institut de Progenese of Paris, we are involved in the description of basic facts in human heredity. By a comparative study of many mammalian species, including the great apes, we are studying the chromosomal variations which occurred during evolution. In our species, we analyze more precisely the deleterious effects of some chromosomal aberrations.

This very year we have demonstrated for the first time that a chromosomal disease could be amenable to therapy. In this fragile-X syndrome, associating a fragility of the X chromosome and severe mental retardation we have shown that a chemical treatment can cure the chromosomal lesion in tissue culture. Moreover, appropriate supply of these chemicals (monocarbons and their carrier molecules) also improves the behavior and the mental abilities of the affected children. Thus, the most fundamental research on mechanisms of life can lead to direct protection of endangered human lives.

When does a man begin is the question to which I'll try to give the most precise answer actually available to Science. Modern biology teaches us that ancestors are united to their progeny by a continuous material link, for it is from the fertilization of the female cell (the ovum) by the male cell (the spermatozoa) that a new

Jerome Lejeune describes himself above; this article is the text of his testimony (delivered on April 23, 1981), before the same Senate subcommittee that Professor Noonan addressed (see previous article).

member of the species will emerge. Life has a very, very long history but each individual has a very neat beginning, the moment of its conception.

The material link is the molecular thread of DNA. In each reproductive cell this ribbon, roughly one meter long, is cut into pieces (23 in our species). Each segment is carefully coiled and packaged (like a magnetic tape in a minicassette) so that under the microscope it appears like a little rod, a chromosome.

As soon as the 23 paternally derived chromosomes are united, through fertilization, with the 23 maternal ones, the full genetic information, necessary and sufficient to express all the inborn qualities of the new individual, is gathered. Exactly as the introduction of a minicassete inside a tape recorder will allow the restitution of the symphony, the new being begins to express himself as soon as he has been conceived.

Nature sciences and the sciences of law speak the same language. Of an individual enjoying a robust health, a biologist would say he has a good constitution; of a society developing itself harmoniously to the benefit of all its members, a legislator would state, it has an equitable constitution.

A legislator could not conceive what a given law is, before all its terms have been clearly and fully spelled out. But when this full information has been given, and when the law has been voted for, then it can help defining the terms of the constitution.

Nature works the same way. The chromosomes are the tables of the law of life and when they have been gathered in the new being (the voting process is the fertilization) they fully spell out his personal constitution.

What is bewildering is the minuteness of the scripture. It is hard to believe, although beyond any possible doubt, that the whole genetic information necessary and sufficient to build our body and even our brain, the most powerful problem-solving device, even able to analyze the laws of the universe, could be epitomized so that its material substratum could fit neatly on the point of a needle!

Even more impressive, during the maturation of the reproductive cells, the genetic information is reshuffled in so many ways that each conceptus receives an entirely original combination which has never occurred before and will never again. Each conceptus is unique, and thus irreplaceable. Identical twins and true

hermaphrodites are exceptions to the rule: one man one genetic make-up; but interestingly enough, these exceptions have to take place at the time of conception. Later accidents could not lead to harmonious development.

All these facts were known long ago and everybody was agreeing that test-tube babies, if produced, would demonstrate the autonomy of the conceptus, over which the bottle has no title of property. Test-tube babies now do exist.

If the ovum of a cow is fertilized by a bull's sperm, the tiny conceptus, floating freely in the liquid, starts immediately its cattle career. Normally it would travel for a week, through the fallopian tube, and reach the uterus. But thanks to modern technology it can travel much farther, even across the ocean! The best shipping equipment for such a two milligram cattle being is to introduce it into the fallopian tube of a female rabbit. (Air freight is much less than for a pregnant cow). At destination, the miniscule animal is carefully removed and delicately settled inside the uterus of a recipient cow. Months after the calf exhibits all the genetic endowment it received from its true parents (the donors of the ovum and of the sperm) and none of the qualities of its temporary container (the rabbit) nor of its uterine foster mother.

How many cells are needed to build an individual? Recent experiments spell out the answer. If very early conceptuses of mice are artificially disassembled (by a peculiar enzymatic treatment) their cells come apart. By mixing such suspensions of cells, coming from different embryos, one sees them reassembling again. If the tiny mass is then implanted in a recipient female, some little mice (very few indeed) manage to develop to term, completely normal. As theoretically expected by B. Mintz and demonstrated by Market and Peter, a chimeric mouse can derive from two or even three embryos, but no more. The maximum number of cells cooperating in the elaboration of an individual is three.

In full accordance with this empirical demonstration, the fertilized egg normally cleaves itself in two cells, one of them dividing again, thus forming the surprising odd number of three, encapsulated inside their protective bag, the *zona pellucida.*

To the best of our actual knowledge, the prerequisite for individuation (a stage containing three fundamental cells) is the next step following conception, minutes after it.

All this explains why Dr. Edwards and Steptoe could witness in

vitro the fertilization of a ripe ovum from Mrs. Brown by a spermatozoa from Mr. Brown. The tiny conceptus they were implanting days later in the womb of Mrs. Brown could not be a tumor or an animal. It was in fact the incredibly young Louise Brown, now three years old.

The viability of a conceptus is extraordinary. Experimentally a mouse conceptus can be deep frozen (even to -269C°) and, after careful thawing, implanted successfully. For further growth, only a recipient uterine mucosa can supply the embryonic placenta with appropriate nutriments. In his life-capsule, the amniotic bag, the early being is just as viable as an astronaut on the moon in his space-suit: refueling with vital fluids is required from the mothership. This nurture is indispensable for survival but does not "make" the baby; no more than the most sophisticated space-shuttle can produce an astronaut. Such a comparison becomes even more cogent when the fetus moves. Thanks to a refined sonar-like imagery, Dr. Ian Donald from England succeeded a year ago in producing a movie featuring the youngest star of the world, an eleven weeks old baby dancing in utero. The baby plays, so to speak, trampoline! He bends his knees, pushes on the wall, soars up, and falls down again. Because his body has the same buoyancy as the amniotic fluid, he does not feel gravity and performs his dance in a very slow, graceful, and elegant way, impossible in any other place on the earth. Only astronauts in their gravity-free state can achieve such gentleness of motion. By the way, for the first walk in space, technologists had to decide where to adapt the tubes carrying the fluids. They finally chose the belt-buckle of the scaphander, reinventing the umbilical cord.

Mr. Chairman and members, when I had the honor of testifying previously before the Senate, I took the liberty of referring to the universal fairy-tale of the man, smaller than the thumb.

At two months of age, the human being is less than one thumb's length from the head to the rump. He would fit at ease in a nut-shell, but everything is there: hands, feet, head, organs, brain, all are in place. His heart has been beating for a month already. Looking closely, you would see the palm creases and a fortune teller would read the good adventure of that tiny person. With a good magnifier the fingerprints could be detected. Every document is available for a national identity card.

With the extreme sophistication of the technics, we have invaded

his privacy. Special hydrophones reveal the most primitive music: A deep, profound, reassuring hammering at some 60-70 per minute (the maternal heart), and a rapid, high pitched cadence at some 150-170 (the heart of the fetus). These mixed tempos mimic those of the counterbass and of the maracas, which are the basic rhythms of any pop music.

We now know what he feels, we have listened to what he hears, smelled what he tastes and we have really seen him dancing full of grace and youth. Science has turned the fairy-tale of Tom Thumb into a true story, the one each of us has lived in the womb of his mother.

And to let you measure how precise the detection can be: If at the very beginning, just after conception, days before implantation, a single cell was removed from the little berry-looking individual, we could cultivate that cell and examine its chromosomes. If a student, looking at it under the microscope, could not recognize the number, the shape, and the banding pattern of these chromosomes, if he was not able to tell safely whether it comes from a chimpanzee being or from a human being, he would fail in his examination.

To accept the fact that, after fertilization has taken place, a new human has come into being is no longer a matter of taste or of opinion. The human nature of the human being from conception to old age is not a metaphysical contention, it is a plain experimental evidence.

In Re the "Human Life Bill"

John T. Noonan, Jr.

THE CONSTITUIONALITY AND WISDOM OF THE ACT TO PROVIDE THAT HUMAN LIFE SHALL BE DEEMED TO EXIST FROM CONCEPTION

THERE CAN BE NO doubt that under Article III, section 1 of the Constitution, the judicial power of the United States is vested in the Supreme Court and "in such inferior Courts as the Congress may from time to time ordain and establish." As Justice White wrote in *Palmore* v. *United States* (411 U.S. 389 at 400-401, 1973), in an opinion joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, Blackmun, Powell, and Rehnquist, "The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress." Congress, he went on to say, was not constitutionally required to create Article III courts nor, if they were created, "required to invest them with all the jurisdiction it was authorized to bestow." Until 1875 "the state courts provided the only forum for vindicating many important federal claims." It needs no further argument to show that the restriction on the jurisdiction of the inferior federal courts — leaving unaffected the jurisdiction of the United States Supreme Court and the state courts — is constitutional.

The only question that can appropriately be raised is whether the restriction is wise. Here the experience of the last eight years must be referred to. The judges of the inferior courts have shown themselves in many instances to be zealous, partisan, and prejudiced champions of those seeking and those providing abortions. They have shown a marked insensitivity to values at stake besides the abortion liberty and a marked disregard for the constitutional restraints on judicial action in this area.

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To give a few examples: a judge of the First Circuit Court of Appeals has compared the termination of childbearing capacity to "excision of benign tumors which would cause subsequent neurological problems."[1] A judge of the Second Circuit Court of Appeals has interpreted *Roe* v. *Wade* to mean that "abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative methods of dealing with pregnancy"; and this judge proceeded to divest abortion of the moral arguments and to treat it simply as an alternative to childbirth.[2] A judge of the Eighth Circuit Court of Appeals imposed payment of the plaintiff's legal fees on the Mayor of St. Louis, because his refusal to allow elective abortion in St. Louis municipal hospitals was "a wanton disregard for the constitutional rights of the plaintiff." In this case, as the Supreme Court later decided, it was the Mayor who had the correct constitutional position.[3] A federal district judge in Brooklyn mandated the federal funding of abortions in cavalier disregard of Article I of the Constitution reserving to Congress alone the power to draw money from the Treasury.[4] A judge of the Fourth Circuit Court of Appeals interpreted *Roe* v. *Wade* to mean that the unborn child in the womb was not alive, even though the particular child in question had been born and lived and his death, due to wounds inflicted before his birth, was the subject of criminal investigation by the state of South Carolina.[5]

The pattern of abusive, indeed outrageous partisanship has been amply documented by Professor Uddo in his article, "A Wink From the Bench: the Federal Courts and Abortion," *Tulane Law Review* (53, 1978, 398). His title refers to a famous incident, boasted of by Sarah Weddington, counsel for the plaintiff in *Roe* v. *Wade*, that when she was arguing the case before a three-judge panel a member of the court "winked at me as if to say, 'It's going to be all right.'" The winks from the federal bench in abortion cases parallel the partisanship that federal judges showed in labor injunction cases before the enactment of the Norris LaGuardia Act; and just as that Act justifiably took from the federal judges the injunction power they had abused, so the proposed statute removes a jurisdiction which has been exploited in favor of one side in a two-sided controversy.[6]

THE FACT-FINDING AND DEFINITIONAL PROVISIONS OF THE ACT

The Act does four things. It finds "a significant likelihood that actual human life exists from conception." It finds that the Fourteenth Amendment was "intended to protect all human beings." It declares that for the purpose of enforcing the obligation of the States "not to deprive persons of life without due process of law," human life "shall be deemed to exist from conception." For the same purpose it declares that "person" shall include all human life as so defined. Are these findings and declarations within the power of Congress?

1. The Source of Congressional Power

The Fourteenth Amendment, section 5, declares: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The key terms of this constitutional grant of power are "appropriate legislation" and "enforce." In general, there must be said of this part of the Constitution what Chief Justice Marshall said in *McCulloch* v. *Maryland* of congressional power under the "Necessary and Proper Clause" of Article I: "First, the clause is placed among the powers of Congress, not among the limitations on those powers. Second, its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted."[7]

The parallel in interpretation of Congress' power under section 5 and Congress' power under Article I has very recently been affirmed by Chief Justice Warren Burger in *Fullilove* v. *Klutznick*. The Court, he declared, had "equated the scope of this authority with the broad powers expressed in the Necessary and Proper Clause, U. S. Const., Act. 1, sec. 18, cl. 8."[8] In the light of this interpretation, Congress has the power under section 5 to find facts, to adopt remedies, and to enact legislation it finds appropriate to secure the rights guaranteed by the Fourteenth Amendment.

It should be added that the enforcement of the Fourteenth Amendment by *congressional* action has solid historical roots. As the Supreme Court said unanimously in 1879 in *Ex parte Virginia*, the Thirteenth, Fourteenth, and Fifteenth Amendments "derive much of their force" from the sections conferring power on Con-

gress. "It is not said the *judicial power* of the government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed . . . It is the power of Congress which has been enlarged."[9] Even if today the judicial branch has taken to itself a more active part in enforcing the Amendments, surely its more assertive role cannot deprive Congress of the power which the framers of the Amendment intended to confer, as the 1879 Court acknowledged, and which the Court in 1980 has recognized to be as broad as Article I's fundamental grant of power to make "all laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[10]

2. The Power of Congress Where the Supreme Court Is in Doubt.

In *Roe* v. *Wade* the Supreme Court declared, "We need not resolve the difficult question of where life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[11] The Court went on to note the varying treatment of the unborn in the law of torts and property and concluded: "In view of all this, we do not agree that by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."[12] In short, the judiciary was in no position to answer, common and statutory law gave various answers, and a state did not have power to define life.

Congress, as a coordinate branch of the national government, is of course in a position very different from any state vis-a-vis the Supreme Court. In this area it is acting within the terms of power expressly conferred by the Fourteenth Amendment and expressly recognized by the Court itself. It is acting with better sources of information than the Court — for the Court took no biological evidence and no historical evidence. It is acting with a better ability than the Court to balance competing value considerations that go to the assessment of the facts. Further, Congress is performing an essential function in the enforcement of the Fourteenth Amendment; for if the judiciary is not "in a position to speculate" when life begins, the Fourteenth Amendment must fail, in a significant way, to be implemented, unless Congress draws on its power to supply an answer.

3. The Power of Congress When the Supreme Court Has Made a Contrary Determination.

The objection will be raised, however, that the Supreme Court has done more than acknowledge its incompetence to decide when life begins. The Court in *Roe* v. *Wade* has formally held that "the word 'person' as used in the Fourteenth Amendment, does not include the unborn."[13] Does not the proposed statute squarely conflict with this holding of the Court and, if it does so, is not the statute void?

It is clear that Congress will reach, if the proposed statute is enacted, a conclusion different from the Court's in *Roe* v. *Wade* on the meaning of person in the Fourteenth Amendment. It does not follow that the statute is void. It follows, rather, that the Court may, and should, change its mind, give deference to the congressional findings and declarations, and overrule *Roe* v. *Wade*.

In the area of the Fourteenth Amendment the Court has already provided just such an example of retreating from its own announced understanding of the Constitution in deference to congressional action taken after, and contrary to, the Court's announcement of what it found the Constitution to mean. In *Lassiter* v. *Northampton Election Board* (360 U.S. 45, 1959) the plaintiff complained that a literacy test for voting was unconstitutional. The Supreme Court, unanimously, held that Article 1, section 2 of the Constitution expressly reserves to the States the power to determine the qualifications of electors. Seven years later in *Katzenbach* v. *Morgan* (384 U.S. 641, 1966), the Court considered an Act of Congress eliminating literacy in English as a condition for voting. If the Court followed *Lassiter*, this Act of Congress was a clear infringement on a power constitutionally reserved to the States; and the Act was clearly contrary to the holding of the Court in *Lassiter*.

The Court, however, found *Lassiter* "inapposite." Speaking through Justice Brennan and quoting *Ex parte Virginia* of 1879, the Court held the congressional action a proper exercise of congressional power under section 5 of the Fourteenth Amendment. The act was "plainly adapted" to furthering the aims of the Equal Protection Clause by securing for Puerto Ricans in New York not only the right to vote but, indirectly, nondiscriminatory treatment in public schools, public housing, and law enforcement. The action of Congress, directly contrary to the interpretation of the Constitution by a unanimous Supreme Court, was upheld by the Court. In

Oregon v. *Mitchell* (400 U.S. 112, 1970), while splitting on other issues, the Court unanimously upheld Congress' total elimination of literacy tests. Justice Black's opinion specifically deferred to the "substantial, if not overwhelming, evidence" on which Congress acted and to the exercise of congressional power under section 5.[14]

4. Congressional Action Affecting Personal Liberties.

In *Shapiro* v. *Thompson*, a case involving the welfare residency requirement of California, it was said by way of *dictum* that even if Congress had consented to the residency requirement — which the Court held it had not — the requirement was invalid, because "Congress may not authorize the States to violate the Equal Protection Clause."[15] Similarly in a footnote to *Katzenbach* v. *Morgan*, Justice Brennan declared that section 5 "grants Congress no power to restrict, abrogate or dilute" the guarantees of the Fourteenth Amendment.[16] In a footnote to his dissent in *Oregon* v. *Mitchell*, Justice Brennan repeated this view, and added *apropos* of state statutes found to be based on unreasonable legislative findings: "Unless Congress were to unearth new evidence in its investigation, its identical findings on the same issue would be no more reasonable than those of the state legislature."[17] The question is thus presented whether the proposed act authorizes states to violate the Equal Protection Clause, dilutes or abrogates Fourteenth Amendment guarantees, or is based on the same evidence on which state legislatures acted unreasonably.

In recognizing the unborn as persons, so far as protection of their lives is concerned, the proposed Act treats no one unequally but gives equal protection to one class of humanity now unequally treated. It does not dilute a Fourteenth Amendment guarantee, but expands the rights of a whole class. It is based not on evidence before the state legislatures — what that evidence was we do not know — but on evidence freshly taken from leading geneticists and physicians.

Yet the question will be pressed: "Does not the Act dilute or abrogate the right to an abortion?" Necessarily, the expression of the rights of one class of human beings has an impact on the rights of others. The elimination of literacy tests in this way "diluted" the voting rights of the literate. It is inescapable that congressional expression of the right to life will have an impact on the abortion right; but in the eyes of Congress, if it enacts this law, there will be a

net gain for Fourteenth Amendment rights by the expansion and the attendant diminution.

Further, it must be noted that the correctness of Justice Brennan's footnotes has been questioned by a careful scholar of constitutional law, Professor Archibald Cox. Professor Cox suggests that Congress is free to act where "the Court has formulated some corollary to a constitutional command upon a different view of contemporaneous conditions than the legislatures" and where "the problems of application quite genuinely involved investigation and evaluation of facts." There are, Cox adds, "areas in which Congress has at least some claims to superior competence while the Court has none." In these areas, Justice Brennan's footnotes "run against the demands of logical consistency." They run also, Cox observes, against even-handedness.[18] If Congress has been given power under the Constitution, that power is to be exercised as Congress finds "appropriate" to the furtherance of the guarantees of the Fourteenth Amendment.

A number of Justices have, indeed, signalled their disagreement with Justice Brennan's "dilution" test. Chief Justice Burger has proposed federal legislation to modify the Court-created role excluding tainted evidence. The constitutional basis for this legislation would be section 5.[19] Such legislation would unquestionably dilute the rights of criminal defendants while it expanded the rights of government prosecutors and the victimized public.

Justices White, Blackmun, and Powell, concurring in *Trafficante* v. *Metropolitan Life Insurance Co.* (409 U. S. 205 at 212, 1972), admitted that they had great difficulty in seeing that the plaintiffs, tenants in nonintegrated housing, had a "case or controversy" with their landlord for his action in excluding others. But they were persuaded that Congress had the power to enact the statute giving them the right to sue, and the Justices invoked *Katzenbach* v. *Morgan* to explain their position. Here, in other words, was a fundamental requirement of federal jurisdiction which these judges permitted to be changed by evoking Congress' section 5 power. The power was used to expand the rights of the tenants and at the same time to dilute the rights of the landlord. Justices White, Blackmun and Powell accepted the balance struck by Congress.

In *Welsh* v. *United States* Justice White, in a dissent joined by Chief Justice Burger and Justice Stewart, took the position that Congress could provide statutory exemptions from the draft to religious objectors but not to others, thus striking a balance between its

power to raise armies and the Free Exercise of Religion Clause. By analogy, these justices invoked *Katzenbach* v. *Morgan* "where we accepted the judgment of Congress as to what legislation was appropriate."[20] In other words, in their view, a statute which balanced rights, giving them to some and not to others, was entirely analogous to the kind of legislative balance struck by Congress and sustained by the Court in *Katzenbach*.

5. Section 5 and *Marbury* v. *Madison*

The cornerstone of the judicial power, Chief Justice Marshall's opinion in *Marbury* v. *Madison*, announces that the Constitution "controls any legislative act repugnant to it" and imposes on the judges the duty to determine this repugnancy.[21] Does the proposed Act defy or subvert these fundamental principles?

Not in the least. Congress is not ousting the Court of jurisdiction, "overruling" the Court, or declaring its will superior to Constitution or Court. On the basis of hearings and fresh evidence, Congress is taking a position which in one important particular disagrees with the Court's interpretation of the Constitution in *Roe* v. *Wade*. Under the principles of *Marbury* v. *Madison*, it will be for the Court to decide whether, following such precedents as *Katzenbach* v. *Morgan*, it should now defer to Congress' interpretation.

To suppose that a statute proposed is a challenge to judicial review assumes a radical — I am inclined to say willful — misunderstanding of the functions of Court and Congress. A decision of the Supreme Court interpreting the Constitution is neither infallible nor eternal nor unchangeable. The Court has often been wrong. The Court has often corrected itself.[22] There is nothing in our constitutional theory that says the Court must remain forever in a mistaken position, and much contrary example to its so doing. The proposed Act is an invitation to the Court to correct its error itself.

The example of the Court correcting itself due to a section 5 exercise of power of Congress has been given. There are other examples of similar interaction between Congress and Court. Here are two. In *Ex parte Bakelite Corp.* (179 U.S. 438, 1929), the Supreme Court unanimously held that the Court of Custom Appeals was not a court within the meaning of Article III of the Constitution. The Court declared it to be a mistake to say that the character of the court depended on the intention of Congress and reserved to itself the right to say what power Congress had exercised. In *Glidden Co.*

v. *Zdanok* (370 U.S. 530, 1962), the Court, 7-2, abandoned this approach and declared that "we may not disregard Congress' declaration that they [the courts in question] were created under Article III." Stressing that this deference to congressional findings did not "compromise the authority or responsibility of this Court as the expositor of the Constitution," Justice Harlan for the Court in fact followed the congressional lead to correct the old error.[23]

It was once settled constitutional doctrine that if the States could not regulate interstate commerce, Congress could not give them power to do so. The classic case on this point, *Cooley* v. *Wardens of Philadelphia* (12 How. 299, 1851), was one of the great unshakable landmarks of constitutional interpretation by the Supreme Court. It declared in ringing terms: "If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot re-grant or in any way reconvey to the States that power."[24] But in 1945, in the teeth of the *Cooley* doctrine, Congress enacted the McCarran Act, conferring on the States the power to regulate insurance. The Court in *Prudential Insurance Co.* v. *Benjamin* (328 U.S. 408, 1946) unanimously sustained the delegation, the opinion for the Court recognizing in Congress a "plenary and supreme authority" over interstate commerce. What had once been the Court's interpretation of the Constitution had yielded to the congressional teaching.

The story is an old one, frequently retold. The Supreme Court is not immune to reason and instruction. It reverses itself. It listens to Congress. Those who want an institution immovable and beyond the reach of popular instruction must look elsewhere.

6. Further Reasons for Congress to Exercise Its Section 5 Power Here

"The *Morgan* case," Archibald Cox has written, "is soundly rooted in constitutional principles, yet it clears the way for a vast expansion of congressional legislation promoting human rights."[25] This expansion, as Cox observes, can be achieved by any law which "may be viewed" as having a relation to an end specified by the Fourteenth Amendment.[26] In the present context, the Fourteenth Amendment guarantees life to persons. But no one can enjoy adult life unless he or she is born. To protect the life guaranteed by the Amendment, Congress has the power under section 5 to protect the path to that life. The proposed legislation is readily seen as a way of protecting the means necessary to have life after birth.

Further, it is sometimes forgotten that the Court in *Roe* v. *Wade*,

acknowledging that "the Constitution does not explicitly mention any right of privacy," finally located that right with some uncertainty in the Fourteenth Amendment "or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people."[27] To this point in the presentation, focus has been upon the Fourteenth Amendment. But if Justice Blackmun's other basis be accepted, Congress is better suited than the Court to make the determination as to the balance struck between the rights of the States and reserved Ninth Amendment rights. Such a determination requires political discretion. As Archibald Cox has written generally of why the Court should defer to Congress in its exercise of section 5 power, such judicial following of a congressional lead "rests upon application of the fact that the fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives, only a small part, or even none of which may come from the hearings and reports of committees or debates upon the floor."[28] As Ninth Amendment rights are reserved to the people, the people through its elected representatives can determine, better than a nonelected elite, where the line limiting governmental power should be drawn.

7. The "Dizzying Implications" of the Proposed Act.

Two professors of law at Harvard Law School, Messrs. Tribe and Ely, have undertaken to instruct the general public, in the New York *Times* of March 17, 1981, on "the dizzying implications" of the proposed legislation. It must be assumed that they have said nothing in a newspaper of mass circulation that they could not say to this committee even if, given the popular medium being used, they have employed language that would seem careless in another context. They speak, for example, of the proposed Act "overruling" *Roe* v. *Wade* when all lawyers know that only a court overrules. Still, such carelessness does leave the unfortunate impression that the proposed Act is a direct challenge to *Marbury* v. *Madison*, a polemical and utterly unwarranted implication.

There is a second unfortunate implication in this article due again, no doubt, to its popular audience. The unmistakable impression is given that resort to congressional power under section 5 is the brand new invention of two conservative leaders. Who would suspect from reading Tribe-Ely that Gerald Gunther, one of the senior constitutional law professors in the country, in his leading casebook

on Constitutional Law had twice raised the question of whether *Katzenbach* v. *Morgan* gave Congress power to affect the result in *Roe* v. *Wade*?[29] Who would suppose that three other leading constitutional law professors, William Lockhart, Yale Kamisar and Jesse Choper, had asked: "Apart from 'specific' constitutional prohibitions, under *Morgan,* what are the limits of congressional power?"[30] Who could imagine that, as far back as 1966, Archibald Cox in the *Harvard Law Review* greeted *Katzenbach* as the discovery of "a vast untapped reservoir of federal legislative power to define and promote the constitutional rights of individuals in relation to state government."[31] Who would believe that Professor Tribe himself had reconciled *Katzenbach* with *Marbury* v. *Madison* and written: "Judicial review does not require that the Constitution be equated with the Supreme Court's view of it."[32] It would have had to have been a very intuitive reader of the *Times* to have guessed that Professor Tribe himself saw no incongruity in Congress providing criteria for constitutional decisions to the Court. Professor Tribe and Ely's fears were justified only if an assumption were made — an assumption which Professor Ely professed to repudiate — that the abortion liberty was part of the Bill of Rights.

The heart of the Tribe-Ely critique is that the proposed Act abandons "the old-fashioned" way of amending the Constitution. Surely these professors of constitutional law cannot be unaware that the correction of constitutional error has been going on for a long time. A method of correcting judicial error in interpretation of the Constitution that has changed the meaning of the Commerce Power, of Article III courts, of voting tests under the Fourteenth Amendment cannot be fairly described as the new invention of Senator Helms and Congressman Hyde. It is a method of "amending the Constitution," to use Tribe-Ely's misleading phrase, as traditional as the Court's "amending the Constitution" by interpretation.

Nonetheless, Professors Tribe and Ely see "dizzying implications" in the method proposed. They suggest it could be used to amend the law on libel, giving a right to libel to a defamed public official; that it could be used to authorize racially restrictive covenants; that it could authorize coerced confessions. In an impatient rhetorical outburst they ask why Congress does not simply redefine "due process" to include "any law Congress or a state legislature approves." The Method, they say, reduces "the Constitution to whatever those in power want it to mean."

This astounding statement proceeds as if the basis for the proposed statute had not been laid by the Court itself as far back as *Katzenbach* and as recently as *Fullilove*. The Court has not invited Congress to rewrite the Constitution at will, nor has Congress responded by arbitrary assaults on civil liberty. The trick of the kind of rhetoric Tribe and Ely engage in is to suppose that all the bad things are done by the group one disapproves of, while all the good things are done by your side. It is rhetoric persuasive only to one's own side.

There are many experts on constitutional law who have said explicitly or in effect that the Supreme Court's creation of the abortion liberty was simply the work of "those in power" making the Constitution mean "what they want."[33] An exercise of "raw judicial power" was how Justice White described the decision.[34] Oddly enough, Professor Ely was one of those who found that this was the kind of decision the Court had fashioned. Ely could find no principle or standard which had guided the Court.[35] Now when a very limited and precise means is taken, in a traditional way, to correct the exercise of raw power, the curious objection is offered that this modest measure will lead to excess of the very sort being corrected.

8. Context and Constitutional Interpretations.

The parade of horribles in the Tribe-Ely piece is a truly dizzying instance of constitutional interpretation offered without context. Sound constitutional interpretation requires a look at the context in which Congress is acting and in which the Court will be responding. That context is formed by the following facts.

1. *Roe* v. *Wade* was one of the most radical decisions ever made by the Supreme Court. At one stroke it set out criteria by which the abortion statutes enacted by Congress and by the fifty States became invalid. It gave the United States the most radical abortion law in the civilized world. In effect, it made abortion on demand a liberty under the Constitution.[36]

2. The reasoning of this decision, so far as "person" is concerned, is remarkable in that it concentrates on showing that other uses of "person" in the Constitution — in the Fugitive Slave Clause, in the qualification for Representatives and Senators, in the disqualification of Electors, etc. — are such that they could not possibly apply to any being before birth.[37] But by the same token, a corporation could not qualify as a person under the Fourteenth Amendment. A

corporation could not have been a fugitive slave, a corporation could not be a Representative or a Senator, a corporation could not be a presidential elector. If Justice Blackmun's reasoning on person is correct, then *Santa Clara County* v. *Southern Pacific RR* (118 U.S. 394, 1886) and all its progeny were wrongly decided, and corporations should be held unprotected by the due process clause.

Indeed it would be interesting, if the Court had in fact adopted the reasoning of Justice Blackmun to exclude corporations from the protection of the Fourteenth Amendment, to see if the conservative critics of *Katzenbach* v. *Morgan* would have denied the Congress power to suggest to the Court by statute that corporations could be considered persons too. Here we deal not with a hypothesis requiring the artificial extension of the meaning of "person" but with real creatures of flesh and blood, whose brains are working, whose hearts are pumping, whose legs are kicking, but which the Court has not found to be persons because they could not vote, be a Senator or Congressman, or become a runaway slave.

3. *Roe* v. *Wade* has been vigorously criticized by leading authorities on law, among them Alexander Bickel of Yale, Robert Byrn of Fordham, Archibald Cox of Harvard, Richard Epstein of Chicago, John Hart Ely of Harvard, Joseph O'Meara Jr. of Notre Dame, Harry Wellington of Yale, and Joseph Witherspoon of Texas. A professionally satisfying defense of it has not been found.[38]

4. As a result of *Roe* v. *Wade* one million five hundred thousand lives per year are being taken by abortions. Even accepting the highest guesses as to the number of abortions prior to the decision, this figure represents an enormous increase — at least 50%, at least 500,000 — in the number of deaths occasioned by the decision.

It is in the context of this kind of radical attack on state power, this kind of fallacious reasoning, this kind of criticism, this kind of slaughter, that Congress is asked to take remedial action.

9. Further Steps

Enactment of the proposed Act will not be the end of abortion. Legislation is not assured of being permanent. Its effect across the United States will not be uniform. No one who has observed the play of ideology in the Supreme Court can guarantee that a law, constitutional according to the principles the Court has enunciated, will actually be sustained by the Court.

Accordingly, Congress should regard passage of this Act as the

first of three steps. The second step will be to pass a constitutional amendment annulling *Roe* v. *Wade*. That annullment can be accomplished simply by words such as "Nothing in this Constitution or the Constitution of any State shall be construed to confer on any person the right to an abortion"; or by words couched in terms of restoring the power the Court has taken away: "The Congress and the several States shall have power to protect life, including the unborn at every stage of biological development, irrespective of age, health, or condition of dependency." Either one of such Amendments would restore the status quo ante *Roe* v. *Wade*, and return to the States their traditional power to protect life.

A final step would be the enactment of an Amendment actually mandating the protection of human life from conception. Such an Amendment would complete the great educational process of which the Act before you is the first and necessary step.

NOTES

1. *Hathaway* v. *Worcester City Hospital* 475 F.2d 701 (1st Cir. 1973/ at 705), (per Frank Coffin, J.).
2. *Roe* v. *Norton* 408 F. Supp. 660 (D. Conn. 1975) at 663, n.5 (per Jon O. Newman, J.).
3. *Doe* v. *Poelker* 515 F.2d 541 (8th Cir. 1975) at 547-548 (per Donald Ross, J.), *reversed, Poelker* v. *Doe* 432 U.S. 519 (1977).
4. See *Harris* v. *McRae* 100 S.Ct. 2671 (1980) reversing the judgment of Dooling, J.
5. *Floyd* v. *Anders* 440 F. Supp. 535 (D. So. Car. 1977) at 539 (per Clement Haynsworth, J.)
6. Cf. Frankfurter and Greene, *The Labor Injunction* (1930).
7. 4 Wheat. 316 (1819) at 418.
8. 100 S.Ct. 2758 (1980) at 2774.
9. 100 U.S. 339 (1879) at 345.
10. U.S. Constitution, Article I, sec. 18, cl. 8.
11. *Roe* v. *Wade* 410 113 (1973) at 159.
12. *Ibid.* at 162.
13. *Ibid.* at 158.
14. 400 U.S. 112 at 134.
15. 394 U.S. 618 (1969) at 641.
16. 384 U.S. 641 at 651-652 n. 10.
17. 400 U.S. 112 at 249 n. 31.
18. Cox, "The Role of Congress in Constitutional Determinations" 40 *U. Cincinatti Law Review*. 199 (1971) at 253, 255.
19. *Bivens* v. *Six Unknown Named Agents* 403 U.S. 388 (1971) at 421-424. Cf. Gunther, *Constitutional Law: Cases and Materials* (1975 ed.), 531.
20. 398 U.S. 333 (1970) at 371.
21. 1. Cranch 137 (1803).
22. Justice Brandeis provided a classic list of such corrections in *Burnet* v. *Coronado Oil and Gas Co.* 285 U.S. 393 (1932) at 407-409.
23. 279 U.S. 438 (1929) at 459.
24. 12 How. 299 (1851) at 317.
25. Cox, "Foreward: Constitutional Adjudication and the Promotion of Human Rights," 80 *Harv. L. Rev.* 91 (1966) at 107.
26. *Ibid.* at 104.

27. *Roe* v. *Wade* 410 U.S. 113 at 153.
28. Cox, "Foreward" at 105.
29. Gunther, *Constitutional Law: Cases and Materials* (1975 ed.) at 656, 1037.
30. Lockhart, Kamisar, and Choper, *Constitutional Law* (4th ed. 1975), 1616.
31. Cox, "Foreward" at 99.
32. Tribe, *American Constitutional Law* (1978), 271.
33. See Noonan, *A Private Choice: Abortion in America in the Seventies* (1979), 29-32.
34. *Doe* v. *Bolton* 410 U.S. 179 (1973) at 272.
35. Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*," *Yale L.J.* 82 (1973) 920 at 946-947.
36. Noonan, *A Private Choice*, 10-12.
37. *Roe* v. *Wade* 410 U.S. 113 at 157.
38. Noonan, *A Private Choice*, 20-32.

APPENDIX A

[*William Raspberry began his May 25 Washington* Post *column with a quotation from* Exodus *21: "Whoever strikes a man a mortal blow must be put to death . . . A kidnaper, whether he sells his victim or still has him when caught, shall be put to death. . . When men have a fight and hurt a pregnant woman so that she suffers a miscarriage, but no further injury, the guilty one shall be fined as much as the woman's husband demands of him . . ." He went on to conclude that the hearings (on the so-called "Human Life Bill") being held by Sen. John East's Senate subcommittee were a mistake: "The result of his misguided effort," wrote Raspberry, "has been to bring ridicule upon himself and to leave the original issue as clouded as ever." Congressman Henry Hyde wrote to the editors of the* Post *in answer to Mr. Raspberry; the full text of Mr. Hyde's letter follows.*]

May 27, 1981

The Editors
Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071

Dear Sirs:

William Raspberry's column of May 25th was particularly disappointing since he has been one of the very few journalists willing to try to understand the ideas and ideals of the pro-life movement.

His use of Exodus 21 to prove how unhelpful Scripture is in solving the problem of when human life begins is really irrelevant. No one, not Senator East, surely, intends to rely on the Old or New Testament to supply a definitive answer.

But it must be noted that Exodus 21 deals with a fine, being the punishment imposed for the unintentional killing of a preborn child. How anyone can use this passage to rationalize the intentional killing of a preborn child — which is the hallmark of every abortion — mystifies me.

May I respectively suggest that Mr. Raspberry add Jeremiah 1:5 to his list of scriptural quotations wherein God Himself speaks: "Before I formed thee in the belly, I knew thee and before thou camest out of the womb, I sanctified thee . . ."

It is awesome how many worshippers at the altar of science, who have been asserting its boundless horizons, now ridicule the testimony of other scientists seeking to provide an answer to perhaps the most fundamental question of all.

Since basic human rights accrue to every human being, is it such a fool's errand to try and determine, if not the exact moment when they accrue, then at least the earliest moment when they ought not to be arbitrarily

denied? We're talking about legislation concerning life and death, are we not? Now if we agree that the right to life arises at the moment one is born, do we concede that ten minutes — or ten days — prior to birth, no such human right exists?

Mr. Raspberry joins the doubters (my pen wants to write "scoffers") who liken the question of when human life begins to the ancient quest for learning the number of angels who could dance on the head of a pin. The answer to the latter is philosophical speculation. The answer to the former means yes or no to one and a half million abortions a year in America.

To quote Moses, Aristotle or St. Thomas Aquinas isn't illuminating because science has learned a lot about biology in the last few centuries.

Ironically, the beginnings of human life weren't questioned in the years before abortion became the preferred solution to an unwanted pregnancy.

Listen to the late Alan Guttmacher, M.D., President of Planned Parenthood, who wrote in 1961, "Fertilization, then, has taken place; a baby has been conceived" (*Birth Control and Love: The Complete Guide to Contraception and Fertility*, Macmillan). In an earlier book (*Having a Baby*, 1947) he referred to the being produced at fertilization as "the new baby which is created at this exact moment."

In 1964, Planned Parenthood issued a pamphlet asserting that "abortion kills the life of a baby, once it has begun." However, by 1968 they and Dr. Guttmacher changed their minds — not as a result of any biological revolution — but because the social engineering called abortion became their focus.

Wasn't the miracle of Louise Brown that her human life began in a test tube? As we enter the developing field of "in vitro" fertilization, isn't the question of the beginning of human life worth asking?

Before abortion became fashionable, the Journal of the California Medical Society published an editorial in September, 1970, accurately describing the new ethic of killing:

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

The list of medical and scientific authority for the definable beginning to human life is long and distinguished and not to be ignored simply because *it is inconvenient to the new abortion ethic.*

APPENDIX A

There are a number of errors in Mr. Raspberry's column — a failure to distinguish between fertilization and that process following implantation, often defined as conception. The abortions this co-sponsor of the Human Life Bill seeks to prohibit are *surgical* abortions — those that are performed after a pregnancy has been determined to exist, and not any medical consequences of the pill or I.U.D. This is not a fight against contraception, not even abortifacient contraception (more properly, interception) but it is a fight against *surgical* abortion.

Using the term "murder" is an effort to "inflame the jury." No one in Congress that I am aware of, uses this term. Rather, the term as used in the criminal laws of every state (prior to 1973) was "abortion" and the person prosecuted was — and will be — the abortionist; the person making a fee out of someone else's misery; not the distressed woman seeking an abortion, who needs support and understanding.

How I wish that columnists who write with such authority about abortion would correctly state the holding of the Supreme Court in *Roe* v. *Wade*. Contrary to Mr. Raspberry's assertion that the Court ruled that the state "may not interfere with a woman's right to end a pregnancy in its early stages," the Court held the state had no right to intervene during the first trimester, and a limited right to intervene concerning *maternal* (not fetal) health during the second trimester of pregnancy. Yes, during the final trimester, the court said the state may intervene, but cannot forbid abortion if the life or the health of the mother is involved. Then they defined health as the absence of distress — thus effectively granting abortion "on demand."

Oh, I realize how awkward it is for those who want to keep abortion "safe and legal" to confront the problem of when human life begins. For if the fetus is human life — not a diseased appendix nor a tumor — then abortion kills that human life and we concede the Hitlerian notion that some lives are not worthy to be lived. How much better for them to obscure and obfuscate — to pretend that the very question is beyond (or beneath?) answer. The humanity of the unborn is the great 13th floor of modern society. Everyone knows it's there, but, for convenience sake, we pretend it isn't. And what if Senator East's hearings cannot prove when human life begins? Can any of his adversaries prove the unborn is *not* human life? And where, in Western Civilization, do we assign the benefit of the doubt?

It is no excuse in law or common sense for a hunter to claim he thought he was shooting a moose when he shoots at some rustling leaves in the forest and kills instead another hunter.

If these scientists cannot *disprove* that the pre-born are of the human species and indeed alive, then ought not important legal consequences follow?

To my dismay, Mr. Raspberry joins those who heap ridicule upon Senator John East, calling him, and his effort, misguided. On the contrary, Sen. East has undertaken a vital duty that very few have the insight and courage to do. It surely is painful to be vilified, lampooned and held up to scorn by the powerful opinion moulders of this country, as Sen. East is almost daily. But as he sits there in his wheel chair and patiently endures this ridicule, surely he is consoled by the fact that he is fighting for the lives and the dignity of the countless unwanted and rejected, in a society that pretends to be caring and humane.

Mr. Raspberry opened his column with a quote from Scripture. It might not be inappropriate to recall that the New Testament speaks of One Who was reviled — we all remember Him, but have long forgotten His assailants. Take heart, Senator East — you are in the very best of company!

Sincerely yours,
HENRY J. HYDE

APPENDIX B

[*The following column by George F. Will originally appeared in the June 22, 1981 issue of* Newsweek *magazine.* (©*1981 by Newsweek, Inc. All rights reserved. Reprinted by permission.*)]

The Case of the Unborn Patient.

by George F. Will

A character in a John Updike novel says, "Life, that's what we seek in one another, even with the DNA molecule cracked and our vitality arrayed before us as a tiny Tinkertoy." But as science explicates the chemistry of life, many people flinch from some facts. They seek not life but reasons to deny that some life exists. They sense, I think, the moral incompatability between some facts of modern science and some practices of modern society.

Recently a boy underwent brain surgery six times in the nine weeks before he was born. An ultrasound scan in the 24th week of gestation revealed hydrocephalus, a damaging concentration of fluid in the brain. A hollow needle was inserted through the womb, into the fetal skull to the fluid. Nearly a quart of fluid was drained in six operations.

Prenatal medicine can detect and treat various forms of fetal distress and genetic problems, with the help of ultrasound pictures that can show all fingers and heart chambers at eighteen weeks. A fetus's inability to assimilate an essential vitamin has been detected and treated by giving large vitamin doses to the mother. Babies likely to be born prematurely can receive drugs that hasten maturation of the lungs, thereby combating hyaline membrane disease, a killer of premature babies. Drugs such as digitalis can be delivered to a fetus through the mother's bloodstream to correct irregular heart rhythms. Excess fluids have been drained from the chests and abdomens of fetuses, and blood transfusions have been given to fetuses.

Rights

Prenatal medicine should raise troubling thoughts in a nation in which abortion is the most frequently performed operation, a nation in which last year 1.5 million abortions ended about one-third of all pregnancies. Science and society are out of sync. The most humane of sciences, medicine, can now treat as patients those who the law says lack an essential human attribute: rights. Mothers can kill any fetus that medicine can treat.

This is not widely understood. Some defenders of the Supreme Court's 1973 abortion decision may have been so busy applauding it that they have not read it. The New Republic recently praised the decision as "fair,"

explaining it this way: "Abortions are freely available in the first trimester, subject to medical determination in the second trimester, and banned in the third, when the fetus is viable." But the Court actually decreed that there can be no serious impediment to even third-trimester abortions. It said that even in the third trimester states cannot prevent any abortion deemed necessary to protect a mother's health from harm, and that harm can include "distress."

There is, effectively, abortion on demand at every point. So just as prenatal medicine was beginning to produce marvelous life-saving and life-enhancing achievements, Supreme Court Justices made it the law of the land that the patients for such medicine have no right to life.

Not surprisingly, some pro-abortion forces are increasingly anti-scientific, in the name of "humility." They say: let's all be properly humble and admit that the matter of when human life begins is a mystery beyond our poor power of understanding, so the answer "birth" is no more arbitrary than any other. This argument is too anti-scientific, and too convenient to the pro-abortion position, even to seem ingenuous. It has aroused Walker Percy, an M.D. and a novelist of distinction. He notes that it is a commonplace of modern biology that the life of an organism begins "when the chromosomes of the sperm fuse with the chromosomes of the ovum to form a new DNA complex that thenceforth directs the ontogenesis of the organism," producing the undeniable "continuum that exists in the life of every individual from the moment of fertilization of a single cell." Percy adds:

> The onset of individual life is not a dogma of the church but a fact of science. How much more convenient if we lived in the thirteenth century, when no one knew anything about microbiology and arguments about the onset of life were legitimate . . . Nowadays it is not some misguided ecclesiastics who are trying to suppress an embarrassing scientific fact. It is the secular juridical-journalistic establishment.

Stephen and Amanda, Australian twins, were conceived in vitro. Two eggs were fertilized in a laboratory and implanted in the mother, who wanted twins. Perhaps the status of life begun in vitro is unclear prior to the implantation that is necessary for the continuum. (Necessary today but perhaps not tomorrow, when there may be artificial wombs.) But little Louise Brown in England is famous because she is the first child whose *life* began in vitro.

Agenda

In 1947, before Planned Parenthood became a pro-abortion lobby, an officer referred to the being produced by fertilization of an ovum as "the new baby which is created at this exact moment." In 1964 a Planned Parenthood pamphlet said, "Abortion kills the life of a baby, once it has begun." What has changed is not biology but Planned Parenthood's agenda.

APPENDIX B

In 1973 the Supreme Court, feigning humility as it arrogantly legislated, said it could not "resolve the difficult question of when life begins." Actually, the Court knew what every high-school biology student knows. So it quickly inserted the telltale adjective "meaningful." It defined viability as the point at which the baby can have "meaningful" life outside the womb. Speaking of such life recently at a Phoenix abortion center, a woman in her second trimester was injected with a saline solution and sent home. Three nights later she went into labor and was told to go to the hospital to "deliver the fetus" — dead, of course. Instead, she delivered a live girl.

The argument about abortion cannot be about when human life begins. It must be about the status of life at various early stages — a matter about which decent people can disagree. But denial of elementary biology is the way some pro-abortionists duck the difficult issue of gradation. However, whatever one thinks should be the status of the life that exists at conception, surely any civilized sensibility should be troubled by the status of life later in pregnancy. Then a mother need not treat as human a being that prenatal medicine can treat as a patient, a being that can become, if the attempt to kill it fails, a pediatrician's patient.

APPENDIX C

[The following is the original transcript (reprinted here with permission) of William F. Buckley's "Firing Line" TV program, which was taped in New York City on May 15, 1981, and originally telecast by the Public Broadcasting System on May 24; "Firing Line" is a production of the Southern Educational Communications Association of Columbia, So. Carolina, and is produced by Mr. Warren Steibel.]

Can Congress Create People?

MR. BUCKLEY: We are calling this hour, "Can Congress Create People?" and the jauntiness of the formulation notwithstanding, that is exactly the question before the House — and the Senate. S.158, also known as the Human Life Bill, sponsored by Senator Helms and, in the House, by Congressman Hyde, stipulates that Congress shall deem life to have begun at the moment of conception. From this it would follow that said life cannot be deprived or extinguished except by due process of law. If S.158 passes into law, the Supreme Court's ruling of 1973 granting women the right to abort their children — or their fetuses, if you prefer — is set aside. Or is it? Could the Supreme Court declare S.158 unconstitutional?

The author of the idea is a young lawyer who described his reasoning in an article written for *The Human Life Review* last winter. Stephen Galebach is an honors graduate of Yale University who went into the Marine Corps and then to the Harvard Law School where he was an editor of the *Law Journal*, after which he was a clerk to Judge Wilkey on the United States Court of Appeals. He maintains that in *Roe* v. *Wade*, while legitimizing abortion, the spokesman for the majority of the Court in effect conceded to the Congress the right to define life. That right is vested in the 14th Amendment which leaves up to Congress the authority to implement the rights to life, liberty, and property; a position subtly enhanced, as you will see, by Mr. Galebach's analysis.

Robert Bork is, of course, the former solicitor general of the United States, back from the wars in Washington, teaching law at Yale University and writing, and intending to resume the active practice of law in Chicago and in Washington beginning this summer. He vigorously opposes S.158, notwithstanding that when last on this program he spoke of the problems of judicial usurpation. He will, as always, make himself clear. Our examiner is Mrs. Harriet Pilpel of Greenbaum, Wolff and Ernst, about whom more in due course.

I should like to begin by asking Mr. Galebach to explain how he finds it historically consistent for the Court to defer to the Congress in such a question.

MR. GALEBACH: The Court defers to Congress on many questions, but especially when the Court lacks the expertise to resolve a particular question. Now, in the 1973 abortion decision, the Supreme Court declared that it was not able to decide when human life begins, so it didn't know whether unborn children were human beings for purposes of making that decision. The Court did say unborn children were not persons. Now the question is whether if Congress looks at the question of when life begins and decides that unborn children are human beings, will that change the constitutional picture so that the Supreme Court will then recognize them as persons which the states can protect by once again passing anti-abortion laws?

MR. BUCKLEY: I thought it was your thesis that it would change the constitutional picture.

MR. GALEBACH: Indeed, there's every reason to believe the Supreme Court would recognize unborn children as persons because the 14th Amendment was intended by its framers to protect all human beings. The language of that amendment is, "No state shall deprive any person of life without due process of law." The author of that amendment referred to it as protecting the rights of all human beings; another sponsor of it referred to it as protecting the rights of common humanity. So that if unborn children are human beings, recognized by Congress, then they certainly should be persons whose lives are protected under the 14th Amendment.

MR. BUCKLEY: So it's a question of the comprehensiveness of the term "human beings." But let me ask you this: You say that in many other situations the Court has deferred to Congress. Can you think of another situation in which — I know you can; this is a rhetorical question — can you think of another situation in which the Court has deferred to Congress in the matter of elaborating the rights specified by the 14th or 5th Amendments?

MR. GALEBACH: Yes, the Court has done that in several important cases. One of them was the case in which Congress expanded voting rights by invoking the authority of the equal protection clause and also invoking the last section of the 14th Amendment, which says that Congress shall have power to enforce this amendment by appropriate legislation. Now, that case was the case of *Katzenbach* v. *Morgan*, and the Supreme Court in the majority opinion in that case recognized a power of Congress actually to define the scope and meaning of 14th Amendment rights — in that case, the equal protection clause in voting rights.

MR. BUCKLEY: So that would be the precedent that comes most clearly to your mind?

MR. GALEBACH: That is the leading precedent in this area.

MR. BUCKLEY: And what was the vote of the Court on that decision — on the Katzenbach case?

MR. GALEBACH: There were dissenters from that. Justice Harlan dissented in an opinion joined by Justice Stewart. Justice Harlan's opinion recognizes a narrower role for Congress in this area. That role is limited to determining factual matters — making legislative findings — which the Supreme Court would then defer to — would give respect to — but not necessarily follow if the Court was not persuaded that those findings controlled the constitutional interpretation to be made.

MR. BUCKLEY: And of course it's Professor Bork's case that the factual matters are the constitutional matters in this case, but before we get into that, Mr. Bork, may I ask you this? Would you say that the following statement is right or wrong? "The Supreme Court has firmly held that the unborn are not persons as that term is used in the Constitution."

MR. BORK: I think that's correct.

MR. BUCKLEY: It strikes me as incorrect because, having read the decision, it seems to me the Court has said that people are disagreed on the subject and they are hardly in a position to disagree with the disagreers or to decide Solomonicly the answer to it.

MR. BORK: They are not in a position to decide when human life begins, but I think for that reason they conclude that they are not persons in their present view. I think Mr. Galebach's effort is to give them a standard about when human life begins and to convert that into a definition of persons.

MR. BUCKLEY: But I'm anxious before we go on to establish whether the Supreme Court is being contradicted because as I read Mr. Galebach's analysis, there isn't merely the matter of contradiction involved, though many of his critics say that there is. There is a matter of elucidation.

MR. BORK: Well, I think I should say that there is nobody who thinks *Roe* v. *Wade* is a worse opinion than I think it is. It's absolutely without constitutional foundation, and I understand the appeal of Mr. Galebach's proposal, because it takes a line of cases that liberals have applauded for years, *Katzenbach* v. *Morgan* being the one he mentions, and turns it around and hoists them on their own petard. However, I happen to think that those were terrible cases to begin with and that Congress should not have the control of the Constitution, either by deciding facts or by deciding law.

MR. BUCKLEY: In other words, in the ideal Bork world, this law would not pass and *Roe* v. *Wade* would be rejected by the Court itself?

MR. BORK: *Roe* v. *Wade* would be rejected by the Court itself, as would *Katzenbach* v. *Morgan.*

MR. BUCKLEY: Oh dear, what are we going to do with that? (laughter)

MR. GALEBACH: That does leave some confusion, but I must say that the Human Life Bill as proposed in Congress doesn't rest on a notion that *Roe*

v. *Wade* is wrongly decided. The bill accepts *Roe* v. *Wade* on its own terms. The justices said unborn children were not persons but also said they couldn't decide whether unborn children were human beings, and so the Human Life Bill presents the question: If unborn children are human beings, then aren't they necessarily persons? Doesn't the Supreme Court need to take a new look at that question and won't the Supreme Court reach a new answer?

MR. BUCKLEY: Since this is so important, may I just read that one sentence so people who want to arrive at their own conclusions as to its meaning can do so? Justice Blackmun wrote: "When those trained in their respective fields of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge" — that doesn't really mean much to me; I know what he meant by that, but anyway — "at this point in the development of man's knowledge is not in a position to speculate as to the answer." Now, I don't see how that is compatible with the assertion that they haven't ruled on the matter. What they are really saying is, "Since nobody around has said with any judicial authority or legislative authority that fetuses are people, therefore we rule that the latent right to privacy of a woman over her own body is superordinated over this uncrystallized right." Is that fair?

MR. BORK: I think that's fair. But I think they did go on to say — maybe Mr. Galebach can clarify it — but they did go on to say, did they not, that the fetuses were not persons within the meaning of the 14th Amendment?

MR. GALEBACH: They did say that, and my argument here is that the Supreme Court did make that decision, but they made it on limited information, and the question is whether they would reach and should reach the same decision if they are given full information by Congress on the question of when life begins — whether unborn children are human beings.

MR. BUCKLEY: Now, let's settle this point also, which I think is important. We're not here, are we, to argue a metaphysical point? We're here to argue a legal point; that is to say, that which Congress says is such and such or that which the Constitution says is such and such, is such and such for the purpose of American law. If they say a black man is a slave — if he was imported as such 150 years ago — we have to treat him as such. This doesn't mean that we've made any personal commitments to that metaphysical theory, right? So we are not — Those people who back this bill are not saying, "Congress has the right on my behalf to specify the truth of the matter; they have the right on our behalf or don't have it to tell us how we must behave in the matter." Agreed?

MR. GALEBACH: Yes.

MR. BUCKLEY: Okay. So you go no further than that, do you, in saying that

Congress has the political authority to answer a question, the answer to which was critical in the reasoning of Justice Blackmun?

MR. GALEBACH: Yes, that's right. Now, there is an important question beyond merely the scientific fact question of when life begins. There's also the question of whether we are to regard all human lives as having equal value, equally worthy of protection under the law; and I think that's one major departure of the opponents of the constitutionality of this bill. Those that are arguing that it's unconstitutional have often said that, "Just because Congress says that unborn children are human beings, well, that doesn't necessarily make them persons; they may be human beings of the sort whose lives really haven't developed to the stage or don't have the characteristics which we regard as meaningful life."

MR. BORK: An interesting aspect of your bill is that when you argue it in your article — which only narrowly fell short of persuading me — was that you say it really rests upon the fact that anybody who judges when human life begins has to weigh imponderables and conflicting evidence and so forth, so that I take it you would think that if Congress rewrote your bill to say that a fetus is not a human being until the moment of birth, that would be a very pro-abortion statute and you would find that equally constitutional.

MR. GALEBACH: Well, that's probably true. It probably would be constitutional. The problem here is that it seems disturbing that Congress could define life as only beginning at birth, but unless some branch of government addresses this question, no human being before birth can be protected; that is, the Supreme Court has said, "We can't decide whether unborn children are human beings." If now it becomes the case that Congress also can't decide whether unborn children are human beings, then no branch of the federal government will be empowered to protect them. The point of the Human Life Bill is that some branch of the government needs to look at this question. Congress is the appropriate body to do it, and the Supreme Court has not said that Congress can't do it. The Court has only said that the judiciary is not capable of doing it.

MR. BUCKLEY: Well, would it extend to the other end of man's life? Would you understand the Congress under the implicit doctrine of *Roe* v. *Wade* to be able to define when meaningful human life ends and therefore to authorize euthanasia or —

MR. GALEBACH: Now, there's an important limitation here. Some legislatures have in fact looked at that question. Some state legislatures have looked at the question; there's no reason why Congress couldn't also. But the important point is that the Supreme Court will review any such determination, just as they'll review the Human Life Bill.

MR. BUCKLEY: That's a circular argument, isn't it? They're reviewing whether

or not they have the authority to do something that Congress said they didn't have the authority to do.

MR. GALEBACH: I don't think it's circular because if the Court felt that Congress was restricting a right to life, it could very well say, "That's not within Congress' power." Congress may be able to expand rights, and in fact the Court in that *Katzenbach* v. *Morgan* precedent used that sort of theory — that Congress can expand 14th Amendment rights but not restrict them.

MR. BORK: It ought to be made clear that if Mr. Galebach is right and if cases like *Katzenbach* v. *Morgan* are right, we really have a constitutional revolution on our hands. It means that Section 5 of the 14th Amendment gives Congress the power to say what violates the 14th Amendment, and the Court ought to defer. Some of that has occurred already. You rest upon a line of precedents to that effect. It seems to me to be very bad constitutional law, and what you're doing or would do is to ratify — out of very good impulses — but to ratify some constitutional damage and make more possible.

MR. BUCKLEY: Let me ask you this, to go back a little further: In the *Jones* decision, which I understand is accepted by all members of the Court, the right of Congress to define that which went into the description of the slave under the 13th Amendment is conceded. Do you have any problem with that?

MR. BORK: Yes, I do. I have a problem any time Congress begins to define constitutional provisions, and they did that in that decision and they did in some others. I may be a constitutional fundamentalist. I'm sorry about that.

MR. BUCKLEY: So you dissent. Let me see; that was after Frankfurter's death, wasn't it? *Jones*?

MR. BORK: I think so.

MR. GALEBACH: Yes.

MR. BUCKLEY: How would he have gone on that, do you think?

MR. BORK: I think he would have dissented.

MR. BUCKLEY: You do?

MR. BORK: I think, but I can't be sure.

MR. BUCKLEY: But as it is, Mr. Galebach, we have no dissenters on *Jones*? I know in your essay —

MR. GALEBACH: I don't believe so, that's right.

MR. BUCKLEY: — you say that it is universally accepted.

MR. GALEBACH: Yes, although I do believe —

MR. BUCKLEY: To the extent we can have a universe without Mr. Bork's acquiescence? (laughter)

MR. BORK: I hope you don't get me out of the universe in order to — (laughter) But you've got to realize two things are happening. One is that it's an enormous centralization of national power when Congress takes over the ability to define the 14th Amendment as it wishes. It can legislate on things we think states should be free about. And it's also an enormous shift in constitutional power from the courts to the Congress. Now, I'm very unhappy with the way the courts have been behaving, but whether we want to make that shift in response is a question we ought to consider very carefully.

MR. BUCKLEY: Don't you have a problem, Mr. Bork, of an existential character? You've got a situation in which we live in a world in which *Roe* v. *Wade* is the law of the land. Now, you think it is a defective decision, and the question is: How can it be remedied? Well, the ideal remedy would be for the Supreme Court to reverse itself, but absent such a development, ought we to say, "Well, all right, if we're living in an age of this kind of opportunistic logical positivism, shouldn't we follow Mr. Galebach when he shows us how we can cope with a concrete problem?"

MR. BORK: If you were only coping with that concrete problem, I wouldn't be too troubled, but I'm afraid you are shifting the very nature of the relationship between the branches. You can cope with it, for example, by a constitutional amendment. The one I would prefer would simply return the matter to the states for regulation — the situation which existed before *Roe* v. *Wade*.

MR. BUCKLEY: Which would — Yes, but that would be simply a particular repudiation; it wouldn't be a generic repudiation of the Court. Or would it so be interpreted by the Court?

MR. BORK: No, I think that would only be particular repudiation. I think that there are enough problems now with a court which is essentially constitutionally unmoored and is essentially legislating, that maybe one would want to consider whether some kind of general checking device should be built into the Constitution — two-thirds Senate vote or something of that sort — to overrule particular decisions. But I would like that considered in full and not done by a statute like this which creates an additional precedent for a general shift in power to the legislature from the Court —

MR. BUCKLEY: On an ad hoc basis.

MR. BORK: — on an ad hoc basis.

MR. GALEBACH: Can I speak to that point?

MR. BUCKLEY: Sure, sure.

MR. GALEBACH: The *Katzenbach* v. *Morgan* case that Professor Bork sees as so troublesome is one I'm not so comfortable with myself. It is one on the books, just like *Roe* v. *Wade* is on the books. I think Congress doesn't

have to rely on the majority opinion in that case, and the Human Life Bill doesn't stand or fall according to one's opinion of the majority opinion in *Katzenbach* v. *Morgan* because the dissent allowed a role for Congress also. It was a narrower, more confined role which would not allow Congress to overrule any Supreme Court precedent at all, by any means, but Justice Harlan wrote an opinion in which he stated that to the extent legislative facts are relevant to a judicial determinination, Congress is equipped to investigate those facts and Congress' findings are entitled to due respect from the Court.

MR. BUCKLEY: You mean the Court is entitled to investigate those facts?

MR. GALEBACH: Congress is entitled to look at the facts and make findings after holding congressional hearings, as is being done now in the Human Life Bill, and then when Congress makes those findings, they are entitled to due respect from the Court — not controlling weight as the majority in *Katzenbach* said, but due respect. So the Court could be influenced by them. The Court could change its mind according to Congress' view. Now, in the Human Life Bill we have a good example of this. The findings have to do with when life begins, what value we are to give to human life. Those findings could very well influence the Court's judicial determination of whether unborn children are persons.

MR. BUCKLEY: Without necessarily mandating a reversal, you mean?

MR. GALEBACH: Exactly.

MR. BUCKLEY: When the Supreme Court said, Mr. Bork — maybe I should be embarrassed to ask you what it meant by saying a certain thing since you say it's — But it did. Mr. Blackmun said, "If the suggestion of personhood is established" — that's kind of shaky English, isn't it? — "If the suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." Now, who has Blackmun got in mind as the relevant authority that might suggest or establish personhood?

MR. BORK: I don't know that when he wrote that he had anything very specific in mind. He was probably talking about the Court — "If the suggestion is established" — he probably meant in a court.

MR. BUCKLEY: Do you read it the same way, Mr. Galebach?

MR. GALEBACH: In a sense that it's normally the Supreme Court that interprets the Constitution. With the Human Life Bill we have an exceptional case because the Court declared itself unable to resolve a particular question. Now, if that question —

MR. BUCKLEY: A factual question?

MR. GALEBACH: Yes, of when life begins. Now, if that factual question is central to the definition of who is a person, then a congressional determination would influence the Court.

MR. BUCKLEY: So the question is whether it's central?

MR. GALEBACH: I think that's really the question we're getting down to here.

MR. BUCKLEY: Suppose they had said, "When those trained in the respective fields of medicine, philosophy and theology have arrived at a consensus that the fetus is a person," would this be a plausible acknowledgement of authority to extend the rights of the 14th Amendment to the fetus?

MR. BORK: One ought to give some respect to the intent of the framers, who I doubt very much had this problem in mind at all when they framed the 14th Amendment, but I don't think we're dealing with a legal question or a factual question or, insofar as a legal question, it really is one that rests heavily upon moral views and religious views and other things. So to say that it's a factual determination I think is to be quite misleading.

MR. GALEBACH: It's not entirely a factual determination. The first part of the question is: When does life begin? In the hearings there were a number of scientists, geneticists, doctors, who testified that it is very clear when life begins. There is a difficult question, of course, as to what value do we give to human life? At what point does value attach to a life?

MR. BUCKLEY: But that's not a factual question, is it?

MR. GALEBACH: It's not. It's tied in with the factual question, I believe, and both of those questions were unanswered. They were left unanswered by the Supreme Court in *Roe* v. *Wade*. So we really don't know whether the Court would take one of these two positions: first, that all human lives are of equal value — the sanctity of life; second, that we must decide at what point value attaches. Those are two competing views of the value of life. The Supreme Court has not said that it adopts one or the other. Now if the Court adopts the view of the sanctity of life, which is the traditionally accepted one, really, in American society and American law, then a congressional determination that unborn children are human beings would mean that, of course, their lives are equally worthy of protection and they should be regarded as persons within the protection of the law.

MR. BORK: See, a very funny thing happens if this statute passes. Suppose a state then passes a law which says that abortions are lawful on certain grounds up till five months or four months —

MR. BUCKLEY: How could it, with the current understanding of the applicability of the 14th Amendment?

MR. BORK: The 14th Amendment says that no persons shall be denied life without due process of law.

MR. BUCKLEY: By a state.

MR. BORK: By a state. But suppose they just let abortions continue without — The state isn't affirmatively taking life; it is just not enforcing a law against that. Now, at that point, you have a little bit of trouble with how you protect the fetus because there's no state action.

MR. BUCKLEY: Suppose there was no state murder statute. Would that be comparable?

MR. BORK: Yes, or a state murder statute that was just unapplied in certain classes of cases. Now, you can construct constitutional arguments about how somebody could challenge that, but they're not at all clear. And it is not at all clear what the effect of this statute would be in operation.

MR. BUCKLEY: Is it clear whether it would be up to Congress to specify the penalties for violation? Or would that be up to the states? Suppose you had State A that said, "This is unlawful and anybody who gets an abortion gets fined $25," and another state that said, "Anybody who practices abortion spends five years in jail." Would this be tolerable under the passing of Mr. Galebach's —

MR. BORK: I think on Mr. Galebach's theory, Congress under Section 5 of the 14th Amendment could probably specify —

MR. BUCKLEY: The penalty?

MR. BORK: — the penalty that the state must use. Isn't that what your theory would lead to?

MR. GALEBACH: They probably could, but the point of this bill is, they're not doing that. In other words, Congress is trusting to the good faith of the states to protect human life once the unborn are declared to be persons.

MR. BUCKLEY: In its own manner?

MR. GALEBACH: Exactly. In other words, most states would like to protect unborn children and did before the 1973 decision — at least a large number would if they had the power — so there's no reason for Congress to presume that states will fail to protect 14th Amendment rights. Congress can initially leave this matter up to the states and let the state legislatures resolve the question of what's the appropriate penalty for abortion; and then, if Congress is not satisfied, they could take further action.

MR. BUCKLEY: You mean it's not like the literacy test then, where in 1965 Congress simply asserted that literacy tests were being administered for the purpose of depriving black people of the vote and therefore there was a presumption against any state, and the federal government simply took over the situation, right?

MR. GALEBACH: Exactly.

MR. BUCKLEY: Under your situation, presumably, if they were experienced under the Human Life Act four or five years from now, Congress could go forward, as Mr. Bork suggests, and prescribe penalties on the grounds that there was a defiance? Is that right?

MR. BORK: I think so. This is an enormous power that underlies this bill for Congress.

MR. BUCKLEY: Let me ask for your comments on a joint letter published in oppposition to the bill by Professor Lawrence Tribe and — who's the other one — Van —

MR. GALEBACH: Van Alstyne, perhaps?

MR. BUCKLEY: Van Alstyne, yes. Now, they said that if Mr. Galebach's reasoning and that of the Human Life Act is accepted, Congress need only announce that one's "liberty of reputation demands that any publisher of libelous matter be held strictly liable, therefore undoing *Sullivan* v. the New York *Times*." In other words, what they're saying is, if they can define life with the specificity that Mr. Galebach says that they can, so can they define liberty; and they could go on to attach to liberty a kind of property right in your name that would void all of those painfully constructed libel statutes. Is that correct? Does that sound reasonable?

MR. BORK: I think it does. Mr. Galebach is trying to avoid that result by particularizing this and saying the Supreme Court has left it open in this kind of case and they haven't left it open elsewhere. On the other hand, Mr. Galebach — neither he nor I — can control the way the Court, if it accepted this statute, would frame its rationale, and it could frame its rationale in a way that permitted that.

MR. GALEBACH: But Congress can frame its rationale in a very narrow way, and I think it would be appropriate for Congress to do that here. Congress can say, "We have a unique justification for acting in the context of protecting unborn human life because the Supreme Court declared itself unable to decide when life begins and that's a fundamental question relevant to the judicial determination of whether unborn children are persons."

MR. BUCKLEY: In other words, "The Supreme Court was in effect seeking our guidance"? — us being Congress.

MR. GALEBACH: Or at least would benefit from it if they didn't actively seek it, yes.

MR. BUCKLEY: Mr. Tribe goes on to say that for instance, they could say that racially restricted covenants are okay because your right to property cannot be withdrawn without due process, and that, under the circumstances, just as they can define who is entitled to the protection of life, so they can define the reach of your property right. Does that follow?

MR. GALEBACH: But the question in all those other areas is: Was there a fundamental question the Supreme Court left open? Was there a role they left open for Congress to play? And in the other areas, no, they didn't.

MR. BORK: That's not entirely fair, Mr. Galebach, because you do rely upon cases like *Katzenbach* v. *Morgan*, *Oregon* v. *Mitchell* and so forth — cases in which nothing was left open, the Court just accepted a congressional definition of a constitutional protection. So that to the degree you rely

upon that and to the degree the Court is persuaded by it, then there is an unknown legislative power under the Constitution given to Congress.

MR. GALEBACH: Well now, it's up to Congress to choose whether they follow the majority view of *Katzenbach* or the more narrow view of Justice Harlan.

MR. BORK: But it will then be up to the Court to choose which one they choose to uphold it on, if they do, which I doubt.

MR. GALEBACH: But the Court does follow a general rule of preferring a narrow rationale when it is available rather than a broad one. We can —

MR. BORK: Except when it suits their purposes to root up a broad one.

MR. BUCKLEY: What do you predict, Mr. Bork, would happen if this act — which is backed by the President — if it becomes law? Would this present us finally with a real constitutional dilemma if the Supreme Court went on to say that it was usurpatory?

MR. BORK: I think it would because, given the Court's performance in other areas where they have allowed this kind of thing, the Court would be quite obviously inconsistent and, I think, would arouse a great deal of anger — and properly so. There would be a constitutional dilemma. It would mean, I think, that you can only legislate the meaning of the Constitution when you do so for liberal purposes, but not for a socially conservative purpose; and unfortunately, there is a good deal of that tendency in the federal judiciary.

MR. BUCKLEY: You talked about this act in one of your statements as gesticulations.

MR. BORK: I don't think I said that.

MR. BUCKLEY: You didn't?

MR. BORK: I might have, but I — Go ahead.

MR. BUCKLEY: Well, because I didn't think I was completing the sentence with how you now view it, but do we have here a situation in which the Supreme Court, if it says Congress has indeed that power, displeases the constituency that simply wants whatever it is that allows people to have an abortion? On the other hand, if it says Congress doesn't have that power, does it have to sit back and have another look at *Fullilove* v. *Klutznick* and another look at —

MR. BORK: I would hope so. They certainly ought to take a look at those cases. They were very bad cases, and I must confess, I'm somewhat distressed to find myself on the other side of this as a constitutional matter because I think this proposal doesn't work a constitutional revolution anywhere near to the degree that the Court has worked one over the last 25 years, and something is very wrong with the course of constitutional decisions and something has to be done about it. I'm not sure that this kind of

a casual shifting of the basic assumption of the roles of the branches is the thing to do.

MR. BUCKLEY: All right. The last time you were on this program, you said that such is the moral authority that has been acquired by the Court that it is inconceivable to you that the Court would ever be overturned via an amendment and you cited as a specific example of it the abortion decision. Do you remember that?

MR. BORK: I may have. I'm beginning — I'm surprised a little bit because the resistance to the Court is much stronger now than I had thought it was going to be, which I think is healthy, because nobody any more believes that these are things to be found in the Constitution. If they were, we'd all defend the Court. Even the people —

MR. BUCKLEY: You mean the absolute right of the woman to destroy fetuses?

MR. BORK: Many, many, many of their recent decisions, this one among others. Nobody believes they're in the Constitution; not even the people who applaud the results think they're in the Constitution. In fact, there's a vast literature pouring out of the law schools trying to explain why it is all right for the Court to amend the Constitution in the name of the Constitution, a system that is called transtextual interpretation, the least of whose faults is that it requires very careful pronunciation. (laughter) But nobody believes it's in the Constitution. I think the public is becoming aware of that, and I think the Court is running into a lot of trouble — political trouble — of which this is just one manifestation.

MR. GALEBACH: Now, if we have such a bad decision in *Roe* v. *Wade* and we have an important question that the Supreme Court left open there, might not the best approach be for Congress to fill that gap, answer that question and let the Court take a new look at the question again of whether unborn children are protected under the 14th Amendment? And if that can be done on a narrow rationale, we don't have the grave consequences on other issues that some people have claimed, and so I think one of the fundamental questions here is whether Congress can pass the bill on a narrow rationale that applies specifically to answering a question left open by the Supreme Court and influencing them to change their decision.

MR. BUCKLEY: Yes, Senator Moynihan wrote an article about a year ago which you may have seen, Mr. Bork, called, "How Should You React to the Supreme Court When It's Wrong?" and he precisely advocated an attempt to force the Court to reconsider by giving it successive challenges, each one of which clarified congressional intent and each one of which, to the extent relevant, adduced relevant historical literature. Now, would that be too expediential for your tastes?

MR. BORK: I don't know entirely. You know, I'm reminded of Roosevelt's Court-packing plan. I think in retrospect we think the justices striking

down economic legislation were wrong, and that Roosevelt was equally wrong. Nevertheless, the attempt had a rather salutory effect upon the Court, which became quite restrained for a period of time. I can't say —

MR. BUCKLEY: That never passed, the Court-packing plan.

MR. BORK: No, no, it didn't, but the Court, I think, took the political opposition to heart, and I think it — I do not suggest for a moment that the Court ought to give way because people are angry, because people were angry about *Brown* v. *Board of Education*, but you could locate that in the Constitution. It was a proper decision. But when the Court is legislating things that have no constitutional foundation, as is true in *Roe* v. *Wade*, then I think some political response and some anger is appropriate, and I hope the Court takes it to heart.

MR. GALEBACH: I agree with that, and I think that the proper way for the anger to be focused — that is, for the opinions to be made felt by the Supreme Court — is through Congress.

MR. BUCKLEY: Is by revisiting the Court with a fresh problem?

MR. GALEBACH: Now, one of the best formulations of this theory actually that I've found in researching was by Professor Bork, and I'd like to read that to see how you think this might apply to what we're talking about here.

MR. BORK: I should have read my own stuff before I came on. (laughter)

MR. GALEBACH: You wrote about the President's busing proposals —

MR. BORK: Yes.

MR. GALEBACH: — back around '72, and they were much the same sort of thing: Congress expressing an opinion contrary to the Court in the expectation that the Court would change its mind when confronted with new information. And you phrased it this way: "The Justices may be persuaded to a different view of a subject by the informed opinion of the legislature. At the very least, a deliberate judgment by Congress on constitutional matters is a powerful brief laid before the Court."

MR. BORK: I think that's right.

MR. GALEBACH: Now, my point about the Human Life Bill is that the very best time for Congress to step forth with an informed opinion to lay before the Court is when the Court has said it is unable to resolve an important question. Then Congress can provide —

MR. BUCKLEY: As they say, their input.

MR. GALEBACH: Exactly.

MR. BORK: What I've said I continue to agree with, and I would hope that the brief laid before the Court would be to "Get out of this field; it's not your business." In fact, I don't really think it's best addressed at a national level. I think it ought to be addressed at the state level.

MR. GALEBACH: That would be the effect of the Human Life Bill. The Court and the national government would get out of it at least.

MR. BORK: Until the case came back up to weigh the rights of privacy and life.

MR. GALEBACH: But the Court could resolve that conflict simply by saying, "States may now protect unborn children."

MR. BORK: See, I wish you'd rewrite your article, then, to say, "This is a brief laid before the Court. This does not rely on *Katzenbach* v. *Morgan* and a real constitutional power in Congress to change the Constitution."

MR. BUCKLEY: By definition you make your briefs by filling them as full as you can of Supreme Court precedents, don't you?

MR. BORK: Not bad Supreme Court precedent.

MR. GALEBACH: Well now, Congress has a chance to make a brief like that when it writes its committee report, and perhaps they will adopt a theory along those narrow lines.

MR. BUCKLEY: In other words they might say, "We're not going to plead *Katzenbach* because we think the Court was wrong there, too."

MR. BORK: I should say that when I supported the constitutionality of President Nixon's attempt to cut back the busing in school cases, I explicitly did not rely upon *Katzenbach* v. *Morgan* because it is very bad constitutional law. That would have been easy for me.

MR. GALEBACH: Couldn't Congress do the same thing now in their committee report?

MR. BORK: Not rely upon *Katzenbach*? I'd be much happier if they didn't. If they said, "This is a brief," I'd be very happy. If they said, "We can control the Constitution," I'd be very unhappy.

MR. BUCKLEY: Has there ever been a brief of that kind filed directly from Congress going to the Court?

MR. BORK: Yes, in some cases. Usually for the wrong reason. Usually to tell the Court what they really meant when they passed a statute some years after the event when different congressmen are around, but I don't recall one in a major constitutional case.

MR. BUCKLEY: What is the procedure?

MR. BORK: They usually file an amicus brief.

MR. BUCKLEY: Is it memorializing the Court or what?

MR. BORK: No, they usually file an amicus brief to inform the Court of something.

MR. BUCKLEY: But that's only when something is pending, right, before the Court?

MR. BORK: Oh yes.

MR. BUCKLEY: But how would you get something pending before the Court? Would you have to have a collateral action?

MR. BORK: You'd have to have a lawsuit, but I assume there would be all kinds of lawsuits on this subject matter.

MR. BUCKLEY: I see, I see. Like the Connecticut lawsuit, for instance.

MR. BORK: And there would be all kinds of funding lawsuits and other kinds of things in which the Congress or anybody else could clearly say, "You got into this mess because you made a basically wrong decision. The decision is not your business constitutionally in *Roe* v. *Wade*."

MR. BUCKLEY: I see. Well, let's submit to our examiner. Mrs. Harriet Pilpel is well known to viewers of this program. She is a distinguished attorney, a graduate of Vassar, and very much identified with the pro-abortion movement, and the women's rights movements and all things that have to do with literary matters. Mrs. Pilpel.

MRS. PILPEL: I think that I should point out in the first instance that Mr. Galebach has been posing the wrong question, and I think that Professor Bork has been raising wrong questions in the sense that what the Supreme Court decided in *Roe* v. *Wade* — and unlike Professor Bork, I don't deplore that decision since it represented what I thought was good constitutional law — was that — these are their words — "Throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today. We are persuaded that the word 'person' does not include the unborn." Both these gentlemen — and I guess you too, Bill — are of the position that the Supreme Court said it couldn't decide the question because of inadequate evidence or something and that Congress now is going to make a factual finding. The question of when human life begins is not a legal question, as Professor Bork said; it is not a factual question either. And I can think of no better support for their position — and I would ask your indulgence in putting this in the form of a question to both gentlemen — the following resolution which was adopted by the National Academy of Sciences, a scientific elite and our scientific authority for many propositions. The resolution reads, "It is the view of the National Academy of Sciences that the statement in your bill cannot stand up to the scrutiny of science. The section reads" — and these are your words — "'The Congress finds that present day scientific evidence indicates the significant likelihood that actual human life exists from conception.'" Your words. "This statement purports to derive its conclusions from science, but it deals with a question to which science can provide no answer. The proposal in your bill that the term 'person' shall include all human life has no basis within our scientific understanding. Defining the time at which the developing embryo becomes a person must remain a matter of moral and religious values." And my question and comment is:

The Supreme Court did not decide that question. They said we lived in a diverse, pluralistic society in which there are many answers to that question. It's not a factual question; it's not a scientific question. Therefore, it's not that the Court was unable to answer it but that under our constitutional system the legislature may not answer it either. It is not a question of fact.

MR. BUCKLEY: Mrs. Pilpel, in the first place, the National Academy of Sciences disagrees with the Court itself because the Court specifically said in the fields of "medicine, philosophy and theology, they are unable to arrive at any consensus." They understood themselves to confront a divided scientific community, so it's not very helpful for you to tell us all of a sudden there is no such division because —

MRS. PILPEL: There is no division on the question that there's a division, and there is no division on the question that this is not a scientific question. It's a religious and moral question on which there is enormous division. That's what the Supreme Court said.

MR. BUCKLEY: Well, let's hear our guests' comments on that particular point. Do you want to start, Mr. Galebach?

MR. GALEBACH: I'm always surprised when I hear this argument that no one can decide when life begins. One of the highest functions of government is to protect human life. How can you protect human life if you can't decide when it begins — whether unborn children are human beings, whether a baby right after birth is a human being? Now, there are difficult questions involved there. That's why the Supreme Court said it was unable to decide. The point is that now that Congress can take a look at the question, let's say they are uncertain. Let's assume Congress has some doubts about whether unborn children are human beings. They might very well decide that the benefit of the doubt should be given to human life and that would be consistent with the Supreme Court's view that when Congress enforces 14th Amendment rights, they don't have to be certain that there's a danger. If they find a likely danger — a risk — to 14th Amendment rights, they may move in and make sure that that risk does not come about. They can protect those rights without being absolutely 100 percent sure.

MRS. PILPEL: But there are two constitutional rights involved here. A woman is a person too. The Court found that women's constitutional rights were also involved and that since fetuses had not in Anglo-American law or constitutional theory ever been considered persons, the woman's rights must prevail; and I would like again to quote you something which I think is rather significant. The American Law Institute, which I'm sure you're familiar with, has defined a human being as a person who has been born and is alive. Now, the American Law Institute consists of judges, professors, practicing lawyers, and so forth, and what they were doing —

MR. BUCKLEY: But the American Law Institute is supposed to interpret the law —

MRS. PILPEL: That's exactly what they were —

MR. BUCKLEY: — and we're making a law.

MRS. PILPEL: That's exactly what —

MR. BUCKLEY: He's about to make a law.

MRS. PILPEL: But he is purporting to make a law which rests back on legal and constitutional theory, which it does not. He is purporting to make a law which redefines a constitutional provision.

MR. BUCKLEY: Look, there —

MRS. PILPEL: And under our separation of powers theory, you cannot have Congress defining the Constitution, as Professor Bork said. Only the Court can define constitutional rights.

MR. GALEBACH: There are several points in there to answer. One of them is that it's certainly not a violation of the doctrine of separation of powers for Congress to look at a question the Supreme Court said it was unable to answer. That's cooperation of powers.

MRS. PILPEL: Excuse me just a moment. The Supreme Court did not say only it was unable to answer. The Supreme Court said that government could not answer that question in a diverse, pluralist society where there was no answer. Therefore, the Supreme Court said neither it nor Congress could answer that question.

MR. BUCKLEY: Where did it say that?

MRS. PILPEL: Throughout the opinion it is clear.

MR. BUCKLEY: (To Mr. Galebach) Do you agree?

MR. GALEBACH: I'd like to — That's not what the Supreme Court said. What they did say is that the state of Texas could not adopt one theory of life and override the rights of the mother, but what we're talking about in the Human Life Bill is the enforcement of the 14th Amendment. It's Congress, along with the Supreme Court, which is expressly given power to enforce the 14th Amendment. No one claims the state of Texas or any other state can enforce the 14th Amendment. Of course they can't. The Supreme Court has never said that Congress can't look at this question; the Supreme Court never said that no branch of government can look at it. That would really be a remarkable holding. The Supreme Court does not say that a fundamental question of public policy cannot be examined by any branch of the federal government. I can't think of the Court ever doing that, and I don't think they're going to do it here.

MRS. PILPEL: The Court has repeatedly stated that it cannot adopt one theory of either ethics or morality that is held by one group in the community and impose it on others. Time prohibits my giving —

MR. BORK: They just did in that case.

MRS. PILPEL: Pardon?

MR. BORK: They just did precisely that in *Roe* v. *Wade.*

MRS. PILPEL: That is not, I think, what they did. I think what they did was they were saying that those people who believe that human life begins at conception are free to follow their beliefs and act accordingly, and those who believe that human life begins at birth are also free; ditto those who believe it begins at viability. They did not take the opinion of one group in society and impose it on the rest of the groups in society. Mr. Galebach consistently ignores the fact that women also have rights and it is not simply a question of looking at whether unborn life is a person; it is also a question of balancing the rights of the woman against the rights of the fetus, which is what the Supreme Court attempted to do without accepting any theory one way or the other.

MR. GALEBACH: All right, that's true. I'd like to respond to that if I may.

MR. BORK: I wish you wouldn't agree that that's true.

MR. GALEBACH: Well, what I would like to agree that is true is that the Supreme Court did balance rights of a mother against rights of a fetus. The point is they performed that balance without knowing if the fetus was a human being. The point of the Human Life Bill is, if the unborn child is a human being, then the Supreme Court needs to go back and take a new look and balance those rights again, because it's probably going to come — and certainly should come — to a different answer.

MR. BUCKLEY: Does that sufficiently amend your objection to his previous answer?

MR. BORK: I'm not sure how it amends it. I don't think we're getting anywhere by arguing about what *Roe* v. *Wade* means in this context because we simply don't know what it means in this context.

MRS. PILPEL: I feel I know what it means in this context.

MR. BORK: Well, the Supreme Court is quite capable of — and legitimately — of accepting a bill like this — or accepting its major thrust — as persuasion. I don't think we ought to be talking about *Roe* v. *Wade.* I think we ought to be talking about what this bill would do if accepted in its full thrust as the power of Congress to our constitutional arrangements.

MRS. PILPEL: I agree with you about that. I mean, I agree with you that it is a very dangerous bill from the point of view of separation of powers as indeed, Mr. Galebach, you seem to think, because your bill in your article is described as on the way to a constitutional amendment. You apparently acknowledge that the route of a constitutional amendment to accomplish what you would like this bill to accomplish is long and difficult, so you are suggesting that Congress, by a simple majority vote, go ahead and enact the Human Life Act or whatever you call it, and I guess you figure that by

the time that constitutional amendment is adopted, you'll simply substitute that. But you cannot pass a constitutional amendment by a simple majority vote.

MR. BUCKLEY: I don't see why all this heavy motivation of what Mr. Galebach is up to is relevant to his analysis as stated and developed on this program.

MRS. PILPEL: Because his analysis —

MR. BUCKLEY: If he says, after *Dred Scott*, "Look, I'm going to introduce a whole series of decisions, hoping that ultimately the Supreme Court will acknowledge that people are human beings even if their face is black," that may be his motive, but each step has to be examined on its own merits.

MRS. PILPEL: I am examining it on its own merits. He says this is an interim step.

MR. BUCKLEY: No, he is saying that the existing bill would confront the Supreme Court with certain alternatives, and indeed it would, would it not? Now, those alternatives would be either to renounce a judicial imposture, using Professor Bork's implicit description of it, in such cases as *Klutznick* and *Katzenbach* and so on, or to go ahead and bend to the Congress on the matter of the right to define the actual situation. Is that correct?

MR. GALEBACH: Those will be the options, and when the Supreme Court decides between those options it will have to look, No. 1, at the question of whether unborn children are human beings; No. 2, at the question of whether all human lives are of equal value and should equally be protected under the law. The Court has not addressed either of these two questions. We don't know how they will decide on either of them. That's why, as Professor Bork implied, we don't know whether the Court will be persuaded by the Human Life Bill. The only way to find out is for Congress to pass it and for the Supreme Court to review it, but Congress —

MRS. PILPEL: I assume you would be in favor of suspending the action of the bill until the Supreme Court has a chance to pass upon it because the bill is inconsistent with the Supreme Court decision and I would think that since you recognize it simply as an interim step on the way to an amendment, you would be willing to suspend its operation until the Supreme Court had an opportunity to review what you call a factual question, which it isn't.

MR. BUCKLEY: The Supreme Court bowed to Congress when Congress moved on the matter of literacy tests. You've got a situation with: Are literacy tests constitutional? The Supreme Court says, "Yes, they are." The Congress says, "No, they aren't, because we are going to indulge certain presumptions." It goes back to the Court, and the Court says, "Well, if that's the way Congress wants to do it, Congress has that right under the 14th Amendment."

MRS. PILPEL: I think that —

MR. BUCKLEY: This is what he's doing. This is the exact correspondent to that.

MRS. PILPEL: He is not, because those cases — the cases you and Professor Bork have referred to — held that the Supreme Court could enlarge rights under the 14th Amendment. This particular proposal attempts to extend to a new group of people rights and takes rights away — constricts rights — of a group that already has them; therefore, *Fullilove* v. *Klutznick*, *Katzenbach* — those cases — are not applicable, as most constitutional authorities would agree.

MR. GALEBACH: It's not as easy as — I'll defer to Professor Bork for that answer.

MR. BORK: You simply can't get away with a remark that when you enlarge one group's rights you don't also automatically diminish another group's rights. In all these cases that occurs. When you say you may not control this behavior, you're telling other people they must be subjected to that behavior.

MRS. PILPEL: Yes, but you have not extended rights at the expense of an existent group of people who have rights to a group that has had no rights up until this time.

MR. GALEBACH: The Supreme Court has said that Congress can expand 14th Amendment rights but may not contract them.

MRS. PILPEL: Correct.

MR. GALEBACH: Here we have a question that is not resolved simply by that statement because in the Human Life Bill Congress is enlarging the rights of unborn children. It's true that when states pass anti-abortion laws, that will cut back on the rights of pregnant women who want to have an abortion, but the Supreme Court has never said what will happen when the expansion of one set of rights results indirectly in the contraction of another set of rights. We don't know what the Court will hold on this. Congress may presume the Court will uphold the bill.

MRS. PILPEL: It seems to me quite clear that what you're saying is that your bill is of questionable validity, which indeed it is.

MR. BUCKLEY: It is of course of questionable validity if you accept the context that Professor Bork invokes. It's of questionable validity if Congress shouldn't have exercised those rights in the first instance, right?

MR. BORK: Yes, the —

MRS. PILPEL: It is of questionable validity for a further reason, which is that it permits — as the bill is written — of no exceptions and says nothing, as other bills which have been introduced in this session of Congress have. There is a bill introduced by another professor or student or both, namely Witherspoon, which contains specific exceptions and is more specific in

terms of its coverage than Mr. Galebach's bill.

MR. GALEBACH: The bill doesn't try to define exceptions. It sets the basic premise that unborn children are human beings and human persons; it then lets the states create the exact anti-abortion laws that they prefer to have. Now, certainly the states could allow an exception —

MRS. PILPEL: Or the exact abortion laws? What about letting the states enact the abortion laws — the pro-choice laws they want to have? Can they do that under your bill?

MR. GALEBACH: The point is they can allow exceptions that are reasonable, subject to Supreme Court review. Certainly they could have an exception where the life of the mother is at stake.

MR. BUCKLEY: We have 30 seconds.

MR. GALEBACH: Okay. As to other exceptions, it's not clear. That will be determined by the Supreme Court and review of the state statutes.

MR. BUCKLEY: Thank you very much, Mrs. Pilpel; thank you very much, Mr. Stephen Galebach; and thank you very much, Professor Bork; ladies and gentlemen.

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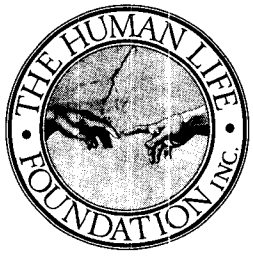
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