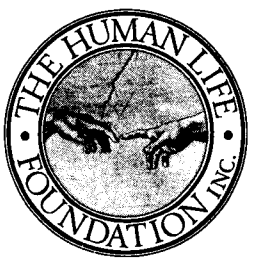
the HUMAN LIFE REVIEW



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Published by:

The Human Life Foundation, Inc.
New York, N.Y.

Vol. VIII, No. 2 $3.00 a copy

. . . FROM THE PUBLISHER

It has become customary now for us to publish an "unusual" issue in the spring, and this, our 30th issue, continues the tradition. For the first time, we reproduce (entirely from the original) the full text of Sen. John P. East's subcommittee report to the Committee on the Judiciary on the Human Life Bill. We've done this in order to preserve the *visual* flavor that these reports carry. Also, since these reports are not usually seen by the public, it gives you the opportunity to see it in the form in which it is actually presented (and shows that the "system" *can* turn out something that is not turgid and unreadable). We hope you agree, for we have devoted a very considerable amount of this issue to the reprint (because of space limitations it was impossible for us to include the "Additional and Minority Views").

Our lead article, by the Honorable Henry J. Hyde, will also appear (with some additional material, mainly from the East Committee Report itself) in the New York Law School *Law Review* (Vol. XXVII, No. 3). Miss Wilson's article, "An Unbeliever's Pilgrimage," is reprinted with permission from *The American Spectator*, P. O. Box 1969, Bloomington, IN, 47402. The article "Social Insecurity" by Germain Grisez and Joseph M. Boyle, Jr., is an excerpt from their book *Life and Death with Liberty and Justice: A Contribution to the Euthanasia Debate* (published in 1979 by the University of Notre Dame Press, Notre Dame, IN, 46566; now available in soft-cover as well) and is reprinted here with permission.

All previous issues (and bound volumes of the years 1975-81) remain available; see inside back cover for details. We also have available Ellen Wilson's *An Even Dozen* (the first venture of the Human Life Press), at $10 per copy. *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
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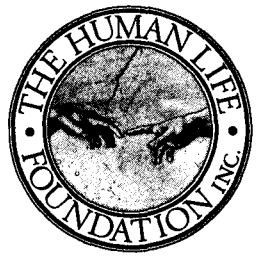

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INTRODUCTION

THE READER will note that we describe the author of our lead article, The Honorable Henry J. Hyde, simply as representing Illinois in the U.S. House of Representatives. That he does (so, once, did Abraham Lincoln). He also does a great deal more than that: our problem was, we could find no way to convey a fair description of the remarkable Mr. Hyde in a few biographical lines. We suppose that most of those who know him "in person" would agree that the only way to accurately describe him *is* to meet him. Above all else, Hyde is a presence; a graceful big man with a big, booming laugh, the latter a constant reminder that good humor is his defining characteristic (and the dismay of his opponents). Once, Mr. Hyde's gift could have been labelled *charisma*, but that word has become much-debased (some pretty dull people are accused of possessing it nowadays). Perhaps Hyde is best portrayed by the kind of lyric that used to appear in (appropriately) Big Band Era songs: "Whatever he's got, he's *got* it."

What he got in the Congress, early in his career (which began in 1975), was the undisputed leadership of the anti-abortionists in the House. His original Hyde Amendment, which began the long struggle to stop federal funding of abortion, made him an eponymous symbol of the New Abolitionists who believe that legalized abortion is comparable to slavery in being a practice indigestible by any civilized society (another Lincolnesque parallel).

Mr. Hyde can also write, as the reader will see for himself. If we can pay him just one more compliment, he writes as well as he speaks, and of course he speaks passionately on the abortion issue. And, we'd say, generously too, as here:

> Anyone who has been involved in this controversy knows only too well that no subject generates emotional reaction more than abortion. Each side views the other as monstrously inhuman and uncaring — and thus demon-

strates that each side *does* care, only from a different perspective and with a different set of values.

Ironically, support for protecting endangered species (the famous snail darter, for example) is a constant theme in Congress. "Save the Whale" organizations and legislation seeking to outlaw the trapping of wild animals have their effective spokesmen. Some Congressmen have even shared an ice flow with baby harp seals to dramatize their plight. But, strangely, many of those active in the cause of humane treatment for animals cannot bring themselves to much concern for the plight of the endangered unborn.

Hyde's purpose is of course to urge passage of the Human Life Bill which he has co-sponsored (along with Senator Jesse Helms) in the Congress. As we write, the fate of that measure remains undecided; it may well have been voted up or down by the time you read this. But no single action (nor piece of legislation) will end the debate on the fundamental moral questions Hyde raises here. Thus we are happy to add his eloquent testimony to the record of that continuing debate, which this journal has chronicled now through one-score and ten issues.

Next, another redoubtable polemicist, Mr. Joseph Sobran, adds his own perspective on the Human Life Bill (HLB), with particular emphasis on what it has done to its *opponents*. For instance, one Soma Golden, an editorial board member of the New York *Times*: in the midst of Senator John P. East's memorable HLB hearings, Ms. Golden wrote (in the *Times* of May 18, 1981) that "It is not the facts of life that divide the country; it is the value of life . . ." Just so, agrees Mr. Sobran; but it wasn't so *before* the HLB hearings, which were held for the precise purpose of deciding when human life begins. Previously, the pro-abortion side had argued that there was really *nothing* "there," just a blob of tissue, the mere "products of conception" (aren't we all?). Now, Ms. Golden would shift the argument, retreating "stubbornly" to another defense line, as Sobran describes it: "If the anti-abortion side had won the factual debate, she was quite prepared to admit *en passant* what the pro-abortion side had denied so vehemently for so long, and to adopt the strategy of doubting whether human life itself has any intrinsic value."

As usual, Sobran provides fascinating notes and asides, e.g., he quotes Ms. Golden: "'Neither the bill nor the [East] committee gives any sign that the members recognize this subject as one great thinkers have pondered over the millennia.' She was apparently unaware that Senator East himself, before entering politics, had made his reputation as a student of great thinkers over the millennia. Wrong he may be; ignorant he is not."

Sobran concludes sadly that it "transpires that the abortion debate isn't really about facts at all. It turns out that we can agree that a human

fetus is a human being. But unhappily, we can't agree on what a human being *is*."

So much for the abortion issue — for the moment. We shift to another thorny one, euthanasia, reprinting another excerpt (we've published several others previously) from the book *Life and Death with Liberty and Justice*, by Professors Germain Grisez and Joseph M. Boyle. We wish we could say *well-known* book, because it ought to be that. But paradoxically, the abortion issue has served to obscure the steady advance of its companion euthanasia, now widely practiced, by all accounts, despite the fact that even those laws already "liberalized" rarely permit the "procedures" involved. As Grisez and Boyle point out, there are many other complications ("legitimate concerns that must be dealt with"), not least the good *motives* of many who seek to change laws designed to prevent deliberate killing, e.g., the realization that present-day medical capabilities make possible unreasonable — unnatural — prolongation of lives that would otherwise end *via* what used to be called "natural" causes. But medical powers do not differ from power itself: it can be used, or *not* used, by those who wield it, and therein lies a clear and present danger. How much danger? Well, as we say, the whole issue is clouded, not only by disputed facts but also by ambiguous motivations. But we noted a revealing little item in the publication *American Medical News* (February 1982) which reported that "More than 95% of physicians think that discounting life-support systems is morally and ethically correct in some instances. . ." We bet that far fewer than 95% of *patients* know that their doctors think that.

Then we bring you another article on another murky controversy: the "test" known as Amniocentesis, which is designed to "discover" abnormalities in the pre-born child. To some, the "ability" (there is considerable dispute about the accuracy and safety of the test itself) to find defects "in time" is a great medical advance. To others, the thing is a kind of "search and destroy" mission: the only "remedy" for defects discovered seems to be abortion. What it all comes down to, says Mrs. Jacqueline Nolan-Haley, is the basic conflict between the ancient *value* of life ethic and the new *quality* of life one that (as in the whole abortion question) seeks to displace it. In one sense, this is yet one more article on the Great Question of Abortion; but it is also an expert view (the author is a distinguished lawyer) of effects and consequences about which most laymen know little, and have pondered not at all. In short, you should learn a lot you (certainly we) didn't know.

At which point we think you'll be ready for our now-regular feature:

something quite different. As our readers know, Ellen Wilson has been contributing essays to this journal for several years now, always on some aspect of the "life" issues that most concern us. Here, she provides a change of pace for you (and, as a matter of fact, herself as well). We reprint her recent review of a widely-acclaimed book by a well-known author. In fact, neither the book nor her review of it strays from our overall interests (but then what *doesn't* concern human life?). And Ellen has already written a great deal about belief and believers, as she does again here, with her accustomed style and grace.

Is there a phrase more trite than "last but not least"? Well, it's *our* treat to use it, for once at least, with perfect accuracy. We conclude with something from the famous "knockabout journalist" (his own description) Malcolm Muggeridge (who provided the lead article in our last issue, showing again,that the first shall become the last, etc.). Read it carefully. Then read Appendix A, which follows it. We say carefully because we think that you too will find it incredible that the article could have produced a *contempt* charge against the editor who ran it. But Mr. Muggeridge explains it all himself, in his inimitable style. (How he must have enjoyed writing the final paragraph!)

Thus we begin and end this issue with serious men of humor. Plus one additional document — to which Mr. Hyde refers you in his article — that we trust you will read as thoroughly as we did, despite the fact that it is a congressional report. Such documents are rarely noted for literary qualities; certainly *we* have waded through scores of them without stopping to praise the prose. But this one is beautifully written (too bad that the author or authors must remain anonymous). It reports the conclusions reached by Senator East's subcommittee on the Human Life Bill which, in fact, began its journalistic life in this review with the memorable article by Stephen Galebach, Esq. ("A Human Life Statute," Winter 1981). We think you will find the report a superb complement to Galebach's initiative; surely it deserves a place among the tablets this journal exists to preserve.

J. P. McFADDEN
Editor

The Human Life Bill: Some Issues and Answers

Henry J. Hyde

Section 1. (a) The Congress finds that the life of each human being begins at conception.

(b) The Congress further finds that the fourteenth amendment to the Constitution of the United States protects all human beings.

Section 2. Upon the basis of these findings, and in the exercise of the powers of Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States, the Congress hereby recognizes that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, each human life exists from conception, without regard to race, sex, age, health, defect, or condition of dependency, and for this purpose 'person' includes all human beings.

Section 3. Congress further recognizes that each State has a compelling interest, independent of the status of unborn children under the fourteenth amendment, in protecting the lives of those within the State's jurisdiction whom the State rationally regards as human beings.

THOSE THREE SECTIONS of the pending Human Life Bill[1] present some of the most fascinating legal and biological questions ever to face the Congress or the Courts.

Of course there are other controversial issues in this legislation, such as a proposed limitation of lower federal court jurisdiction, but the questions of when a human being's life begins, when personhood attaches and the constitutional power of Congress to make such determinations are of more interest to me and are presently engaging some of the finest medical and legal minds in the country.

Before addressing the question of when a human life begins, it is prudent to inquire whether an answer is possible, and if so, whether it makes any difference.

A certain amount of courage (or stubbornness — they are often

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the same) is required to press this inquiry in the face of the explicit contempt of such as A. Bartlett Giamatti, President of Yale, who advised his freshman class to avoid Moral Majority types as ". . . those who presume to know what God alone knows, which is when human life begins."

I am convinced that biology can tell us when an individual's human life begins. Wasn't the significance of the birth of Louise Brown that her conception was in a test tube?

It is instructive to study the semantic tactics of some academicians and biologists who support the abortion ethic. They choose to pose the relevant question as "when does human life begin?" and then to answer that there is no answer — we are dealing with an unsolvable mystery. But pose the question "when does an individual's life begin?" and answers are possible.

One need not be an historian to draw interesting parallels between the 17th Century astronomer Galileo and his struggle at the hands of "misguided ecclesiastics" unable to reconcile their theology with his notion of a unified cosmos. Today we see these roles exactly reversed, with many churchmen (among others) insisting that an individual's life begins at conception (and hence ought to be legally protectable) and some scientists and certain university presidents denying that such scientific information is even discoverable.

As for the need for such inquiry, it seems only sensible that Congress — which so often legislates on matters of life and death — seek to inform itself on when an individual's life commences. Legal consequences and constitutional rights come into play once we commence dealing with a human life. The time frame for attaching these consequences and rights cannot be a matter of indifference to responsible legislators.

The whole controversy became national in scope when the Supreme Court, in *Roe* v. *Wade* (410 U.S. 113, 1973), with Justice Blackmun speaking for the majority, asserted:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

As I read this statement, the Court is making at least three important points:

1. There is no consensus as to when life begins;

2. We (the Court) are therefore incompetent to make a declaration on this "difficult" question;

3. In any event, we don't need to do so to decide that the unborn is a non-person.

It is not disrespectful to note that Dred Scott stands for the proposition (among others, of course) that the Supreme Court is not infallible. Its self-confessed inability to determine when a human's life begins does not foreclose Congress from exploring the question.

Congress is uniquely structured to hold hearings and evaluate conflicting testimony as a basis for determining public policy. The business of Congress is legislation, and the business of the Courts *ought* to be adjudication.

It is crucial that we differentiate between several important interrelated but somewhat different terms — "actual human life," "biological human life" and "personhood."

One leading doctor, opposed to this legislation (Dr. Leon Rosenberg of Yale University Medical School) told the Senators during the hearing that he knows of "no scientific evidence which bears on the question of when actual human life exists." This assertion was roundly criticized in a letter to the magazine *Science* (July 31, 1981) from Dr. C. B. Goodhart of Gonville and Caius College, Cambridge, England, who replied in part:

> But, leaving aside the question of what the word *actual* means with its theological overtones, Rosenberg would surely agree that the new *biological* human life begins with the activation of the egg at fertilization. The fertilized egg is certainly human, since it belongs to no other species than *Homo sapiens*; it is certainly alive, since it can die (as good a definition of life as most!); and it certainly constitutes a uniquely separate human organism, no longer forming any part of its mother's body and already genetically as distinct from both of its parents as it will ever be, right from the start. It is no less a separate organism because at this stage it may not represent one single individual, being still capable of developing into monozygotic twins; if there are problems here, they are theological rather than biological ones, however.
>
> Presumably, what Rosenberg means is that there is no scientific evidence bearing on the question of the existence of the human *person*, as distinct

> from biological life. Since only a human can have the status of a person, this is not a problem which arises with the development of other animal species. The biological life of a chimpanzee, for instance, starts with the fertilization of the egg, as it does with a human, and it then regularly develops to maturity and death. It is only with humans that there is this further problem as to whether and when the developing organism begins to exist as a person.

Clearly, it is the law's task (rather than biology's) to determine what value society will place on this biological human life, once it has begun. If we are to postpone "personhood" until some arbitrary time after biological life has begun, we must accept the anomoly of a class of humans — alive — but not to be recognized as possessing the human rights inherent in every person. There are plenty of historical precedents for this (the institution of slavery, as an obvious example) but no confirmed utilitarian can doubt that involuntary euthanasia of handicapped infants, the aged and unwanted, and the abortion of the innocently inconvenient preborn are facilitated by simply classifying these defective or unwanted humans as non-persons.

The Fourteenth Amendment provides: "Nor shall any State deprive any person of life, liberty or property without due process of law." Could express words and intention be clearer in setting out a separate constitutional right to life?

Contrast this explicit constitutional guarantee of a right to life with the fuzzy foundation of the right to abortion which the Court said rested in a right to privacy it took them 105 years to discover.

How can this right to life be secured or enforced if life cannot be defined? The Court pronounced itself incapable of providing a definition and thereby signed a death warrant for over one and a half million unborn children annually. In the face of this inaction by the Court, in response to this massive epidemic of destruction, Congress has the responsibility to provide a definition securing the right to life guaranteed by the Fourteenth Amendment to every human, even if it is just a tiny island of humanity known as the fetus.

If it is accepted that human rights have a hierarchy, then the right to life must be primal. It provides the foundation for the structure of all other human rights, including the newly discovered constitutional right of privacy.

Now science not only has an answer, but it has *the* answer to the question of life's beginnings. This answer is based on fact, not opinion, on reason and observation rather than emotion and speculation. Science is not tainted by religious or philosophical bias, nor should it be colored by pro-abortion or anti-abortion prejudice.

So let us advance our inquiry one logical step at a time, remembering we are not asking a generic question about human life but rather about when *an individual's* human life has its beginning.

It is worth noting that of all the 22 expert witnesses who testified before the Senate Subcommittee on the Separation of Powers (chaired by Senator John East, of North Carolina) on the medical and biological questions, none ever claimed that unborn children are not alive nor that they belonged to any other species than human, or even that they were a part of the mother rather than a distinct individual human being.

Some, however, refused to acknowledge that "human being" means any individual which is genetically human. Rather they chose to define "humanness" with reference to various qualities of life that they deemed essential. But these were essentially philosophical or moral preferences having nothing to do with answering the medical-biological question "when does a human life begin?"

A fair summary of the voluminous testimony would conclude that the life of each human being (or any other individual belonging to a species that reproduces sexually) begins at conception. The male sperm cell and female egg cell, prior to conception, are only parts of the parents-to-be. When the sperm cell and egg cell unite in conception (a process also called fertilization) a new distinct individual being is created, of the same species as the parents.

Medical and biological literature universally agree on the origin of each human life. The report of Senator East's subcommittee has set out a representative sampling of this literature[2].

Other testimony offered before the Subcommittee confirms that the life of each human being begins at conception. Though it was argued that human life is a continuum with no identifiable beginning, the words of Jerome Lejeune, M.D. (Professor of Fundamental Genetics, University of Rene Descartes, Paris, France) show that such arguments are not to the point of the Human Life

Bill. "Life has a very, very long history, but each individual has a very neat beginning — the moment of its conception." Dr. Watson Bowes, Professor of Obstetrics and Gynecology at the University of Colorado School of Medicine testified that, "If we are talking, then, about the biological beginning of a human life or lives, as distinct from other human lives, the answer is most assuredly that it is at the time of conception — that is to say, the time at which a human ovum is fertilized by a human sperm." Dr. Bowes ended his prepared remarks by saying, "In conclusion, the beginning of a human life from a biological point of view is at the time of conception. This straightforward biological fact should not be distorted to serve sociological, political, or economic goals."[3]

When Is a Human Being a Person?

Acknowledging that biological life commences at fertilization of the female egg by the male sperm, the crucial question yet remains, "What value shall we assign to this new genetic package, this new entity that is both alive and of the human species?"

Obviously we now go beyond a purely scientific inquiry and are in the realm of philosophy.

When one asks "What is a person?" the answer supplied by Robert E. Joyce, Ph.D., Chairman of the Philosophy Department of St. John's University in Minnesota, is helpful. He has written that:

> A person is essentially a being that is naturally gifted (not self-gifted) with capacities or potentialities to know, love, desire, and relate to self and others in a self-reflective way. The person is — not by self but by nature — *able* to be aware of who he or she is and *able* to direct his or her own self in *accord with* this nature. A tree acts in accord with its nature, but does not direct itself that way — it is not consciously a tree. A dog or a dolphin acts in accord with its nature, but does not and cannot direct itself *as a self* in accord with its nature. A person can. The person's dignity and freedom are, at least partly, based on his or her capacity for *freely* acting in accordance with nature, rather than merely existing. Our freedom as persons resides not so much in our ability to do as we please, but in our ability to act freely and deliberately as we were gifted.[4]

In his book, *Abortion, Law, Choice, and Morality*, Daniel Callahan has said:

> Abortion is not the destruction of a human person — for at no stage of its development does the conceptus fulfill the definition of a person, which

> implies a developed capacity for reasoning, willing, desiring, and relating to others — but is the destruction of an important and valuable form of human life.[5]

This view harmonizes with that of the majority in *Roe* v. *Wade*. But in response to this, Professor Joyce asserts:

> I would suggest that a person is not an individual with a *developed* capacity for reasoning, willing, desiring, and relating to others. A person is an individual with a *natural* capacity for these activities and relationships, whether this natural capacity is ever developed or not — i.e., whether he or she ever attains the functional capacity or not. Individuals of a rational, volitional, self-conscious *nature* may never attain or may lose the functional capacity for fulfilling this nature to any appreciable extent. But this inability to fulfill their nature does not negate or destroy the nature itself, even though it may, for us, render that nature more difficult to appreciate and love. That difficulty would seem to be a challenge for us as persons more than it is for them.
>
> Neither a human embryo nor a rabbitt embryo has the functional capacity to think, will, desire, read, and write. The radical difference, from the very beginning of development, is that the human embryo actually has the natural capacity to act in these ways, whereas the rabbitt embryo does not and never will. For all its concern about potentialities, the developmentalist approach fails to see the actuality upon which these potentialities are based. Every potential is itself an actuality. A person's potential to walk across the street is an actuality that the tree beside him does not have. A woman's potential to give birth to a baby is an actuality that a man does not have. The potential of a human *conceptus* to think and talk is an actuality. Even the potential to actuation (called 'passive potency' by traditional philosophers) is itself an actuality that is not had by something lacking it.

These concepts argue that personhood is an endowment, not an achievement, and assert in Joyce's phrase that "Nature does not revolve around function. Function revolves around nature. Functions can come and go, but nature is dynamically stable."

Often pre-born children are referred to as possessing "potential human life." But a little reflection reveals this is grossly inaccurate. At any moment of its existence a whole living entity — whether a goldfish or a fetus — is either alive or it is not. If it is alive, it is what its *nature* is, even though it is incomplete in its functional development. This idea is sometimes expressed by stating that a pregnant woman always gives birth to a human being — not a puppy or a rabbit.

Thus there really is no such thing as a potentially living organ-

ism. It either is alive or it is not. It possesses great potentiality but is not itself potential life. Therefore the single-celled person at conception is fully possessed of its personhood. It is thus endowed, but will use its inherent potential to achieve. It is no less a person because its functions are as yet undeveloped and thus cannot fully express its personality.

(This fact rejects the rationale for the pro-abortion term "pro-choice." Presumably the choice is whether or not the pregnant woman is to have a baby. But she already *has* a baby implanted in her womb, needing only time and nourishment to be born. The "choice," then, is whether to carry the baby to term — let it live and be born — or to kill it through abortion. Every pregnancy terminates. Abortion seeks to *ex*terminate a pregnancy.)

At its roots we have a conflict of immense proportions between the Quality of Life ethic and the Sanctity of Life ethic. If Darwinism is to govern the human aspects of our society, then indeed the handicapped, retarded, insane, sickly, terminally ill, incorrigably poor and the unwanted everywhere can be too much of a financial and emotional drain on those favored elite not so disadvantaged and who arrogate to themselves the crucial decisions as to who shall live and which of us fail to measure up — amd thus should die. The implications of the Quality of Life ethic can be rather chilling depending on which group you belong to. I've often thought that the Quality of Life must have been pretty poor at Valley Forge where nearly 3000 men froze or starved to death. But to their everlasting glory, there was something more important to suffer and struggle for — and we should be grateful they shared this commitment.

It is not merely convenient — it is necessary — that combat soldiers dehumanize the enemy. This is the same necessary tactic employed by those advocating abortion in their war against the unborn — dehumanizing them.

That humanity (or humanness) is an objective fact rather than a subjective determination has important implications. If the latter were true, any human being that the State found undesirable could be re-defined as a non-person and hence disposable. Defenders of slavery justified their position in this manner.

The Philadelphia *Inquirer* in its magazine section of Sunday,

August 2, 1981, published a feature story on "The Dreaded Complication." The complication so dreaded by abortionists is that the "products of conception" they seek to terminate will be born alive. The article describes a live 2½ pound baby boy who survived the abortion whereupon ". . . a nurse took the squirming infant to a closet where dirty linens were stored . . . it was nothing new."

Much needs to be written about the struggle between the two competing ethics, the Quality of life versus the Sanctity of Life. Suffice it for the purposes of this article to say that this country's tradition and history reflect a deeply ingrained respect for the Sanctity of Life. The Declaration of Independence affirms this belief in the majestic words:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.

That some persons are unwanted or unloved does not exclude them from the family of humanity but, on the contrary, society must take special care of those who are least loved — if we maintain we are a caring and humane society.

As George Will has pointed out, we measure a society's ascent from barbarism by how it takes care of people. The unloved and unwanted are still human beings unless the State reserves the right of redefining them as sub-human. One of the clearest and most dispassionate outlines of the struggle is contained in a September 1970 editorial appearing in *California Medicine* — over two years before *Roe* v. *Wade* was decided:

> In defiance of the long-held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right, and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws and public policy rather than the reverse.
>
> Since the old ethic has not yet been fully displaced, it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorent. 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 auspice.

A final and troublesome question remains: Does Congress have

the power to legislate in contradiction of a Supreme Court interpretation of the Constitution? In other words, is the Supreme Court really Supreme?

Professor Joseph P. Witherspoon, Maxey Professor of Law, University of Texas School of Law, has done the most exhaustive research I have seen on the problem. According to him, prior to adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, various political leaders in America held that the Supreme Court could not bind the co-equal branches of the federal government so as to divest them of the power to perform their specific functions as delegated to them by the Constitution.

Thomas Jefferson, for example, stated his views as follows:

> To consider the judges as the ultimate arbiters of all constitutional questions — [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is, 'boni judicis est ampliare jurisdictionem,' and their power [is] the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments coequal and cosovereign within themselves.[6]
>
> My construction of the Constitution is . . . that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action, and especially where it is to act ultimately and without appeal.
>
> [Otherwise] [t]he Constitution . . . is a mere thing of wax, in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any Government is independent, is absolute also; in theory only at first, while the spirit of the people is up, but in practice as fast as that relaxes. Independence can be trusted nowhere but with the people in mass.[7]

Similarly, President Andrew Jackson, in the message setting forth his veto of the Bank Bill on July 10, 1832, observed that

> It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by the precedent and by the decision of the Supreme Court. To this conclusion I cannot assent . . .
>
> If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of the Government. The Congress, the Executive, and the Court must each for itself be guided

> by its own opinion of the Constitution . . . It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.[8]

The views of Thomas Jefferson and Andrew Jackson, as well as the similar views of James Madison,[9] were very influential with the framers of the Thirteenth, Fourteenth and Fifteenth Amendments and with the States that ratified these amendments.

In his debates with Senator Stephen A. Douglas, Abraham Lincoln had stated the nature and basis of the authority of the Congress to legislate in contradiction of a Supreme Court decision which it believed to be erroneous:

> We oppose the Dred Scott decision in a certain way . . . as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. We do not propose to be bound by it as a political rule in that way, because we think it lays the foundation for spreading the evil (of slavery) into the States themselves. We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon that subject.[10]

In his first inaugural address Lincoln stated one of the underlying reasons for the Republican Party position that Congress could by legislation give effect to an interpretation of the Constitution contrary to that of the Supreme Court:

> Nor do I deny that such decisions [of the Supreme Court on constitutional questions] must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government . . . At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[11]

Legal scholars dispute whether the Supreme Court's finding that

the pre-born is a non-person (*Roe* v. *Wade*) can be challenged by an Act of Congress. It is the position of many that once the Court has adjudicated this issue only the Court itself can reverse its finding.

But the Court, in *Roe* v. *Wade*, asserted its own incompetency to determine when human life begins, pointing out what they termed the absence of consensus on this issue. This factual vacuum would no longer be present should the Human Life Bill be adopted and signed into law. After hearings, the taking and evaluating of testimony, the findings of Congress — based on these hearings — should, according to established legal precedents, receive great deference by the Court. After all, Congress, a coordinate branch of government, will have filled the Court's proclaimed factual vacuum with its own findings and so a further Congressional determination that each pre-born human life is also a person within the meaning of the Fourteenth Amendment presents the Court with a fundamentally different question of Constitutional law than in *Roe* v. *Wade*.

Once the factual issue of whether the pre-born are human beings is determined in their favor, the Congress, based on this finding can properly declare each human life as endowed with personhood and hence protectable under the Constitution.

The legal environment, the legal landscape, will be different for the Court this time around. Instead of a vacuum there will be Congressionally legislated findings upon which to posit personhood and protection for the pre-born.

Of course the Supreme Court has the responsibility for interpreting the Constitution as it applies to specific cases. But where the Court confesses its inability to resolve questions that buttress such important and specific Constitutional rights — questions literally of life and death — is Congress powerless to do what it is uniquely structured to do, hold hearings, make findings and determine public policy?

As the East report states the issue, "The purpose of this legislation is not to impair the Supreme Court's power to review the Constitutionality of legislation, but to exercise the authority of Congress to disagree with the result of an earlier Supreme Court decision based on an investigation of facts and a decision concern-

ing values that the Supreme Court declined to address."

The Human Life Bill will be reviewed by the Supreme Court, and thus the Court *will* have the last word. But in the interim, important dialogue will ensue between Congress and the Court and the void that supports *Roe* v. *Wade* will be supplanted by a legislative foundation that the Court will not and cannot be indifferent to.

The Fourteenth Amendment specifically forbids a State to deprive a person of life, and Section 5 of that Amendment expressly confers authority to Congress for the purpose of enforcing this guarantee through appropriate legislation. The Court is entitled to respect and deference in its adjudications and interpretations, but Congress likewise is entitled to respect and deference in its efforts to deal with questions of immense significance and fraught with profound public policy consequences.

To assert that Congress is necessarily impotent in the face of the Court's confessed impotence on the fundamental issue of when a human life begins is to concede a powerlessness on an issue of paramount importance that the Founding Fathers would be the first to reject, if not denounce.

The status of abortion, the existence and value to be accorded pre-natal life, are questions, in a democracy, that the elected representatives of the people must not be foreclosed from considering.

Anyone who has been involved in this controversy knows only too well that no subject generates emotional reaction more than abortion. Each side views the other as monstrously inhuman and uncaring — and thus demonstrates that each side *does* care, only from a different perspective and with a different set of values.

Ironically, support for protecting endangered species (the famous snail darter, for example) is a constant theme in Congress. "Save the Whale" organizations and legislation seeking to outlaw the trapping of wild animals have their effective spokesmen. Some Congressmen have even shared an ice floe with baby harp seals to dramatize their plight. But, strangely, many of those active in the cause of humane treatment for animals cannot bring themselves to much concern for the plight of the endangered unborn.

The heart of this issue, of course, is the humanity of the unborn. If you view the fetus as a blob of tissue, a sort of tumor, then

surely it is disposable. But if you value the fetus as a pre-born child and respect human life as the ultimate value, all other considerations become secondary. Of course one's religious views can have an impact on whether the pre-born ought to be protected or not. Should you accept the notion that we humans are permitted to share with God as co-creators in the perpetuation of the human race, then clearly the act of conception (which is creation) takes on a special value.

This is not to say that many persons whose lives embrace religious convictions do not support abortion, because indeed they do, including some clergy.

On the other hand, Bernard N. Nathanson, M.D., an admitted atheist, in his 1979 book *Aborting America*[12] relates his personal odyssey from being a prominent abortionist to becoming a pro-life advocate. He bases his present conviction that abortion is a moral wrong on the Golden Rule — the very basis for a civilized society. He is unable to answer the question as to why he changed so dramatically except to say, as a medical doctor, he opened his mind to "the data" on human life, and its beginnings.

The humanity of the unborn has been called the "13th floor of human society." Everyone really knows it's there, but it is often more convenient to pretend it's not.

I'm not sure I want to passively accept a society in which parents have been told they have no responsibility toward their unborn children, and in which children are told they have no responsibilities toward their parents. This doesn't fit my definition of the caring humane society we pretend to be.

The views expressed 41 years ago during World War II by Dr. Joseph D. Lee, a leader in modern obstetrical practice, which were printed in the 1940 edition of the *Yearbook of Obstetrics and Gynecology* are more relevant than ever:

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

human life and of the rights of the individual, even though unborn, is proof that humanity is not yet lost . . .

NOTES

1. The three sections are quoted from the text of the current Senate version (S. 1741), re-introduced by Sen. Helms on Oct. 15, 1981; they differ somewhat in language (but little in content) from the original versions introduced by Sen. Jesse Helms in the Senate (S. 158) and by Rep. Henry Hyde in the House (H.R. 900) on Jan. 19, 1981; there is also another House version (H. R. 3225) at this writing. — Ed.

2. The Committee Print of Sen. East's subcommittee hearings, held April 23-June 19, 1981, was reported to the full Senate Judiciary Committee in December, 1981; the text of the Committee print (*sans* dissenting opinions), including the quotations from medical texts, is reprinted as *Appendix A* in this issue. — Ed.

3. The Subcommittee heard much testimony in the same vein. Dr. Hymie Gordon, Professor of Medical Genetics and physician at the Mayo Clinic, testified that, "[t]he individuality of the unborn baby is established at the very first second of its conception." Later, Dr. Gordon elaborated:

> . . . I think we can now also say that the question of the beginning of life — when life begins — is no longer a question for theological or philosophical dispute. It is an established scientific fact. Theologians and philosophers may go on to debate the meaning of life or the purpose of life, but it is an established fact that all life, including human life, begins at the moment of conception.

Later, Dr. Gordon remarked:

> I have never ever seen in my own scientific reading, long before I became concerned with issues of life of this nature, that anyone has ever argued that life did not begin at the moment of conception and that it was a human conception if it resulted from the fertilization of the human egg by a human sperm. As far as I know, these have never been argued against.

Dr. Micheline Matthews-Roth, a principal research associate in the Department of Medicine at the Harvard Medical School, after reviewing the scientific literature on the question of when the life of a human being begins, concluded her statement with these words:

> So, in summary, it is incorrect to say that biological data cannot be decisive. In biology, as in any other branch of science, experiments repeated and confirmed by many different workers using many different species of organisms do, indeed, prove that a particular biological finding is true.
>
> And, so it is with the biological finding that an organism reproducing by sexual reproduction starts its life as one cell — the zygote — and throughout its existence belongs to the species of its parents. No experiments have disproved this finding.
>
> So, therefore, it is scientifically correct to say that an individual human life begins at conception, when egg and sperm both join to form the zygote, and that this developing human always is a member of our species in all stages of life.

4. Robert E. Joyce, "When Does a Person Begin?" from *New Perspectives on Abortion* (Aletheia Books, 1981).

5. Daniel Callahan, *Abortion, Law, Choice and Morality* (The MacMillan Co.: New York, 1970), pp. 497-498.

6. Letter to William C. Jarvis, September 20, 1820, *The Writings of Thomas Jefferson* (Ford ed. 1899), 160.

7. Letter to Judge Roane, September 6, 1819, as quoted by Rep. Philemon Bliss, *Cong. Globe*, 35 Cong., 2nd Sess (Feb. 7, 1859), App. 7.

8. *Messages and Papers of the Presidents II* (Richardson ed. 1896), 576, 581-83.

9. Elliot, *Debates of the Federal Constitution 4,* (1836), 549-50.

10. *The Collected Works of Abraham Lincoln I* (Basler ed. 1953), 494, 516.

11. Richardson, *Messages and Papers of the Presidents 5*, (1897), 9-10.

12. Nathanson, *Aborting America* (Doubleday & Co.: New York, 1979).

The Value-Free Society

Joseph Sobran

IF MOST PEOPLE NOWADAYS retain anything of their first philosophy course, it is likely to be the convenient distinction between "facts" and "values" that was fashionable during the heyday of logical positivism. According to this still popular doctrine, we cannot derive "ought" from "is." An impassible gulf separates them. On one side are provable, objective realities; on the other, merely subjective preferences. Or: on one side science, on the other religion, esthetics, ethics.

Miss Golden was ridiculing the Senate hearings on the Human Life Bill; she called it, on her own authority, "constitutionally questionable and intellectually vacant." But her words were actually a tacit confession that the hearings had succeeded in making the point — the factual point — they had set out to make.

Indeed Miss Golden was forced to fall back on the dogma of positivism that facts have nothing to do with values — a dogma which, as its critics have always pointed out, fails its own test. Is the statement "facts have no relation to values" a statement of fact? If so, how can it be proved? It is, in truth, a metaphysical statement, one which transcends physical evidence; and unfortunately for the positivist, it is not a logically necessary truth.

Not that Miss Golden was inhibited by such thoughts. She proceeded stubbornly. If the anti-abortion side had won the factual debate, she was quite prepared to admit *en passant* what the pro-abortion side had denied so vehemently for so long, and to adopt the strategy of doubting whether human life itself has any intrinsic value.

"Neither the bill nor the committee" of Senator John East, she wrote, "gives any sign that the members recognize this subject as one that great thinkers have pondered over the millennia." She was apparently unaware that Senator East himself, before entering

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politics, had made his reputation as a student of great thinkers over the millennia. Wrong he may be; ignorant he is not.

Assuming, however, her own intellectual superiority, Miss Golden went on: "Aristotle, for instance, couldn't decide the question. He cautiously approved of abortion, if done before 'sensation and life' had begun." He also approved of infanticide, even after sensation and life had begun, and of slavery. He knew little of fetal development, and his views on these subjects are made in the way of political prescription, from what he conceived to be the standpoint of the good of the *polis* — a mode of analysis of dubious relevance and even more dubious morality.

If Aristotle was uncertain, Miss Golden didn't appear so, and the facts of sensation and life appear not to cloud the issue for her. Few advocates of legal abortion have faced up to the sheer suffering it often inflicts; perhaps none have done so unless their opponents have forced them to. When the columnist George Will raised the issue (citing Professor John T. Noonan's article *Pain in the Unborn*, in the fall 1981 *Human Life Review*), one of his readers, with a sort of heated sneer, likened the pain of an aborted human fetus to that of a severed earthworm.

Tone is the immediate expression of values, and the tone characteristic of abortion advocates is that of the sneer. And for a natural reason: their position is reductionist, value-denying. It intentionally minimizes the worth of the incipient human life; and let us bear in mind that for a long while it minimized the facts themselves. It is a prejudice, in the fundamental sense that it springs from the will in advance of any knowledge; it is not a conclusion from the available evidence, nor a perplexity caused by inordinate communion with complexities or "great thinkers." The pro-abortion forces resisted and resented the Senate committee's very effort to gather and present evidence. They did not sit down before the truth as a little child; they preferred not to hear about little children.

When they ingeniously devise new arguments, we ought to recall some of their old ones; their cynical appeal to anti-Catholic sentiment, for instance. The reductionist style was afoot there too. What had Catholics to gain by stopping legal abortion? What *interest* did they have in doing so? None. The pro-abortion side,

however, did its best to imply that a simple *exercise* of Catholic power was somehow an attempt to *increase* that power.

A very different tone was sounded by *Newsweek* in its January 11, 1982 cover story "How Life Begins." Written by Sharon Begley, it began:

> If newborns could remember and speak, they would emerge from the womb carrying tales as wondrous as Homer's. They would describe the fury of conception and the sinuous choreography of nerve cells, billions of them dancing pas de deux to make connections that infuse mere matter with consciousness. They would recount how the amorphous glob of an arm bud grows into the fine structure of fingers agile enough to play a polonaise. They would tell of cells swarming out of the nascent spinal cord to colonize far reaches of the embryo, helping to form face, head and glands. The explosion of such complexity and order — a heart that beats, legs that run and a brain powerful enough to contemplate its own origins — seems like a miracle. It is as if a single dab of white paint turned into the multicolored splendor of the Sistine ceiling.

Miss Begley went on to speak of the abortion question as "scientifically unanswerable," and yet she implicitly answered it herself, in her accents of stunned wonder. The very facts of fetal development, far from inducing value-free detachment, inspired her to remarkable eloquence.

Her whole article, though merely descriptive, was suffused with the reverence of a mind free of self-interest and absorbed by the unfolding reality before it. Reading it one felt that rare and sublime sensation of beholding, of sharing the intellect's love of its object. "The five-week embryo, only one-third of an inch long, is a marvel of miniaturization: limb buds are sending out shoots whose dimples mark the nascent hands and feet, and the hindbrain has grown stalked eye cups."

Stalked eye cups! This is not a "pretty" description, but an enthralled one, and it takes a certain nerve to insist, in the face of such data, that description has no bearing on prescription, or that the thing described is no more than a "blob of protoplasm." And we allow such things to be killed. They are destined to be men and women; they are what we once were. Is not our indifference to them, our official denial of our kinship with them, a judgment on ourselves?

As if to balance the undeniable import of Miss Begley's article with a kind of moral disclaimer, *Newsweek* supplemented it with a

shorter piece titled "But Is It a Person?" "It is unquestionably alive," wrote Jerry Adler, "a unique entity . . ." But, he continued, "The question is one for philosophers, not scientists; . . . the problem is not determining when 'actual human life' begins, but when the value of that life begins to outweigh other considerations, such as the health, or even the happiness, of the mother. And on that question, science is silent."

From the heights to the depths. This was pretty near absurdity. Science, in the sense of physical analysis, is silent on *every* moral question, for the simple reason that science is not ethics. Science can't say whether a child ought to kill its mother, either — or, as Mr. Adler might put it, science can't say at what point the life of the mother ceases to outweigh the convenience of the child. (Should the question be left to the conscience of the individual child?) We might, following the method of Miss Golden, make a case for matricide by conjuring up Heraclitus, Plato, Hume, Nietzsche, Heidegger, and Sartre to intimate that great thinkers have never achieved a consensus about such weighty matters, so who are we to say?

The clear rhetorical *thrust* of such pseudo-agonizing is to minimize the value of the unborn. One thinks of the yokel in Swift, who, after listening to the elaborate philosophical arguments of the skeptic, comes right to the bottom line: "Why, if it be as you say, I can drink, and whore, and defy the parson!" The reductionist style can be applied to absolutely anything, and it is amazing that in the age of the Gestapo and the Gulag, people should still fail to see the pitfalls of this sort of easy — and easily penetrable — sophistry. We have seen enough grisly consequences from specious thinking that we should never allow mere verbal evasions to nullify ancient, though precariously established, moral traditions. But it is so fatally easy for anyone who has had an introductory philosophy course to pose as a bold questioner of conventional wisdom; far harder to regenerate the wisdom so glibly renounced.

"Value dwells not in particular will," says Shakespeare's Hector. But when values are thought to have no relation to "facts," they can hardly dwell anywhere else. The new conventional wisdom of the semi-educated has it that certain values (arbitrarily selected, according to the convenience of the speaker on a given occasion)

exist only in the consciousness of the subject, so that it is presumptuous (and therefore wrong?) for society to violate the freedom of its members (their freedom is a value mysteriously exempted from the reductive glare) by imposing its own standards of right and wrong on them. The assumption is that the values ascribed to "society" are merely the preferences of those in power, as subjective as those of the individual. The reductive approach de-legitimizes authority well enough; but we are never told why it doesn't also de-legitimize individual freedom.

Science, after all, can't say whether individual freedom is good, or whether the poor ought to be fed, or whether war ought to be avoided. It is only an accident that we have not yet had a right-wing philosophy of nihilism to question the tacitly agreed-on values of the "progressive" nihilists. It is not as if all the great thinkers had been liberals. The real case is that most of the liberals have engaged in selective debunking.

G. K. Chesterton remarked that the murderer is the supreme spendthrift, wasting in a moment what he cannot re-create in a life-time. The freedom confusedly derived from the divorce of facts from values is like that: the abortionist destroys a thing he is incapable of reproducing, the skeptic breaks a tradition he could never have begotten. Most of the recently constituted freedoms we now enjoy — or pretend to enjoy — are not the measured liberties of human beings who understand their own nature and limits, but unmeasured irresponsibilities with immeasurable consequences. They are freedoms to renounce. We have begun to declare our independence of our own actions and choices, a declaration that militates against all those accumulated habits summed up in the word character.

If this is freedom, it is not human freedom. It may be canine freedom. Santayana said that the only thing the modern liberal wants to liberate man from is the marriage contract; and this comes close to the hidden agenda of the progressive nihilist. Philosophically, one can doubt anything. One can doubt God, one can doubt matter. With such a rich field of options for doubt, it is instructive to notice which things the modern nihilists have *chosen* to doubt.

The animus of reductionism is specific: it is against chastity, or

sexual virtue — of all words the surest to evoke sneers. They are also the words that express the highest human refinement except charity. Even the licentious Romans respected chastity, and honored virginity even when they apparently had no virgins. Today the word chastity is almost taboo, except as a joke, because it affronts the values of those who profess to be value-free; it expresses a view of human nature, and of human perfection, that we are implicitly forbidden to act on. There is something almost risque nowadays in reminding people that character is most basically shown in the use of the body, and that the body's properly human use must be directed to something beyond promiscuous animal desire.

When the Reagan Administration recently launched a campaign to include the advocacy of chastity in its sex education program, it was greeted with progressive hoots. Progressives still uphold the fiction that sex education is, can be, and ought to be value-free. In actual fact, of course, they are using sex education as a vehicle for their own moral code, and the Administration's action threatened to convert the whole thing into the very opposite of what they intended it to be.

It is easy to see what they had in mind. They never wanted to destroy marriage or the family, as some of their critics charge. But they thought these could be demoted to the status of mere options among many other "lifestyles," which is to say, sexstyles. And they saw no harm in sexual perversion and promiscuity, so long as the young were told how to avoid certain practical consequences. Sex education, to their minds, meant simply accepting the whole field of sexual behavior and preparing the young to choose intelligently. They utterly failed to see that this in effect meant adopting more or less officially a whole theory of human nature and destiny — one which, if false, would have disastrous results.

It may be as well for dogs to mate as the inclination seizes them. The male has no responsibility to his offspring. With human beings it is different. Moreover, human beings know it. The act of sex naturally has a much richer meaning for them, even if they are too naive to realize it may result in children. They need an entirely different emotional orchestration, and it is also naive to affect ignorance of this.

Real human freedom, as against the canine sort, requires permanence. If there were no rules of property in land we might pitch our tents where we liked and pull them up when we liked; but we would not be free to build houses. The permanence we need also requires sustained intentions, and mutual guarantees of such intentions, which is why Chesterton called the promise the most basic human institution. How can a man keep his soul, he asked, when he cannot even keep his appointments? Chesterton also reminds us that the old English ballads celebrated not lovers, but *true* lovers. Even a wedding vow is a vow of chastity, a promise of fidelity to one's spouse and restraint toward all others.

People have always assumed that chastity is preeminently a woman's virtue. To dismiss this as a double standard is to miss the point that the masculine and the feminine differ in more than simple physical form. All societies are organized around the womb, the source of progeny and therefore of society's future, and a woman's body therefore demands both special consecration and especially strict conduct. The very people who complain of the double standard, however, are most derisive toward the idea of male chastity, and the day is past when a Milton would hotly defend himself against a charge of sexual levity — a charge that gave much of its sting by implying that he had used women dishonorably, that is, had been willing to bed them without the decency to wed them. His supposed unchastity would also be a form of uncharity. The other side of the double standard was that a man's honor depended heavily on his respect for women's honor.

The institution of marriage and the code of chastity, now derided as middle-class morality, actually served to protect women, including the poorest, from exploitation, to give them a publicly supported right to say No. All of us deserve love, really human love, and since human nature shows no automatic tendency to supply the need at all times — as witness the facts of desertion, divorce, and abortion — social order consists in guaranteeing certain minima of respect.

"Values" are not really vague entities arbitrarily superadded to "facts"; the distinction is artificial. In an essay renowned among professional philosophers, John Searle used the promise to show how to derive "is" from "ought." A promise, he argued, constitutes

an obligation. It is something quite distinct from a statement of intent. Intentions may change; promises should be kept. Or there is no such thing as a promise.

It is interesting that Searle should have chosen the same action Chesterton named as basic as a fulcrum for reconstructing the values recent philosophy has done so much to debunk. But as we all realize, at least in practical life, there are some acts with built-in obligations, whether an actual promise is made or not. To have a child is to have duties as a parent. To have sex is to have duties toward one's partner. Such duties spring from what we as human beings are and what as human beings we can foresee. It is no good pretending we are quasidogs, conscious only of "facts."

Yet that is pretty much what we officially pretend nowadays. Society no longer dares to expect virtue, especially sexual virtue, from its members. At the level of law this may seem like a happy increase in freedom, and a welcome decline in busybody government. And certainly government should be modest about enforcing virtue.

But by an unfortunate development, not only government but all of society has grown modest — morbidly modest — about even *recognizing* virtue. I had a personal glimpse of the truth recently when a young woman, upon two hours' acquaintance, confided to me that she was having an affair with a man slightly older than herself; and it transpired that she wanted badly to marry him and have children, but didn't dare raise the issue. She was miserably afraid he would eventually leave her, as he had left the woman — slightly older again than he — who had formerly been his lover and her best friend. In short, she wanted some assurance of constancy — a vow — but had not the least sense that she had any right to expect it. Though highly intelligent, she took for granted that in the modern world we are, as Sartre put it, condemned to be free. Or, to paraphrase it a bit, condemned to be value-free. We live, as the philosopher Alasdair MacIntyre has put it in a brilliant book, "after virtue" — having abandoned any "concept of *man* understood as having an essential nature and an essential purpose or function."

Neither men nor women have a clear sense of identity, unless they manage to achieve it more or less on their own; at any rate

society can't tell them what they are. And now it even transpires that the abortion debate isn't really about facts at all. It turns out that we can agree that a human fetus is a human being. But unhappily, we can't agree on what a human being *is*.

Social Insecurity

Germain Grisez and
Joseph M. Boyle, Jr.

NOT ONLY ARE the issues related to euthanasia highly complex but so are the motives and causes which are making these issues so pressing. It would be disastrous to oversimplify the roots of the movement for euthanasia. There are legitimate concerns which must be dealt with. Those with good motives for seeking changes in the law must be heard sympathetically.

It is often said that medical advances themselves create many of the problems. There are several senses in which this is true.

First, the use of the respirator can create a state of affairs in which some of the traditional criteria for death are clearly met while others clearly are not met. The question then arises: Is this patient dead or not?

Second, improved forms of treatment maintain the lives of many very weak individuals who would in the past have died. For example, antibiotics prevent infections which formerly carried off many severely malformed infants and many inmates in public institutions for the retarded, the mentally ill, and the aged. Yet the prevention of death from infectious diseases does not restore such persons to full health. Society thus is faced with a larger proportion of individuals who continue to live but cannot function well.

Third, the development of any new form of treatment raises the question of whether or not it is to be used in specific sorts of cases. So long as nothing can be done, no decision has to be made. When something can be done, one must decide whether to do it or not. Thus, for example, when surgical intervention became possible to

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treat infants born with spina bifida cystica, a congenital defect resulting from the spinal column's two sides not unifying perfectly, physicians had a new power to treat or withhold treatment in each case. The problem of whether a new treatment is to be used in a particular case is especially difficult when the treatment is first introduced. For then physicians might have doubts about the value and side effects of the treatment; they also have little medical tradition to guide their judgments.

Besides these rather direct ways in which technical advances in medicine are creating new problems there is another, less direct, psychological way in which progress puts pressure on traditional attitudes toward death, sickness, and defectiveness. The more medicine has become an efficient technique, the more patients and physicians themselves expect of treatment. In former times medicine was expected to guide people to more healthful living, to help the body to heal itself, to help the patient to live with chronic disease and defect, and to relieve symptoms. Today, while much of a physician's work is necessarily still directed toward the traditional goals, there has been a revolution of rising expectations.

Just as one expects a mechanic to fix one's automobile or major appliance, to make it run according to specifications, so one is likely to expect one's physician to intervene with a cure. For certain acute conditions dramatic interventions are possible. But the expectation is unrealistic for the dying, the chronically ill, the incurable, the irremediably defective. If an automobile or a major appliance cannot be restored to standard functioning, it is scrapped and replaced with an improved model. This mentality makes many people feel that the severely defective, the permanently insane, the declining aged are like abandoned vehicles, which no longer belong with the rest of us on the road of life.

Another way in which technical advances contribute to the problems related to euthanasia is that progress in medicine is one factor which continues to increase the price of medical care. Between 1950 and 1975 American health expenditures (public and private, social and personal) increased almost tenfold in dollars, from slightly over 12 billion to nearly 118.5 billion dollars. Part of this increase was due to inflation, but even as a proportion of gross national product, American health expenditures rose from 4.5 per-

cent of GNP in 1950 to 8.2 percent of GNP in 1975.[1] Some of this increase was due to technical advances; some to other factors, including federal programs of Medicare and Medicaid.

Regardless of the cause of escalating health expenditures the fact of this escalation cannot be evaded. Even American wealth, vast as it is, remains finite. Resources are scarce and there are many legitimate demands for them. Health expenditures cannot continue indefinitely to consume a larger and larger share of the gross national product. This state of affairs is bound to lead to the question: Should not care be withheld from those who stand to benefit but little from it? If the answer is affirmative, the next question is: Should not those who are to be denied care be helped to die quickly, especially if they volunteer?

The fact that medicine has become less a personal art and more an impersonal technique, together with the increasing costs of treatment, leads in another way to demands for changes in laws related to euthanasia. In times past many patients trusted their physicians, the dying felt secure and cared for, hospitals were for acute care and not for the dying patient. Today many patients have little or no personal relationship with their physicians, do not trust them, and feel exploited when charged heavily for impersonal treatment. The dying often feel abandoned and betrayed. As more and more patients die in hospitals and other institutions,[2] dying and the conditions of dying often seem an affront to the dignity even of those who die first class. The demand to facilitate the exercise of patient autonomy is an understandable enough reaction.

Another factor which is generating pressure for euthanasia is that persons who cannot care for themselves are today a burden and are likely to be unwanted in ways in which they were not unwanted in the past.

On the one hand the nuclear family is changing. It is less stable due to rising divorce rates, more mobile due to economic demands and opportunities. The nuclear family is less likely to include an extra child who devotes a good many years to the care of other members who cannot care for themselves. The wife and mother is more likely to be working outside the household. Thus the family does not provide its own, built-in nursing service as it once often did.

On the other hand the very concept of nursing service seems to have lost much of its appeal. A normal, healthy child can be irritating enough; cleaning and feeding it every day, comforting it when it is ill, and putting up with its constant demands tax a parent's patience. But most parents still receive a good deal of satisfaction from the normal, healthy child and have high hopes for the unfolding person. Any dependent person other than a normal, healthy child makes greater demands, gives less satisfaction, and holds out less promise. Only a person who finds fulfillment in service to the bodily needs of another wants such a dependent.[3] Thus, understandably enough, whether rightly or wrongly, there is strong temptation to look for a final solution to the problem of the burdensome and unwanted person, who must otherwise be accepted as someone's charge and given someone's service.

When the family provided much of its own nursing service, the nearby community helped the family with a certain amount of charitable aid. Often this aid was not sufficient, and as the family changed and urbanization continued, voluntary charity became less and less adequate to the need for social assistance. Thus, largely due to genuine humanitarian concern, voluntary charity was more and more replaced by public welfare, and partly due to mass demands expressed in the democratic process, public welfare has more and more become the welfare state, further and further removing those who contribute from those who benefit, and separating the two sides by a vast bureaucracy. In the United States, the involvement of the federal government with the welfare of the aged and the disabled dates only from the 1930s.[4] The cost is immense.

The Mounting Burden of Public Welfare

The point can be seen clearly by considering escalating expenditures under public programs for social welfare, comparing 1950 with 1975. Here we exclude expenditures for veterans programs and for education; we include social insurance, public aid, health and medical programs, housing, and other social welfare.

In 1950 all levels of government in the United States spent a little less than 10 billion dollars for social welfare; this was 3.73 percent of GNP and 15.94 percent of all government outlays. In

1975 expenditures exceeded 191 billion dollars — 13.3 percent of GNP and 39 percent of all government outlays.

In 1950 the United States federal government spent less than 4 billion dollars for social welfare; this was 1.52 percent of GNP and under 10 percent of federal outlays. In 1975 the United States federal government spent more than 140 billion dollars for social welfare; this was 9.75 percent of the GNP and 46.57 percent of federal outlays. (This compared with 1950 defense expenditures amounting to 4.7 percent of GNP and 29.1 percent of federal outlays, and with 1975 defense expenditures of 6 percent of GNP and 26.7 percent of federal outlays.)[5]

It is generally believed, and we shall provide some evidence for the belief, that the rising costs of welfare were a potent factor in the legalization of abortion. Killing the unborn who would otherwise become welfare recipients is one way of limiting increasing welfare costs. But the problem of welfare costs points beyond abortion to changes in the law which will expedite the death of dependent persons, especially of the aged and dying.[6]

A Proposal for Easing the Burden

As we shall show, defective infants already are being selected for nontreatment, sometimes for active nontreatment, which means the withdrawal of all food and fluids.[7] Many of the mentally retarded residing in institutions are afflicted with multiple handicaps.[8] Among these there surely are numerous individuals in worse condition and with poorer prospects than some of the infants who are being selected for nontreatment. The line between the mentally retarded and the mentally ill is not always a clear-cut one; the two groups often are mixed together in the same institution.[9] A large part, perhaps the majority, of aged nursing-home patients have psychiatric symptoms. In recent years many of the aged who formerly lived in mental hospitals have been moved to the cheaper nursing homes.[10] Thus, there is a practical continuum between the defective infants now being selected for nontreatment and the aged millions who are dependent upon public welfare expenditures of one sort or another.

In 1972 Walter W. Sackett, testifying before a United States Senate committee conducting hearings on "death with dignity,"

stated that severely retarded, nontrainable individuals in public institutions should be "allowed to die." In two institutions in Florida, he said, there were fifteen hundred such individuals, and it would cost the state 5 billion dollars to keep them alive artificially for a period of fifty years. He did not explain what was artificial about the means used to maintain these individuals. But he did extrapolate his figures to the nation as a whole, to claim that in the same period the cost would be 100 billion dollars.[11]

If Sackett were correct, it would cost 66,666 dollars to maintain each such individual per year. Actually, maintenance cost per individual in public institutions for the mentally retarded was 5,537 dollars in 1971. Even if allowance is made for the capital cost of buildings and equipment, Sackett's estimate was ten times too high.[12] Still, at the end of 1971 there were 180,963 residents in public institutions for the retarded in the United States. Some of these undoubtedly were temporary residents, but more than 75,000 such residents at the time of the 1970 census were at least twenty-five years old and had been resident for at least fifteen months.[13] Even at a reasonable estimate the cost of maintaining 75,000 persons in institutions would amount to one-half billion dollars per year.

Moreover, the 1970 census counted 393,460 persons in public mental hospitals, 277,453 resident for at least fifteen months. At the end of 1975, due to new modes of treatment, there were only 191,395 resident patients in such facilities. But the cost of their care is high — perhaps 1,000 dollars per resident per month.[14] At this rate, to maintain even 125,000 permanent residents would cost 1.5 billion dollars per year.

The maintenance of the aged is an even more costly proposition. In 1973-1974 there were nearly one million aged persons in nursing and personal care homes. The average monthly resident charge was 479 dollars. Nearly half of this was paid by Medicare and Medicaid, and another 11.4 percent by other public assistance. About two-thirds of these persons were over seventy-five years old. In fiscal year 1976 Medicaid charges alone for this purpose reached 5.3 billion dollars nationwide.[15] Clearly, the monthly charge was continuing to escalate.

To maintain dependent persons in institutions is extremely

costly. And it is universally held that most institutions fail to provide minimally decent human living conditions.[16] Moreover, many dependent persons probably are maintained outside institutions only at considerable public cost and private difficulty.

For example, it is estimated that in 1970 there were 200,000 persons in the United States with Intelligence Quotients of 0 to 24, and 490,000 more with IQs of 25 to 49; more than one-half of these persons were over twenty years of age.[17] Again, among the aged it is estimated that there are twice as many bedfast and housebound persons living outside institutions as in them, and ten times as many aged persons living in poverty outside institutions as in them.[18]

If euthanasia were accepted as a solution to the problem of dependency, the public contribution to the support of all these persons could be terminated. Those without private means of support could be processed into public institutions and allowed or helped to die at minimal public cost.

It is hardly likely that the social costs of the dependent will be ignored in the political unfolding of the euthanasia movement. Every citizen would do well to consider these costs and their relevance to the euthanasia debate, because the vast majority of today's population is potentially involved.

The Future Social Insecurity of the Elderly

Some may think themselves secure because they participate in private pension arrangements which seem sound and adequate. But inflation eats away at the value of annuities. Millions who built up sound and adequate funding for retirement in the 1920s and 1930s found themselves among the aged poor in the 1950s and 1960s. After World War II, retirement plans based upon equity investments (stocks) were developed; they held out great promise for a time. But in recent years the stock market has not kept pace with inflation, and many retirement funds, no matter how invested, have lost value in terms of constant dollars.[19]

To provide for one's old age in the face of inflation it would be necessary to save *more* during one's working years than one expected to spend during one's retirement, to take account of the negative effect of inflation which overbalances apparent earnings

on investments. Invested money has never lost value over a long term; it seems impossible that the present situation will long continue. However, it is just possible that the very modern phenomenon of massive investment for retirement is going to falsify expectations based upon previous historical experience and seemingly sound theory.

Many people suppose that Social Security, which is now indexed, at least will provide a secure, minimum income for the elderly. United States Social Security was devised during the depression years of the mid-1930s as an attempt to prevent desperate poverty in old age, such as many then experienced. As originally devised, the plan mingled elements of insurance and of gratuitous public welfare assistance.[20]

However, the plan is altogether unlike insurance in two vital respects. First, participation for most people is not voluntary. Payments must be made, and are taken from the payroll, like other taxes. Second, there is no significant fund to balance the huge liabilities which Social Security has toward persons who will retire in the future. For all practical purposes the system is on a pay-as-we-go basis. The taxes collected each year are fully used in paying current benefits.[21] This system has worked until now because of the continuous economic and population expansion the United States has experienced from 1937 to 1977. But will workers in the future be willing to continue to pay the price?[22]

Already Social Security takes about 40 percent of *all* taxes on individuals — this figure includes the portion nominally paid by employers, since both portions ultimately are part of payroll costs from the economic point of view.[23] In the 1930s there were 9.5 persons aged 20-64 for each older person; in 1975 the ratio had dropped to 5:1; in 2050, it is predicted, the ratio will have dropped still further to 3.5:1.[24]

Moreover, not all persons aged 20-64 are earning a taxable income. Currently there are about one hundred employed persons for every thirty retired persons, but those born during the baby boom of 1940-1965 will begin retiring in 2005. By 2030 there will be forty-five retired persons for every hundred who are working, an increase in burden of 50 percent. To finance this burden Social Security taxes will have to increase 50 percent over their present

levels, perhaps to reach 20 percent of gross income. Such an increase would be especially burdensome to the middle class, whose marginal tax rate on an income (in current dollars) of 12,000 dollars would increase from 36 to 46 percent.[25]

The widespread fraud in Medicare and Medicaid, which are recently added public assistance programs of Social Security, threatens to erode public confidence in the whole program.[26] Moreover, many people regard Social Security as radically unfair, and the public at large is likely to begin to share this view as the burden becomes greater. There are three main complaints.

First, Social Security taxes are at the same rate on the first dollar of the poorest worker's earnings as they are on the first dollar of the earnings of the wealthiest wage earner, and the total tax paid each year by the middle class worker is exactly the same as that paid by the wealthiest. Second, a retired wage earner must really retire to receive full Social Security benefits; a wealthy person can receive the full benefit together with an unlimited amount of unearned income from rents, investments, and other sources. Third, these characteristics might be justified if Social Security truly were insurance. But many charges against these funds cannot be rationalized as insurance.[27]

The facts about Social Security being what they are, no one should be confident that the program will do as much for the elderly in the coming forty years as it has in the past forty. At some point a large part of the currently employed might decide that they must look to their own future security and that they cannot count upon their children for it. This loss of confidence is likely to come about if the increasing burden of the retired leads to a reversal of the trend to improve their standards of living and health care. If wage earners project a downward trend to their own retirement years, the employed might decide to discontinue the intergenerational transfer payments of the Social Security system. The elderly, of course, would strongly oppose such a breach of faith — as it would seem to them. But they might not win.

As Robert N. Butler, director of the National Institute on Aging, has stated: "Americans suffer from a personal and institutionalized prejudice against older people."[28] In a youth-oriented society many older persons are forcibly disengaged from life and shunted aside.

Burdened with increasing personal problems, they are expected not to be a burden to the young. Rather than being expected to grow and to contribute from the wisdom of their years, the elderly often are expected to be quiet, to go away, to decline and die quietly.[29]

Some point out, with a certain resentment, that elderly people, who are 10 percent of the population, receive 25 percent of expenditures on health care, while children, who are 38 percent of the population, receive only 9 percent of health care expenditures. Public programs, it is noticed, supply nearly 20 billion dollars of health care for the elderly — nearly two-thirds of their total health-care costs. The elderly receive per person about three times their proportionate share of the health-care service given the population as a whole.[30]

As one commentator has pointed out: "From the standpoint of social priorities, without regard for humaneness, the aged as beneficiaries of a public program and as recipients of public services (Medicare) represent a poor investment." He predicts that as pressures build up, side effects might include "a weakening of the taboo on the 'right to die.'" The chronically ill aged who need total care are likely to be shunted aside.[31]

Thus there are many factors which are making the issues related to euthanasia pressing. Not least among these factors is the growing burden of public welfare. But this factor is a double-edged sword. If Americans in the present generation begin to accept euthanasia as a means of lightening the welfare burden, they might just find that they have signed their own death warrant.

Killing as an Option No Longer Unthinkable

Killing on a massive scale has become a very common final solution to problems in the twentieth century.

World War I was fought brutally; it probably was the most destructive war in history up to its time. Under Lenin and Stalin, Soviet Socialism used mass killing as an instrument of political control and social transformation. Under Hitler, Nazi Germany adopted similar policies, adding the genocide of Jews. The Soviet Union was the first Western nation to legalize abortion; legalization has spread to much of the Western world, and is being carried to underdeveloped nations as a form of foreign aid.

World War II was fought even more brutally than World War I. Both sides used terroristic tactics, particularly strategic bombing, culminating in the American use of the atomic bomb on Japan to bring about unconditional surrender.

Guerrilla warfare and attempts to suppress it since World War II have refined terrorism, torture, and indiscriminate killing of military and civilian populations. Vietnam is only one example. Meanwhile, both the Soviet Union and the United States have developed and maintain in readiness capabilities for thermonuclear war, which might in a few hours destroy a large proportion of the world's population. The American strategy is one of deterrence; the hope is that thermonuclear war will never be necessary. Close observers of the Soviet Union doubt that the commitment to deterrence really is mutual.[32]

Yet there is no reason to think that humankind is becoming less morally responsible. Indeed, much twentieth-century killing has been done in the name of high moral ideals. The communist nations, for example, declare that they are trying to liberate humankind from oppression and to establish a good and just society. Despite the cynical scepticism of liberal democratic commentators on the world scene, there is little ground to doubt the sincerity of many communists or their genuine dedication to the marxist ideal. The liberal democratic nations, likewise, declare that they are trying to protect individual liberty against totalitarianism; motives doubtless are mixed, yet there is genuine idealism here too.

How can high moral idealism lead to mass killing? The Indo-European religious tradition stressed the sanctity of human life. Life as such somehow participated in the divine; human life in particular was considered sacred through its close affinity with spirit, and with the ultimate principle of meaning and value in reality. This ultimate principle was taken to be timeless; humankind and human history were thought to go on within an established framework, whether or not this was understood as the providential plan of a personal God.[33]

Modern, post-Christian thought has a very different world view. An impersonal, spiritless, mindless universe of mass and energy is believed to evolve by natural necessity, void of meaning and value until life capable of cognition and desire emerges under the impe-

tus of blind forces. Significance and purpose only emerge fully in humankind, where there is self-consciousness and the ability to undertake purposeful transformation of the universe. Hence, there is no objective realm of principles to which humankind must conform its plans and desires, no divine law to which human law must look for its principles. For post-Christian men and women the principles of human law are *human* desires and interests, needs and satisfactions, joys and hopes *alone.*

Human desire and satisfaction alike have their primary locus in consciousness. Self-consciousness is what distinguishes humankind. The body and its processes are of a piece with nature, except to the extent that the body and its functioning can be controlled, transformed, dominated, and reduced to obedience by technique. From this post-Christian perspective human bodiliness and human personhood are two very distinct realities; personhood is comprised only of what is distinctively human.

It follows that human individuals who have not had an opportunity to develop distinctive personalities — or who have lost the power to exercise their distinctive personalities — hardly have the character of persons. The unborn, for this reason, seem to many only potential persons.

Likewise, from a marxist viewpoint the oppressed masses are so far deprived of personhood that mass killing for the sake of a future just society is not absurd; those killed now are only so many individual human bodies that can be used and destroyed so that the true men and women of the future can emerge. And from the liberal, democratic viewpoint the victims of totalitarianism are depersonalized; the people of Southeast Asia, as well as the populations on which the missiles and their hydrogen bombs are targeted, are not persons because they do not have the liberty to develop significant personal lives.

Thus, for modern, post-Christian thinkers mass killing is acceptable as a final solution to human problems. Human life in itself no longer has sanctity. What is important is the quality of life, the extent to which an individual's life contributes instrumentally to the attainment and enjoyment of specifically human and personal values. Whenever some human individual's life is not of sufficient quality — whether measured from the individual's own perspective

or from the perspective of society or both — that life becomes a disvalue. Such a life is unwanted because it is useless; it is evil because it is unwanted; it must be destroyed because it is evil.

To those who still believe in the sanctity of life the modern, post-Christian conception is unreal, almost incredible. It is hard to believe that a society which has committed itself so heavily to social welfare could turn about and systematically seek to limit and reduce the burden of welfare by mass killing. But the legalization of abortion is a fact. And abortion has been legalized on the basis that the unborn are not persons and can be destroyed if they are unwanted by the women who bear them and by society at large. Others who are unwanted differ but little from the unborn.

Public Confusion and the "Right to Die"

Thus far we have shown that the euthanasia debate is complex, far more so than the debate over abortion was. We also have shown that there are a great many social factors which make euthanasia a contemporary issue and which are likely to make it an even more intense issue in the future. Furthermore, there are aspects of the contemporary attitude toward human life which point toward the adoption of killing as a solution to social problems. In this state of affairs there is a real danger that proponents of euthanasia will reach their objectives before those inclined to seek other solutions have managed to sort out the issues, work out consistent and defensible positions on them, and advance attractive alternatives to euthanasia as a solution to problems.

In dealing with public opinion the clarification of the issues will be essential if legalization of mercy killing is to be prevented. This can be seen from the results of two polls, one by Gallup and one by Harris, both taken in 1973.

The Gallup question was: "When a person has a disease that cannot be cured, do you think doctors should be allowed by law to end the patient's life by some painless means if the patient and his family request it?" The response was 53 percent affirmative, an increase of 17 percent to the same question since 1950. (It is interesting to note that only 47 percent answered a 1974 Gallup poll that they favored the United States Supreme Court's ruling on abortion; the ruling was described in the question: "The U. S.

Supreme Court has ruled that a woman may go to a doctor to end pregnancy at any time during the first three months of pregnancy.")

The Harris euthanasia poll asked two questions. "Do you think a patient with terminal disease ought to be able to tell his doctor to let him die rather than to extend his life when no cure is in sight, or do you think this is wrong?" To this question, 62 percent replied it ought to be allowed, 28 percent that it is wrong. Harris also asked: "Do you think the patient who is terminally ill, with no cure in sight, ought to have the right to tell his doctor to put him out of his misery, or do you think this is wrong?" To this question, Harris received only a 37 percent response that it ought to be allowed, while 53 percent said it is wrong.[34]

The different result of these two polls makes clear how a majority against active euthanasia can be converted into a majority in favor of it merely by submerging the distinction the Harris poll called to attention. One might imagine that the distinction between a patient's refusal of useless treatment, on the one hand, and, on the other, the application of deadly means by a physician at a patient's request would be clear to everyone. But this is not so. Proponents of euthanasia are making the most of such confusions.

In the United States a Euthanasia Society was founded in 1938. In 1967 it was making no progress toward its goal of legalizing at least voluntary euthanasia for adults. Members set up a new unit, the Euthanasia Educational Fund, to disseminate information. At or about the time this was done, Luis Kutner suggested the "living will" — something not as objectionable as mercy killing to the public at large, although not exactly what proponents of euthanasia had always sought.[35] The "living will" is a form letter, to be signed by adults, directing family and physician in case of terminal illness to avoid heroic measures or extraordinary means of treatment, and to give palliative care and permit natural death.

The Kutner proposal received much favorable publicity. Literature on death, dying, and euthanasia quickly began to burgeon. After the United States Supreme Court decisions on abortion early in 1973, much of the thrust behind the movement to legalize abortion seemed to pass over to the movement to legalize euthanasia.

At the beginning of 1975 the old Euthanasia Society was reacti-

vated as the Society for the Right to Die, an action unit to press for legislation.[36] The Euthanasia Educational Fund and the Society for the Right to Die share the same office, and fifteen of the seventeen members of the officers and board of the latter organization in 1976 were among the officers, board, or committees of the former organization in 1974.[37] In 1975-1976 the Quinlan case was much in the news. This was what was needed to break the dam against legislation. The Society for the Right to Die vigorously promoted legislation for "death with dignity," advancing its own model bill.[38]

In 1976 California enacted the first such legislation, but the California law explicitly excludes mercy killing, extends only to competent adults, and asserts not a right to die, but only the right to refuse treatment so that nature can take its course.[39] However, in 1977, when more or less similar bills were introduced in the legislatures of forty-one states, seven additional states enacted legislation.

New Mexico and Arkansas were among these seven. Their laws do enact a right to die, extend the exercise of this to minors by means of proxy consent by a parent or guardian, and do not explicitly exclude (although they do not authorize) mercy killing.[40] The New Mexico statute is patterned on the model proposed by the Society for the Right to Die.[41] Even the more conservative California statute appears to be modeled upon the voluntary euthanasia bill which was debated by the British Parliament in 1969.[42] With only some simple amendments the California statute can become a law permitting and regulating killing with the consent of the one to be killed.

Many who doubt the wisdom of legalizing such killing believe that the proper course of action is to oppose the enactment of any legislation along these lines. Yet in California there was in the end little serious opposition to enactment of the statute. Most of those who opposed the legalization of abortion saw clearly what they wanted and did not want, and so they were able to react with vigor and unity, at least with respect to objectives. But now many of the same persons and groups are not sure where to draw the line with respect to euthanasia. The claim that people should have a way of controlling what is done to themselves is hard to reject as unreasonable. How can this claim be distinguished in theory and

separated in practical politics from the legalization of killing with consent, and the authorization of absolute parental discretion concerning the nontreatment — and perhaps even the killing — of infants?

From Voluntary to Nonvoluntary Euthanasia

Even before the 1973 abortion decision there was discussions of actual cases in which parents had refused treatment for their infants necessary to preserve their lives, and physicians and hospitals had refrained from the treatment on the basis of the parental refusal, although the necessary treatment would otherwise have been given as a matter of course.

One such widely publicized case was at Johns Hopkins University Hospital; it occurred in 1963 but was not publicized until later. The infant was afflicted with Down's syndrome (mongolism) and needed a surgical operation, simple enough in itself, to remove an intestinal blockage. The parents refused consent; the physicians and hospital sought no court order; the baby starved to death in about two weeks.[43] A somewhat similar case occurred in a Catholic hospital in Decatur, Illinois, where a chaplain advised that there was no moral duty to undertake the extraordinary means of surgery upon an infant lacking a normal esophagus.[44]

Almost exactly nine months after the United States Supreme Court's abortion decisions two important articles appeared in which physicians at the University of Virginia Medical Center and Yale-New Haven Hospital described in some detail and defended their own practices of withholding treatment from newborn infants suffering from a variety of defects. The arguments for these practices were that the prospects for "meaningful life" were very poor or hopeless, that considerations of quality of life may in such cases prevail over what others would regard as the infant's right to life.[45]

An intense discussion unfolded beginning about the same time concerning the selection for treatment and for neglect of infants born with spina bifida cystica. Untreated infants may nevertheless survive and, if they do, be in far worse condition than had they been treated intensively from the outset. For some who engaged in this discussion the implication was clear that neglect must be total:

The infant selected for nontreatment must not be fed, although it was able to ingest food in a normal manner.

As early as May 1972 John M. Freeman of Johns Hopkins argued that if infants were to be neglected, their death should with better kindness be actively hastened.[46] The physicians at Yale-New Haven Hospital also subsequently argued that choices for death, also by active means, ought to be legally permitted.[47] Writing in the same prestigious medical journal in which the physicians publicized their practices of letting babies die, philosopher James Rachels argued that the distinction between active and passive euthanasia is unsound.[48] Some commentators who think the selective nontreatment of defective infants to amount to homicide by omission agree that in this case, at least, letting die is simply a method of killing.[49] On this view, nonvoluntary euthanasia is being widely practiced, admitted, and ignored by legal authorities in America and England today.[50]

Joseph Fletcher has argued that it is wrong — immoral and irresponsible — not to back up abortion with the measures required postnatally to end damage in cases in which a child is born with Down's syndrome.[51] He published this view nearly five years before the United States Supreme Court's decisions concerning abortion. Since then more and more of those who argued vehemently that abortion was a very different matter from infanticide have proceeded from acceptance of the former to defense of the latter. The two practices do have a great deal in common.

Further, in the case of severely deformed infants maintained in custodial institutions, it has been argued that the alternative to kindly killing is banishment to a living death in a warehouse for human beings who are effectively reduced to a state of nonpersonhood by brutality and neglect.[52] Fletcher has pressed the view that individuals with an Intelligence Quotient below 20, perhaps also those with an IQ below 40, do not qualify as persons.[53] Again, others have joined him in this position.

Many who would not readily accept nonvoluntary euthanasia in other cases may be willing to accept it in the case of infants, for they are in a condition in which no adult ever again will be, and killing them — especially when the violence is concealed by the use of the method of calculated neglect — does not seem much differ-

ent from abortion. Moreover, perhaps there are cases in which the omission of possible methods of treatment is morally acceptable and is, or should be, sanctioned by law. But if there are such cases, how can they be distinguished from others in which the neglect is simply a method of homicide, chosen merely because this method is not easily prosecuted as a crime?

Some who would reject nonvoluntary euthanasia even in the case of severely defective infants have a much more difficult time judging whether voluntary euthanasia might not be allowed for competent adults who give their informed consent to it. Clearly, here, a just respect for the person's right to life no more demands that euthanasia be forbidden than it demands that suicide and attempted suicide be considered criminal. For all practical purposes, suicide and attempted suicide are no longer held criminal in the English-speaking world. Why must those who choose to bring about their own deaths be required by law to do so by their own hands, when others who would willingly help could do the job more surely, more quickly, and more gently?[54]

However, if voluntary euthanasia is legalized, court decisions could extend the benefits of such kindly killing to children and other persons who are not legally competent. The argument would be that equal protection of the law forbids the limiting of the boon of being put out of one's misery to persons legally competent to give informed consent to the procedure. Substitute consent already is used to justify transplants from a noncompetent person.[55] And an important aspect of the New Jersey Supreme Court's resolution of the Quinlan case was the determination that Miss Quinlan's father could act on her behalf:

> If a putative decision by Karen to permit this non-cognitive, vegetative existence to terminate by natural forces is regarded as a valuable incident of her right of privacy, as we believe it to be, then it should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice. The only practical way to prevent destruction of the right is to permit the guardian and family of Karen to render their best judgment, subject to the qualifications hereinafter stated, as to whether she would exercise it in these circumstances.[56]

Of course, the New Jersey Supreme Court is not dealing with killing, and does not declare any right to die. Nevertheless, if the legislature were to hold voluntary euthanasia licit on the basis of a

right to die, a court accepting this line of reasoning — which would be very difficult to reject — would be compelled to hold that the only practical way to prevent the destruction of the right in the case of noncompetent persons would be to permit others to render judgment on their behalf.

NOTES

1. U. S. Bureau of the Census, *Statistical Abstract of the United States: 1976,* 97 ed. (Washington D.C.: Superintendent of Documents, 1976), p. 72, No. 104 and No. 105.

2. Claire F. Ryder and Diane M. Ross, "Terminal Care — Issues and Alternatives," *Public Health Reports*, 92 (1977), pp. 20-29.

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6. See Anderson, *op. cit.*, p. 94; Robert A. Derzon, administrator, Health Care Financing Administration, Memorandum to the Secretary, U. S. Department of Health, Education, and Welfare, "Additional Cost-Saving Initiatives — ACTION," June 4, 1977, pp. 8-9. Helge Hilding Mansson, "Justifying the Final Solution," *Omega*, 3 (1972), pp. 79-87, reports the chilling results of a social psychology experiment in which large numbers of university students agreed that the unfit should be killed by society as a final solution to problems of overpopulation and personal misery.

7. See Herbert B. Eckstein, Geoffrey Hatcher, and Eliot Slater, "Severely Malformed Children," *British Medical Journal*, 2 (1975), pp. 285-289.

8. Ronald W. Conley, *The Economics of Mental Retardation* (Baltimore and London: Johns Hopkins University Press, 1973), p. 87.

9. *Ibid.*, pp. 78-79; Morton Kramer *et al. Mental Disorders/Suicide* (Cambridge, Mass.: Harvard University Press, 1972), p. 64.

10. *Developments in Aging: 1976; A Report of the Special Committee on Aging, U. S. Senate, pursuant to Sen. Res. 373* (March 1, 1976), 95th Cong., 1st. Sess., p. 46; Bernard A. Stotsky, "Extended Care and Institutional Care," in Ewald W. Busse and Eric Pfeiffer, *Mental Illness in Later Life* (Washington, D.C.: American Psychiatric Association, 1973), p. 172.

11. Walter W. Sackett, "Statement," in *Death and Dignity: An Inquiry into Related Public Issues: Hearings before the Special Committee on Aging, U. S. Senate,* 92nd Cong., 2nd Sess., part 1 (August 7. 1972), p. 30.

12. U. S. Bureau of the Census, *Statistical Abstract*, p. 86, No. 136; Conley, *op. cit.*, pp. 96-97.

13. U. S. Bureau of the Census, *Census of Population: 1970; Subject Reports: Persons in Institutions and Other Group Quarters* (Washington, D. C.: Superintendent of Documents, 1973), p. 61, table 28; *Statistical Abstract, p. 136, No. 86.*

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16. *Developments in Aging: 1976,* pp. 44-47; Conley, *op. cit.*, pp. 360-362.

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18. *Developments in Aging: 1976,* pp. 4 and 33.

19. U. S. Bureau of the Census, *Statistical Abstract*, p. 433, No. 700, shows consumer price inflation at 4.6 percent per year average 1966-1970, 7.4 percent per year average 1971-1975; p. 305, No. 479, shows investment income and profit/loss on sales of investments for all private pension funds other than those managed by insurance companies at less than 4 percent per year.

20. *Financing the Social Security System: Hearings before the Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives,* 94th Cong., 1st. Sess. (May 7 to June 19, 1975), p. 185 (report of the quadrennial advisory council).

21. *Ibid.*, pp. 369-379 (statement of John A. Brittain, Brookings Institution), pp. 102-103 (statement of W. Allen Wallis).

22. *Ibid.*, pp. 13-17 (reply by Social Security administration) gives the history of the actuarial estimates; Gold, Kutza, and Marmor, *op. cit.*, p. 13, explicitly ask: "whether a diminishing number of workers, through higher taxation, will be willing to support the steadily growing numbers of retirees."

23. *Financing the Social Security System,* p. 181 (report of the quadrennial advisory council).

24. *Ibid.*, pp. 392-393 (statement of Conrad Taeuber).

25. *Ibid.*, pp. 102-103 (statement of W. Allen Wallis), pp. 275-276 (report of the quadrennial advisory council), p. 382 (statement of Martin Feldstein).

26. *Developments in Aging: 1976,* pp. 26-32; Derzon, in the memorandum cited in note 11 above, estimates fraud in Medicaid alone at 800-900 million dollars per year (p. 2).

27. *Financing the Social Security System,* p. 113 (statement of J. W. van Gorkum), pp. 199-200 (report of the quadrennial advisory council), p. 419 (remarks of Congressman, James A. Burke, chairman of the subcommittee).

28. *Medicine and Aging: An Assessment of Opportunities and Neglect: Hearing before the Special Committee on Aging, United States Senate,* 94th Cong., 2d Sess. (October 13, 1976), p. 13.

29. *Training Needs in Gerontology: Hearing before the Special Committee on Aging, United States Senate,* 93d Cong., 1st Sess. (June 19, 1973), pp. 15-17 (statement by George Ebra.

30. *Developments in Aging: 1976,* p. xix; Theodore R. Marmor, in Neugarten and Havinghurst, eds., *op. cit.*, p. 24.

31. Anderson, *op. cit.*, p. 94.

32. For the history of the legalization of abortion see Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments* (New York and Cleveland: Corpus Books, 1970), pp. 185-266. For the Soviet attitude toward nuclear war see Richard Pipes, "Why the Soviet Union Thinks It Could Fight and Win a Nuclear War," *Commentary,* 58 (July 1977), pp. 21-34.

33. See Grisez, *op. cit.*, pp. 117-150.

34. See John M. Ostheimer and Leonard G. Ritt, "Life and Death: Current Public Attitudes," in Nancy C. Ostheimer and John M. Ostheimer, eds., *Life or Death — Who Controls?* (New York: Springer Publishing Co., 1976), pp. 286-289.

35. "History of Euthanasia in U. S.: Concept for Our Time," *Euthanasia News,* 1 (November 1975), pp. 2-3. The following paragraph (p. 3) is of special importance: "Legislative initiative had all but ceased and it was decided that there was no chance of getting any bills passed until there was a massive educational effort. By the end of the '60s there were two significant events: the Euthanasia Educational Fund was established in 1967 to disseminate information concerning the problem of euthanasia, and Luis Kutner suggested a Living Will at a meeting of the Society." Kutner published his proposal in an article concerned primarily with active euthanasia which switched with practically no transition to the proposal of the "living will": "Comments: Due Process of Euthanasia: The Living Will, a Proposal," *Indiana Law Journal,* 44 (1969), pp. 539-544, especially pp. 548-550.

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

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

38. Cf. "Model Bill," *Death with Dignity: Legislative Manual,* pp. 95-96, with the New Mexico statute, 1977 N. M. Laws, ch. 287.

39. CAL. HEALTH & SAFETY CODE §§7185-7195 (1976).

40. 1977 N. M. LAWS, ch. 287; 1977 ARK ACTS, act 879; 1977 N. C. LAWS, ch. 815; 1977 IDAHO LAWS, ch. 106; 1977 TEXAS LEGISLATIVE SERVICE, S. B. 148; 1977 OREGON LEGISLATIVE ASSEMBLY, S.B. 438; 1977 NEVADA LEGISLATIVE, Assembly Bill 8.

41. See note 38 above.

42. The 1969 British bill is printed in A. B. Downing, ed., *Euthanasia and the Right to Die* (London: Peter Owen, 1969), pp. 201-206. Both this bill and the California statute contain similar safeguards: the requirement that one's terminal condition be certified by two physicians for one to become a *qualified patient*, the prescription that a legal form be used for the *directive to physicians*, a fourteen-day *waiting period* after one is qualified before the directive becomes fully effective, and a penalty for *homicide* specified for anyone forging a directive or concealing its revocation. From one point of view such safeguards may be admirable, but they are precisely the machinery needed for active euthanasia.

43. See James M. Gustafson, "Mongolism, Parental Desires, and the Right to Life," *Perspectives in Biology and Medicine*, 16 (1973), pp. 529-557.

44. See Dennis J. Horan, "Euthanasia, Medical Treatment and the Mongoloid Child: Death as a Treatment of Choice?" *Baylor Law Review*, 27 (1975), pp. 76-77.

45. Anthony Shaw, "Dilemmas of 'Informed Consent' in Children," and Raymond S. Duff and A. G. M. Campbell, "Moral and Ethical Dilemmas in the Special-Care Nursery," *New England Journal of Medicine*, 289 (October 25, 1973), pp. 885-890 and 890-894.

46. John M. Freeman, "Is There a Right to Die — Quickly?" *Journal of Pediatrics*, 80 (1972), pp. 904-905.

47. Raymond S. Duff and A. G. M. Campbell, "On Deciding the Care of Severely Handicapped or Dying Persons: With Particular Reference to Infants," *Pediatrics*, 57 (1976), p. 492.

48. James Rachels, "Active and Passive Euthanasia," *New England Journal of Medicine*, 292 (1975), pp. 78-80.

49. John A. Robertson, "Involuntary Euthanasia of Defective Newborns: A Legal Analysis," *Stanford Law Review*, 27 (1975), pp. 217-244.

50. Cf. Harvey A. Stevens and Richard A. Conn, "Right to Life/Involuntary Pediatric Euthanasia," *Mental Retardation*, 14 (1976), pp. 3-6.

51. Joseph Fletcher, "The Right to Die: A Theologian Comments," *Atlantic*, 221 (April 1968), p. 63.

52. See Robert A. Burt, "Authorizing Death for Anomalous Newborns," in Aubrey Milunsky and George J. Annas, eds., *Genetics and the Law* (New York and London: Plenum Press, 1976), p. 441.

53. Joseph Fletcher, "Indicators of Humanhood: A Tentative Profile of Man," *Hastings Center Report*, 2 (November 1972), p. 1.

54. See Eliot Slater, "Assisted Suicide: Some Ethical Considerations," *International Journal of Health Services, 6 (1976)*, pp. 321-330.

55. John A. Robertson, "Organ Donations by Incompetents and the Substituted Consent Doctrine," *Columbia Law Review*, 76 (1976), pp. 48-78.

56. Case cited in matter of Quinlan, 70 N.J. 10, 355 A. 2d 647 (1976), at 664.

Amniocentesis and Human Quality Control

Jacqueline M. Nolan-Haley

FIVE YEARS AGO I wrote of what I perceived to be the gradual metamorphosis of the value of life ethic in favor of a quality of life ethic.[1] The former attaches value to all human life if for no other reason than it is human. The latter ethic determines first what is human and then applies a value to it.

What prompted my consideration of this issue was an announcement by two Yale physicians that forty-three infants had been allowed to die at Yale-New Haven Hospital after a joint decision by parents and physicians that "prognosis for meaningful life was poor or hopeless."[2] My concern was twofold: would such decisions be restricted to the newborn nursery; and, who would be the ultimate arbiter of "meaningful life"?

During the past five years the quality of life ethic has continued to displace the traditional ethic. Due to advances in genetics, particularly the pre-natal diagnostic technique of amniocentesis, and the revival of the eugenics movement,[3] the concept of "meaningful life" has assumed added dimension *in utero.*

The reasons offered by women who undergo amniocentesis vary from a desire to know if a child has a genetic defect, an interest in learning the child's sex or simply the desire to have a beautiful baby.[4] Prenatal detection of defects followed by abortion of those deemed "defective" has reduced the number of death decisions being made in newborn nurseries.

Under a quality of life ethic this is perceived as a "good." It spares parents the agony of making life/death decisions of the Yale-New Haven Hospital type and it fulfills what one physician has referred to as the societal interest in assuring only quality products.[5] Under a value of life ethic, however, this mode of behavior is unacceptable. A New Jersey court has articulated the concern:

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> A child need not be perfect to have a worthwhile life . . . The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not here talking about the breeding of prize cattle.[6]

Under either ethic the question remains whether we are talking about and indeed encouraging the breeding of prize cattle. This article focuses upon the question in the context of consideration of amniocentesis and its significance for the legal and medical community.

1. Amniocentesis

The most prevalent method of genetic screening is amniocentesis, a pre-natal diagnostic technique which, when combined with abortion, provides the greatest guarantee of a quality child that physicians can accommodate in this age of consumerism.[7] It does not follow, however, that normal results subsequent to performance of amniocentesis assure that a child is without malformations.[8] While amniocentesis has been praised as a weapon of preventive medicine, the panegyrics may be premature.[9] Few detected diseases can be treated or cured *in* or *ex utero* and second trimester abortion is generally the single "cure" for defects which are diagnosed.[10] Since most physicians agree that there is no point in administering the test unless patients are willing to abort,[11] it may be preventive medicine only in the sense of the biblical mandate — if the eye is an occasion of sin, pluck it out.

Amniocentesis was developed initially to diagnose and manage cases of RH incompatability.[12] At the present time it can determine fetal sex and detect a varied assortment of chromosomal conditions and metabolic diseases. It is generally recommended by some physicians for pregnancies where there is advanced maternal age or a family history of Down's Syndrome, although it is reported that the majority of infants with Down's Syndrome are now born to women less than thirty-five years of age.[13] Amniocentesis is also recommended where there is a family history of spina bifida or muscular dystrophy, mental retardation in close relatives, Eastern European ancestry for Tay-Sachs disease and dispositive carrier status for sickle cell trait.[14]

The most recent use of large-scale amniocentesis has been in connection with prenatal screening and the diagnosis of neural

tube defects which are among the most common major congenital defects in the United States. Detection of neural tube defects results from a five part testing procedure which culminates in amniocentesis.[15]

The process of amniocentesis involves examination of amniotic fluid to determine the extent of the presence of alpha-fetoprotein, a protein which is produced by the child while developing *in utero*. It appears in the amniotic fluid at increasing levels during the first fourteen weeks of pregnancy and after that time the level declines. Alpha-fetoprotein (AFP) is also found in the mother's blood. Research has shown that by measuring the levels of AFP in amniotic fluid it is possible to detect neural tube defects.[16] However, not all neural tube defects can be diagnosed. High AFP levels may occur on a statistical basis or may represent an anomaly other than neural tube defects.[17]

The Food and Drug Administration has received several applications for premarket approval of AFP test kits which are defined by the FDA as "reagents and other materials for use in the diagnosis of neural tube defects in fetuses by analysis of the amount of alpha-fetoprotein (AFP) in the blood serum (or plasma) and amniotic fluid of pregnant women."[18] Since these kits were not marketed commercially in the United States before the Medical Device Amendments Act of 1976 was enacted, they are included as a class III device under the Food, Drug and Cosmetic Act[19] and therefore require FDA approval before being marketed. The FDA, however, has refrained from granting premarket approval while it determines what restrictions are necessary to assure safety and effectiveness of the kits.

The FDA has stated that it is in a dilemma in deciding the conditions under which the test kits can be used safely and effectively.[20] While some have argued that the kits should be given the widest possible distribution, consumer organizations, health professionals and specialists in AFP testing have expressed serious reservations. Specifically, these groups have informed the FDA that unrestricted use of the AFP kits could increase the number of abortions of normal infants, minimize identification of affected infants, and heighten anxiety over the outcome of pregnancy.[21]

Cognizant of these problems, the FDA has proposed regulations

which focus upon controlled conditions for use. An AFP program would be required to have a coordinator who assures the FDA in writing that the program is in compliance with the FDA regulations. Within its organizational structure, a program would be required to provide access to services such as amniocentesis, ultrasonography and other laboratory services necessary for proper diagnostic follow-up.

Specifically, a competent diagnostic ultrasound service would be required to be available that is capable of detecting multiple fetuses, anencephaly, fetal death and gestational age. Amniocentesis would be available for all women in the program who requested it. The FDA has opined that its approval of the AFP test kit would significantly increase the number of amniocentesis procedures performed each year and has questioned whether the supply of such services would be adequate.[22]

The program coordinator would be required to provide qualified personnel for counseling which would be based on a policy of voluntary participation, particularly with respect to available options when defects are detected. Laboratories would be required to be part of a program enrolled with the FDA to purchase AFP kits and could accept samples only from physicians who were similarly part of such a program.[23]

Regardless of whether or not amniocentesis is performed in the context of an FDA enrolled program, there are recognized procedures designed to insure the medical and genetic integrity of the process. Typically, amniocentesis will be preceded by genetic counseling to insure that family pedigree can be recorded, relevant genetic facts can be evaluated and the psychological ramifications of pre-natal diagnosis may be explained.[24] It is recommended that amniocentesis also be preceded by an ultrasound investigation to determine the location of the placenta prior to uterine puncture and to evaluate the gestational age of the child.[25] The actual procedure is usually performed between the sixteenth and twentieth week of pregnancy by perforating the maternal abdominal wall and uterus. Amniotic fluid is then withdrawn.[26] In cases of multiple gestation it is possible to obtain amniotic fluid from both sacs.[27] The fluid is examined by karyotyping and biochemical analysis and this requires highly trained technicians and competent

laboratories. Amniocentesis may also be performed transvaginally from the twelfth to the fifteenth week of pregnancy but this is considered risky.[28]

Amniocentesis is by no means a risk-free procedure.[29] A study published in Britain in 1978 showed that damage to normal pregnancies from amniocentesis included increased change of respiratory distress syndrome, abruptio placenta and fetal morbidity.[30] Apart from the physical problems, emotional problems also have been reported.[31]

Finally, one of the biggest technical problems is the receiving and communicating of accurate test results.[32] Current laboratory services are overburdened and it has been predicted that a major increase in demand may result in an unacceptable error rate. Also, because this is a potential $100 million industry, there is the additional concern that profit may take precedence over quality control.[33]

In a study conducted by the National Institute of Child Health and Human Development, there were six inaccurate diagnoses out of 1040 tests performed.[34] Two infants were born with Down's Syndrome which amniocentesis failed to detect. There were three cases of mistaken sexual identification and one mistaken diagnosis of galactosemia in a child who proved to be healthy at birth. A study published in 1979, indicated that out of 3000 tests performed, fourteen diagnostic errors were found, six of which affected the outcome of the pregnancy.[35] In that same study, of sixty-four abortions performed for chromosomal abnormalities, it was possible to verify only forty-two of them cytogenetically.

II. Abortion, Euthanasia and Amniocentesis

Abortion, more often than not, is the preferred and recommended course of action where amniocentesis reveals abnormalities.[36] A National Institute of Health Consensus Development Conference estimated in 1979 that of fetuses found to be defective through pre-natal diagnosis, over 95% were aborted.[37] The time lapse between amniocentesis and abortion has been reported to vary between 32.2 days where a karyotype investigation was performed to 45.3 days when there was a biochemical investigation.[38]

Abortion is generally chosen since few of the detected diseases

can be cured or even treated *in utero* at the present time.[39] One physician has predicted that if intrauterine treatment of genetically diseased infants does become possible, most families will still choose abortion since it has already been reported that some parents have chosen to abort when the simple remedy of a corrective diet would have permitted a child to lead a normal life.[40] The state of the law in relation to abortion may also have some impact in this regard.

Elective abortion became a legal act in 1973.[41] Although there are certain limitations on when it can be performed, it is always permissible when a woman's life or health is at stake.[42] The Supreme Court never clearly defined the word "health" but implied that it should be employed in its broadest context.[43] The Court listed some of the detriments which affect health such as abandoning educational plans, sustaining a loss of income and foregoing the satisfaction of a career.[44] Although improbable, it is possible that these psychological and socio-economic considerations affecting health will not mature until the 280th day of gestation and thus, even at full term, under certain circumstances, a woman may choose abortion over regular delivery.[45]

Prior to 1973, abortion was generally available for eugenic reasons under the nomenclature of a selective or therapeutic abortion.[46] The word eugenic was first used by Sir Francis Galton in 1883 as the name of a science directed toward improving hereditary qualities in a particular race by eliminating the unfit.[47] Eugenic abortions refer to those performed to prevent the birth of a defective or malformed child.[48]

As the set of eugenic reasons constantly expands, we are confronted with a situation perhaps not imagined by the proponents of eugenic abortion prior to its legalization — sexual preference abortions. Chicago *Tribune* columnist Joan Beck makes this observation:

> Abortion is increasingly being used to end the life of healthy unborn infants just because they are not of the sex their parents prefer. And almost all of the unborn babies aborted for no other reason except that they are of an unwanted sex are female.[49]

The reasons underlying male sexual preference are unclear. One couple of Asian ancestry who had three daughters sought amnio-

centesis to ascertain whether the wife was carrying a boy since their culture placed a high value on male heirs. They stated that if the physician refused to perform the amniocentesis for that purpose, they would abort in any event.[50] Where physicians have been reluctant to perform amniocentesis for sexual preference reasons, some women have concocted various stories.[51] In 1972 it was reported that a 38-year-old woman, desirous of a second son, sought amniocentesis under the guise of concern about Down's syndrome. After being informed that she was carrying a female, she obtained an abortion.[52] This prompted an editorial in the Journal of the American Medical Association:

> Abortion is often called "therapeutic." What name should be given to the abortion demanded solely because the sex of the fetus displeases the parents to be?[53]

There seems to be no clear agreement among physicians on this issue. One physician has recommended that labs performing amniocentesis withhold the sex of the fetus unless it is crucial to the management of the case.[54] One of the initial developers and most ardent advocates of amniocentesis favors abortion where the test results show an undesired sex and would also favor abortion if the test revealed that the child would become afflicted with cancer in mid-life.[55] It has also been suggested that sexual preference abortions are no more objectionable than those performed to facilitate a woman's travel plans.[56] In any event, description of abortion based upon sexual preference as "eugenic" or "therapeutic" is largely academic in view of the legality of abortion under the current state of the law.[57]

It is interesting to note that the rationale which supports eugenic abortion is equally supportive of eugenic euthanasia, when defective infants "slip through the screen and are born."[58] And, with viability now occurring in the second trimester and abortions following amniocentesis being performed in the second or third trimester, many defective infants will indeed be born.[59] Unlike abortion however, euthanasia is broadly held to be illegal. The act of birth confers legal personhood, a status which is protected by our judicial system. But present law is based upon the traditional western ethic which attaches value to all human life. Advocates of a quality of life ethic do not necessarily recognize a continued right

to life after birth. Nobel laureate, Sir Francis Crick, has stated that ". . . no newborn infant should be declared human until it has passed certain tests regarding its genetic endowment and . . . if it fails these tests, it forfeits the right to life."[60] An equally preposterous suggestion is that a child achieve a minimum I.Q. test score of 20-40 before being considered human.[61]

III. Amniocentesis and Wrongful Life/Birth Litigation

The existence of amniocentesis as a pre-natal detection technique has generated a unique set of malpractice litigation, specifically labeled wrongful life actions.[62] These actions are brought by parents on behalf of a child seeking damages resulting from the fact of the child's birth. The theoretical justification for the action is that but for the defendant/physician's negligence, the child would not have been born.[63]

Wrongful life actions are distinguishable from wrongful birth actions which are brought by the parents of the affected child and typically allege that had they been informed of the existence of amniocentesis, it would have been performed and the defective child would have been aborted. In wrongful birth actions the parents usually seek damages for pain and suffering, loss of consortium, emotional distress, loss of wages, medical expenses and the costs of raising the child.[64] In 1967, damages were first awarded to parents in a wrongful birth case and the trend today is toward recovery for the parents.[65]

Courts have uniformly rejected wrongful life claims on two grounds. First, it is difficult to assess damages. Tort damages are compensatory in nature and designed to put the party in the position in which he or she would have been but for the negligence of the defendant. In a wrongful life action the court would be required to weigh the value of an impaired life against the nonexistence of that life.[66]

The second justification for judicial rejection of wrongful life claims is based on a public policy which favors the continuing reaffirmation of the value of life ethic. The most recent case involving a wrongful life claim noted that ". . . in some fashion, a deeply held belief in the sanctity of life has compelled some courts to deny recovery . . ."[67]

The landmark wrongful life case which has served as precedent in denying relief in the amniocentesis cases is *Gleitman* v. *Cosgrove*.[68] Mrs. Gleitman contracted rubella during the first trimester of her pregnancy and her child was born with serious impairments. The plaintiffs alleged that the defendant knew of Mrs. Gleitman's condition but failed to inform her of any potentially harmful consequences to the child and therefore sought damages for wrongful life and wrongful birth. The New Jersey Supreme Court denied recovery to either the child or the parents stating that, "life with defects" was better than "no life at all" and that it would be impossible to assess damages. Even if Mrs. Gleitman could have obtained a legal abortion, the court noted that public policy disfavored allowing recovery for "the denial of the opportunity to take an embryonic life."[69]

Gleitman has been followed in virtually all wrongful cases, including the amniocentesis cases, to deny damages to the child. However, since the legalization of abortion in 1973, there has been a retreat from that holding with respect to the parents' right to recover. In *Berman* v. *Allen*,[70] the Supreme Court of New Jersey recognized a cause of action by parents against a physician for medical malpractice in failing to advise of the existence of amniocentesis after plaintiffs' child was born with Down's Syndrome. The parents asserted that had they been advised of amniocentesis, it would have been performed and the defective child would have been aborted.

The infant's claim for wrongful life was rejected, however, based on a reaffirmation of the value of life ethic articulated in *Gleitman*. The court went to great lengths to reaffirm "the sanctity of life," quoting from the Declaration of Independence and the United States Constitution that "life is one of three fundamental rights of which no man can be deprived without due process."

The retreat from *Gleitman* was inextricably linked with the Supreme Court's decision in *Roe* v. *Wade* which legalized abortion. The *Berman* court stated that "public policy now supports, rather than militates against, the proposition that [a woman] not be impermissibly denied a meaningful opportunity to make [the] decision to abort at least during the first trimester of pregnancy."[71] Thus, the essence of the injury in *Berman* was that the parents

were deprived of the right to exercise a decision whether or not to abort.

While *Berman* continued the *Gleitman* rule disallowing economic damages, it recognized that the defendant physicians had breached a duty to the parents by failing to inform them of the availability of amniocentesis. This deprived the parents of the exercise of an option with respect to acceptance or rejection of parenthood. Thus, the parents were allowed to recover the "monetary equivalent of their distress" without making any allowances for "the love and joy they will experience as parents."[72]

Damages for pecuniary loss were allowed in *Becker* v. *Schwartz*,[73] a wrongful life and wrongful birth action involving the failure of the physicians to inform the parents of the existence of amniocentesis resulting in the subsequent birth of a mongoloid child. The court held that the parents could recover for their pecuniary loss but not for emotional distress. In denying the child's claim the court reaffirmed the value of life ethic and questioned whether wrongful life claims should ever be recognized given the impossibility of knowing the true desires of the child.[74]

In *Johnson* v. *Yeshiva University*, [75] also a wrongful life and wrongful birth action, no liability was imposed upon a physician for failure to perform amniocentesis despite subsequent birth of a defective child. The court upheld the physician's conduct as a "permissible exercise of medical judgment and not a departure from then accepted medical practice." In this case the plaintiff failed to establish that on the basis of her medical history and the state of medical knowledge about amniocentesis in 1969, the defendant physician departed from accepted medical practice.

In *Gildiner* v. *Thomas Jefferson University Hospital*,[76] the court recognized the existence of a cause of action for the negligent performance and interpretation of amniocentesis. After Linda Gildiner discovered that she was pregnant, plaintiffs underwent a Tay-Sachs test which determined that they were both carriers of Tay-Sachs disease. Amniocentesis was performed and plaintiffs were informed that the results eliminated any possibility that their child would be afflicted with Tay-Sachs. Upon the birth of their child afflicted with Tay-Sachs, the parents instituted a wrongful life and birth action.

Based upon the *Gleitman* rationale, the court rejected the child's wrongful life action. But, the court recognized a cause of action on behalf of the parents based upon general negligence principles. It noted that a failure in the performance or interpretation of amniocentesis could result in a healthy fetus being aborted or in the unwanted birth of a child with Tay-Sachs disease and that both of these occurrences violated the public policy of the state. *Gildiner* is internally inconsistent. By accepting *Gleitman* the court accepts the proposition that life is more precious than non-life. Therefore, the birth of a child whether unwanted by parents or afflicted with Tay-Sachs disease cannot be violative of a state's public policy.

The most recent case involving amniocentesis was dismissed on procedural grounds. In *Feigelson* v. *Ryan*,[77] damages were sought against physicians for their failure to perform amniocentesis. An artificial insemination was performed upon plaintiff which resulted in pregnancy. After the child was born on February 19, 1976, he underwent chromosomal analysis and it was discovered that he suffered from a chromosomal disorder causing mental retardation and physical disability. Plaintiffs were informed of this problem in May, 1977, and brought an action contending that they were improperly advised regarding the risks of pregnancy for women over the age of thirty-five. Had they been properly informed, it was alleged, the mother would have undergone amniocentesis and upon discovery of the genetic defect, would have aborted the child. However, New York's three year statute of limitations in malpractice cases had lapsed and the case was dismissed.

One of the issues raised by the amniocentesis cases is that of how a court would react if faced with an action by parents who were unhappy about the sex of their child. Considering the growing use of amniocentesis to determine fetal sex and the *Berman* court's rationale in support of a parental right of action for being deprived of the ability to make an abortion decision, this potentiality is not so remote. It may well be that these cases would be decided in the same manner as the cases dealing with unwanted but otherwise healthy children. It is generally held that plaintiffs who have attempted to prevent the birth of a child may collect for medical expenses, loss of income, and pain and suffering from the defendant whose negligence caused the child's conception.[78]

IV. The Dilemma

The increased availability, advocacy and use of amniocentesis as a panacea against the birth of infants possessed of defects or as a guarantee of beautiful children or children of a desired sex, presents serious legal-ethical-moral considerations. While the potential for a perfect human being seems to become real, the trade-off is diminished protection for human beings *qua* human beings. Between these competing values lies a host of uncomfortable issues.

There is what the British medical journal *Lancet* refers to as "the ethical problems of over-kill of healthy fetuses."[79]

> The dilemma lies in deciding what value should be placed on the gains of terminating affected fetuses and the losses of killing normal fetuses. These cannot simply be weighed against each other in numerical terms. The value of terminating affected fetuses must depend on the likely degree of handicap and its effect on parents, their families and society; some fetuses will be so severely affected that they will be stillborn or die soon after birth, in which case amniocentesis and termination cannot be said to have averted handicap. At the other end of the scale, some will be only mildly affected and have a prospect of almost normal lives. Between these two extremes lies a full range of physical and mental disabilities.[80]

Are we ready to accept the consequences of over-kill?

Additionally, when the possibility of error is considered, the potential for litigation is endless. In the National Institute of Child Health and Human Development test which was sponsored by the government, and which, one assumes, would have been conducted under ideal conditions, there were errors. Who should bear the risk of loss in these cases? The physician, genetic counselor, laboratory, parents? How should damages be assessed when the aborted child is found to be without defect or of the desired sex?

Finally, the question remains as to whether a law which permits parents to eliminate a child of undesired sex before birth would extend after birth where diagnosis was inaccurate? The majority of the population would probably frown upon the exercise of the latter course of action as homicide. Psychologically, *in utero* death by abortion is preferred to *ex utero* death, since, as noted by the *California Medical Journal* in 1970, a quality of life mentality has succeeded in separating the idea of abortion from the idea of killing.[81] This observation is reinforced by a comment from the mother of a

child with Tay-Sachs disease who has stated that knowing that a child affected with Tay-Sachs can be "detected and aborted" meant that she could become pregnant again without fear of "watching" another of her children die.[82]

The rights associated with parenthood seem somewhat confused among the rights associated with marriage and childrearing. There is a right to conceive[83] and not to conceive;[84] a right to know what has been conceived[85] and to eliminate the same.[86] The logical outcome of this quality of life ethic is that these rights may become obligations, social or otherwise. Ethicist John Fletcher has stated:

> With the availability of the technology and know-how permitting prevention of many genetically based congenital abnormalities, there may be developing as a corollary a social attitude which demands such use. In general, if a congenital abnormality can be avoided, then it should be, and those individuals who do not partake of these advances will be socially ostracized.[87]

When will parents be forced to forfeit offspring who fail the quality control specifications of judges? The idea is not entirely unreasonable in a country where, under compulsory sterilization statutes, thousands of Americans were sterilized involuntarily in a campaign to eliminate biological inferiors from the American populace.[88]

While one of the leading experts in amniocentesis, Dr. Henry L. Nadler, believes that performing amniocentesis in every pregnancy "would be like a hunting expedition,"[89] it could become compulsory in the name of public welfare as did sterilization.[90] These observations become less speculative as the quality of life ethic fully displaces the traditional ethic and the obligation to beget only quality "products of conception" is enforced. Already, it has been suggested that there be compulsory controls when there is a failure to adhere to "humane minimal standards of reproduction."[91]

Coercion may be subtle and as one physician has noted, ". . . it is sometimes difficult to distinguish coercion from choice."[92] If amniocentesis becomes publicly funded and large-scale advertising is undertaken, there is the problem of guilt for women who decline to have the test performed.[93] It is possible that amniocentesis could become publicly funded to the extent that abortion is so funded and to the extent that AFP screening programs become manda-

tory. The latter possibility is extremely remote, however, since most commentators oppose any form of mandatory screening programs.[94]

Conclusion

Given the choice, few if any women would choose to conceive a defective child just as few would choose to marry a person with a progressively debilitating disease. But, after conception occurs, removing defects from the womb should not be approached with the mechanical nonchalance of removing a defective refrigerator. As noted by the New York Court of Appeals, that which exists in the womb is human and it is unquestionably alive.[95]

Medicine must encourage research to treat and cure *in* and *ex utero* or there are no real choices. "Abortion is never therapeutic for the fetus . . ."[96] Law must safeguard zealously the rights of those deemed "defective," the most vulnerable members of society. In short, members of the legal-medical community must insure that emphasis be placed upon eliminating the "defect" not the "defective." Otherwise, the apotheosis of human quality control will lead us out of control.

NOTES

1. Nolan-Haley, "Defective Children, Their Parents and the Death Decision," *J. Legal Med.*, Jan., 1976, p. 9.

2. Duff, "Moral and Ethical Dilemmas in the Special Care Nursery," 289 *New Eng. J. Med.*, p. 890 (1973).

3. See generally T. Howard & J. Rifkin, *Who Should Play God?* (1977). See also Sammons, "Ethical Issues in Genetic Intervention," 23 *Soc. Work* 237, 240 (1978).

4. Golbus, Conte, Schneider & Epstein, "Intrauterine Diagnosis of Genetic Defects: Results, Problems, and Follow-Up of One Hundred Cases in a Prenatal Genetic Detection Center," 118 *Am. J. Obst. & Gyn.* 897 (1974). See also Brody, "How Doctors Can Assure More Perfect Babies," *Woman's Day*, Feb. 1977, p. 65.

5. Morrison, "Implications of Prenatal Diagnosis for the Quality of, and Right to, Human Life: Society as Standard," in *Ethical Issues in Human Genetics: Genetic Counseling and the Use of Genetic Knowledge*, pp. 201-211 (B. Hilton, ed., 1973).

6. *Gleitman* v. *Cosgrove*, 49 N.J. 22, 30, 227, A. 2d. 689, 693 (1967), rev'd in part, *Berman* v. *Allen*. 80 N.J. 421, 404 A.2d. 8 (1979).

7. Sammons, *supra* note 3, p. 238. Other methods of genetic screening are ultrasonography, radiography and fetoscopy, maternal blood and urine sampling. Goodner, "Prenatal Genetic Diagnosis: Present and Future," 19 *Clin. Obst. & Gyn.* pp. 965-76 (1976).

8. Editorial, "Prenatal Diagnosis of Downs Syndrome," 242 *J.A.M.A.* 2326 (1979).

9. Culletin, "Amniocentesis: HEW Backs Test for Prenatal Diagnosis of Disease," 190 *Science*:, 537, 540 (1975).

10. Milunsky, "Pre-Natal Diagnosis of Genetic Disorders," 70 *Am. J. Med.* 7, 8 (1981): Luy, "Genetic Detection — The Newest Use of Amniocentesis," *Mod. Med.*, Sept. 2, 1974, 31, 36.

11. See, e.g., Chapman, "What Are Your Odds in the Prenatal Gamble?" *Legal Aspects of Medical Practice*, March, 1979, 30, 33.

12. *Id.*, 32.

13. Holmes, "Genetic Counseling for the Older Woman," 298 *New. Eng. J. Med.* 1419-21 (1978).

14. "Antenatal Diagnosis: What Is Standard?" 241 *J.A.M.A.* 1666, 1667 (1979).

15. "Maternal Serum Alpha-Fetoprotein: Issues in the Prenatal Screening and Diagnosis of Neural Tube Defects," in *Proceedings of a Conference Held by the National Center for Health Care: Technology and the Food and Drug Administration*, in Washington, D.C. (July 28-30, 1980), 1-20.

16. Milunsky, "Prenatal Detection of Neural Tube Defects," 244 *J.A.M.A.* 2731 (1980).

17. Golbus, Loughman, Epstein, Halsbasch, Stephens & Hall, "Prenatal Genetic Diagnosis in 3000 Amniocenteses," 300 *New Eng. J. Med.* 157 (1979).

18. 45 Fed. Reg. 74, 171 (1980).

19. 21 U.S.C. § 360c(f)(1).

20. 45 Fed. Reg. 74, 159 (1980).

21. *Id.*

22. 45 Fed. Reg. 74,161, 74,162 (1980).

23. *Id.* 74,162

24. Golbus, *supra* note 17, at 157.

25. Milunsky, *supra* note 10, 7.

26. Fuchs, "Amniocentesis and Abortion: Methods and Risks," in *Symposium on Intrauterine Diagnosis* (D. Bergsma, ed., 1971).

27. Golbus, *supra* note 17, at 160.

28. Fuchs, *Supra* note 26, at 19.

29. The feto-maternal risks involved are: spontaneous abortion (In Golbus' study, *supra* note 17, published in 1979, which involved 3000 amniocenteses, there were 42 spontaneous abortions before 28 weeks. This represents a rate of 1.5% which is similar to the rate found in studies conducted in Europe and Canada.): secondary sterility, Fuchs, *supra* note 26, at 19; fetal death due to needle lesion; amniotic fluid infection, Fuchs, *supra* note 26, at 18, 19 (see also Alexander, "Workgroup Paper: Risks of Amniocentesis," in *Proceedings*, *supra* note 15, at 20); placenta rupture, Friedman, "Legal Implications of Amniocentesis," 123 *U. Pa. L. Rev.* at 92, 106 n.87 (1974); inflamation of the amniotic sac, Gerbie, Nadler & Gerbie, "Amniocentesis in Genetic Counseling," 109*Am. J. Obst. & Gyn.* at 765, 767 (1971); fetal scarring and eye-damage, Friedman, *supra*, at 106 nn.89, 91; maternal peritonitis due to perforation of the intestines and feto-maternal hemorrhage due to perforation of the placenta, Fuchs, *supra* note 26, at 18, 19.

30. "An Assessment of the Hazards of Amniocentesis: Report of the M.R.C. Working Party on Amniocentesis," 1978 *Brit. J. Obst. & Gyn.* p. 85, Supp. 2.

31. Golbus, *supra* note 4: "Amniocentesis — Abortion Woes," *Med. World News*, July 12, 1976, p. 72; Brody, "Genetic Defects Sought in Fetus: Goal Is To Find Them When Abortion Is Still Possible," N.Y. *Times*, May 12, 1976; Blumberg, Golbus & Hanson, "The Psychological Sequalae of Abortion Performed for a Genetic Indication," 122 *Am. J. Obst. & Gyn.* 799 (1975).

32. Golbus, *supra* note 17.

33. Editorial, *supra* note 8.

34. "Midtrimester Amniocentesis for Prenatal Diagnosis," 236 *J.A.M.A.* 1471 (1976). See generally "Risks of Amniocentesis," *Lancet*, Sept. 15, 1979, at 578; Milunsky, "Amniocentesis," in *Genetic Disorders and the Fetus* 27-42 (A. Milunsky, ed., 1979).

35. Golbus, *supra* note 17.

36. Lieberman, "Psychological Aspects of Selective Abortion," in *Symposium*, *supra* note 26, at 20; Finley, Varner, Vinson & Finley, "Participants' Reaction to Amniocentesis and Prenatal Genetic Studies," 238 *J.A.M.A.* 2377, 2379 (1977).

37. DHEW, Public Health Service, NIH No. 79-2973, *Antenatal Diagnosis: Report of a Consensus Development Conference* 1-79.

38. Golbus, *supra* note 17, at 160.

39. Luy, *supra* note 10, at 36. However, successful prenatal treatment of genetic disorders of vitamin B12 metabolism has been reported. Jones, "Prenatal Diagnosis of Birth Defects," 1 *Perinatal Care* 10, 17 (1977).

40. McBride, "Prenatal Diagnosis: Problems and Outlook," 222 *J.A.M.A.* 132, 135 (1972).

41. *Roe* v. *Wade*, 410 U.S. 113 (1973).

42. *Id.*, at 164.

43. *Id.*, at 207, 208.

44. *Id.*, at 215.

45. It becomes critical then to appreciate the definition of abortion, a term which has been variously defined. As will become evident, it is inappropriate to label the termination of pregnancy after

viability an abortion. See, e.g., D. Cavenaugh & M. Talisman, *Prematurity and the Obstetrician* 4 (1969), where abortion is defined as "the expulsion or extraction of all (complete) or any part (incomplete) of the product of conception that weighs less than 500g. alive or dead." See also J. Greenhill, *Obstetrics* 265 (13th ed. 1965) ("interruption of pregnancy before the fetus is viable"); "A Statement on Abortion by One Hundred Professors of Obstetrics," 112 *Am. J. Obst. & Gyn.* 922 (1972) states

> It should be emphasized that abortion is medically defined as the termination of pregnancy before the end of the twentieth week. Regardless of the wording of a particular state law, therefore, abortions should not be performed for purely social reasons beyond this gestational age. Every effort should be made, of course, to perform abortions before the end of the first trimester.

Id. at 923.

46. Nadler & Gerbie, "Role of Amniocentesis in the Intrauterine Detection of Genetic Disorders," 282 *New Eng. J. Med.* 596, 599 (1970); Kindregan, "Abortion, the Law and Defective Children: A Legal Medical Study," 3 *Suffolk U. Law Rev.* 226, 243-247 (1969).

47. Kindregan, *supra* note 46, at 226.

48. *Id.*, at 246.

49. Beck, "Abortion — Signs of Trouble Ahead," *American Medical News*, Nov. 22, 1976; see also Fletcher, "Ethics and Amniocentesis for Fetal Sex Identification," 301 *New Eng. J. Med.* 550, 552 (1979).

50. Young, "Now You Can Pick Your Child's Sex — If . . .," *National Observer*, Oct. 30, 1976. at 3.

51. Knox, "Doctor's Dilemma: Abortion If Fetus is Wrong Sex," Boston *Globe*, Aug. 11, 1976, at 1. col. 1 & 2.

52. "An Abuse of Prenatal Diagnosis," 221 *J.A.M.A.* 408 (1972).

53. "Abortion: A Special Demand," 221 *J.A.M.A.* 400 (1972).

54. "An Abuse," *supra* note 52.

55. *Howard & Rifkin, supra* note 3, at 141.

56. Fletcher, *supra* note 49, at 552.

57. See text accompanying note 45, *supra.*

58. Fletcher, "Abortion, Euthanasia and Care of Defective Newborns," 292 *New Eng. J. Med.* 75 (1975).

59. Henig, "The Child Savers," N. Y. *Times* Mag., March 22, 1981, at 34.

60. Frankel, "The Specter of Eugenics," *Commentary*, March, 1974.

61. Weber, *Who Shall Live?* 77 (1976).

62. See generally "Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling," 87 *Yale L. J.*, 1488 (1978); Capron, "Tort Liability in Genetic Counseling," 79 *Colum. L. Rev.* 618 (1979); Trotzig, "The Defective Child and the Actions for Wrongful Life and Wrongful Birth," 14 *Fam. L. Q.* 15 (1980).

63. The "amniocentesis" cases are: *Fiegelson* v. *Ryan, N.Y.L.J.* Feb. 24, 1981, at 5: *Berman* v. *Allen*, 80 N.J. 421, 404 A.2d. 8 (1979); *Becker* v. *Schwartz*, 60 App. Div. 2d. 587, 400 N.Y.S.2d. 119 (1977), *modified*, 46 N.Y.2d. 401, 413 N.Y.S.2d. 895 (1978); *Gildiner* v. *Thomas Jefferson Univ. Hosp.*, 451 E. Supp. 692 (E.D. Pa. 1978); *Johnson* v. *Yeshiva Univ.*, 53 App. Div.2d. 523, 384 N.Y.S.2d. 455 (1976), *aff'd*, 42 N.Y. 2d 818, 396 N.Y.S. 2d 647 (1977); *Karlsons* v. *Guerinot*, 57 App. Div. 2d 73, 394 N.Y.S. 2d 933 (1977); *Greenberg* v. *Kliot*, 47 App. Div. 2d 765, 367 N.Y.S. 2d 966, *leave to appeal denied,* 37 N.Y. 2d 707, 375 N.Y.S. 2d 1026 (1975).

64. *Curlender* v. *Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 *Cal. Rptr.* 477 (1980). For an excellent collection of the recent wrongful birth cases, see Trotzig, *supra* note 62, n. 6.

65. *Custodio* v. *Bauer*, 251 Cal. App. 2d 303, 59 *Cal. Rptr.* 463 (1967).

66. See e.g., *Berman* v. *Allen*, 80 N.J. 421, 425, 404 A.2d 8, 12 (1979). See also *Comment*, "Wrongful Life and a Fundamental Right to be Born Healthy: *Park* v. *Chessin, Becker* v. *Schwartz*," 27 *Buffalo L. Rev.* 537 (1978); Kashi, "The Case of the Unwanted Blessing: Wrongful Life," 31 *U. Miami. L. Rev.* 1409 (1977).

67. *Curlender* v. *Bio-Science Laboratories* 165 *Cal. Rptr.* 477, 486 (1980).

68. 49 N.J. 22, 227 A.2d 689 (1967). The first wrongful life claim arose in *Zepeda* v. *Zepeda*. 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964). A healthy child conceived out of wedlock sued his father, claiming injury due to his illegitimate birth status. While the court recognized that a tortious act had been committed, it denied recovery on public policy grounds stating that such a decision should be made by the legislature. See also *Williams* v. *State*, 18 N.Y.2d 481, 276 N.Y.S.2d 885 (1966).

69. 49 N.J. at 30, 227 A.2d. at 693.

70. 80 N.J. 421, 404 A.2d 8 (1979).

71. 80 N.J. at 431-32, 404 A.2d at 13-15.

72. *Id.*

73. 60 App. Div. 2d 587, 400 N.Y.2d 119 (1977), modified, 46 N.Y.S.2d 401, 413 N.Y.S.2d 895 (1978).

74. This child was subsequently put up for adoption. "Baby in Malpractice Suit Was Put Up for Adoption," N.Y. *Times*, Feb. 17, 1979, 23, col. 1, at 24, col. 1.

75. 53 App. Div. 2d 523, 384 N.Y.S.2d 455 (1976), *aff'd*, 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977). But see *Karlsons* v. *Guerinot*, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977), wherein the plaintiff, a 37-year old woman brought an action after the birth of her mongoloid child. She alleged that had she been informed of the existence of amniocentesis, she would have undergone the process and aborted the defective child. Recovery was allowed the mother on the theory that the defendants had a duty to provide proper prenatal care. The breach of duty consisted of a failure to test for the existence of the deformity in light of the mother's previous history which included a thyroid condition and the birth previously of a deformed child.

76. 451 F. Supp. 692 (E.D. Pa. 1978).

77. *N.Y.L.J.* Feb. 24, 1981, at 5.

78. See *Comment*, "Liability for Failure of Birth Control Methods," 76 *Colum. L. Rev.* 1187 (1976).

79. "The Risk of Amniocentesis," *Lancet*, Dec. 16, 1978, at 1287.

80. *Id.* at 1288.

81. "A New Ethic for Medicine and Society," 113 *Cal. Med.*, 67, 68 (1970).

82. "Antenatal Diagnosis," *supra* note 14, at 1669.

83. *Skinner* v. *Williamson*, 316 U.S. 438 (1942) (right to procreate).

84. *Eisenstadt* v. *Baird*, 408 U.S. 438 (1972) (right of unmarried persons to use contraceptives); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (right of married persons to use contraceptives).

85. *Becker* v. *Schwartz*, 60 App. Div.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 413 N.Y.S.2d 895 (1978); *Park* v. *Chessin*, 400 N.Y.S.2d 110 (1977) (physician may be held liable in negligence for failing to inform patients of the availability of amniocentesis in certain circumstances and of the risk of bearing abnormal children).

86. *Roe* v. *Wade*. 410 U.S. 113 (1973).

87. Sorenson, "Some Social and Psychologic Issues in Genetic Screening," quoting John Fletcher, in *Symposium*, *supra* note 26, at 177.

88. Howard & Rifkin, *supra* note 3, at 57. See also Vacari, "Legal Aspects of Compulsory Sterilization in America," 3 *Int'l. Rev. Nat. Fam. Plan.* 1 (1979).

89. McBride, *supra* note 40, at 132.

90. See Friedman, *supra* note 29, at 122-142.

91. "Laws Forbidding Some Persons From Reproducing Held Justified," *Obs. & Gyn. News*, Aug. 1, 1979.

92. Editorial, *supra* note 8.

93. *Id.*

94. See, e.g., *supra* note 15, at 37, 69.

95. *Byrn* v. *N.Y.C. Health & Hosp.* Corp., 31 N.Y.2d 194, 199, 335 N.Y.S. 2d 390, 392 (1972), *appeal dismissed*, 410 U.S. 949 (1973). In *Byrn*, the New York Court of Appeals upheld a law permitting abortion but stated:

> It is not effectively contradicted, if it is contradicted at all, that modern biological disciplines accept that upon conception a fetus has an independent genetic "package" with potential to become a full-fledged human being and that it has autonomy of development and character although it is for the period of gestation dependent upon the mother . . . and it is unquestionably alive.

96. Powledge & Fletcher, "Guidelines for the Ethical, Social and Legal Issues in Prenatal Diagnosis," 300 *New Eng. J. Med.* 168, 171 (1979).

An Unbeliever's Pilgrimage

Ellen Wilson

WHAT A WONDERFUL travel book V. S. Naipaul would have written, had he written a travel book! His eye is accurate and tireless; his sentences are deceptively simple conductors of evocative detail. These natural gifts, let loose on the exotic landscapes and alien manners of the Islamic world, produce sensitive description on almost every page. Here for example, is his first impression of Malaysia, after leaving the deserts of Pakistan:

> Malaysia steams. In the rainy seasons in the mornings the clouds build up. In the afternoon it pours, the blue-green hills vanish, and afterwards the clouds linger in the rifts in the mountains, like smoke. Creepers race up the steel guy ropes of telephone poles; they overwhelm dying coconut branches, fall off, they cover dying trees or trees that cannot resist and create odd effects of topiary.

And this is an aerial view of the country around Mashhad, near the Russian border of Iran:

> The land over which we flew was mainly brown. The flat green fields to the east of Tehran quickly went by; and soon we were flying over bare mountains, now with centipedelike ranges, now cratered, now hard and broken, now with great smooth slopes veined from the watercourses created by melted snow.

In Indonesia his eye catches the extraordinary lighting effects of the late afternoon sun:

> The sun was red; it came red through the trees, fell red on the road. A faint mist rose off the rice fields; the blue hills went pale; and sun and sky were reflected in the water of the rice fields.

Naipaul, though, is more than a frustrated nature poet, and his descriptions of Moslem cities, with their hybrid cultures and divided loyalties, are vivid and convincing. He takes us into government offices and the anxious pressrooms of Tehran's post-revolutionary newspapers. He shows us student demonstrations

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Ellen Wilson, our contributing editor, is the author of *An Even Dozen*, recently published by The Human Life Press (New York, N.Y.). This article is a review of *Among the Believers: An Islamic Journey*, by V. S. Naipaul (Alfred A. Knopf. New York, 1981) which originally appeared in the March, 1982, issue of *The American Spectator* and is reprinted here with permission (©1982, *The American Spectator*).

and street paintings of beautiful women in tears. Not surprisingly for a writer who spends months on the road, he is keenly alive to variations in hotel accommodations — his description of the Khomeini-era Tehran Hilton, with its deserted French restaurant, Chez Maurice, meticulously set for nonexistent diners, is ludicrous yet oddly touching.

Unfortunately, Naipaul aspires to more than a travel book, and, in the effort, achieves less. The title shows what he is about: He has come to the Moslem world to investigate the modern Islamic revival which has married political revolution with cultural and economic stagnation.

There is no pretense of neutrality: Naipaul is squarely on the side of the modern world, or as he calls it, "the universal civilization," and he criticizes Moslem efforts to enjoy its fruits without accepting moral responsibility:

> All the rejection of the West is contained within the assumption that there will always exist out there a living, creative civilization, oddly neutral, open to all to appeal to. Rejection, therefore, is not absolute rejection. It is also, for the community as a whole, a way of ceasing to strive intellectually. It is to be parasitic; parasitism is one of the unacknowledged fruits of fundamentalism.

Most Westerners would not quarrel with this analysis. The cultural dynamism of medieval Islam — which could tolerate Aristotle on the one hand and Omár Khayyam on the other — has long since spent itself, and today's Islam is suspicious of foreign innovations and wary of native ones. But Western offers are tempting, and a difficult moral calculus must be employed to determine the degree of contamination. Naipaul relishes the story of one Moslem leader — whose credentials as an opponent of Western ways were impeccable — who, at the end of his life, flew to a Boston hospital in a final bid for health: "Of the maulana it might be said that he had gone to his well-deserved place in heaven by way of Boston; and that he went at least part of the way by Boeing."

The sketches of Moslem cities and countryside, the exchanges with students and civil servants, teachers and Moslem holy men, the quickness to spot humbug or hypocrisy — these are marks of a writer who has refined journalism to high art. But to report is not to explain, and Naipaul seeks — vainly — to *explain* Islam's hold

on its adherents. He unravels the abstruse religious genealogies of Moslem minority sects; he narrates Islamic martial epics; he visits model schools and describes their "stultifying" and "medieval" reliance on rote learning of the Koran. He talks with Iranian Marxists, and with Pakistanis hungering for a "pure" Islamic state. He interviews urbanized Malaysians uneasy about their surrender to modernity and nostalgic for the lost simplicities of village life. His efforts are prodigious. Yet Naipaul leaves me, in the end, confused and vaguely dissatisfied with his observations.

Midway through the book, Naipaul records a revealing conversation with a young Malaysian named Shafi, who presses him to produce his own statement of belief or code of life only to have Naipaul back off and retreat to the neutrality of the interviewer:

> "I would say: what is the purpose of your writing? Is it to tell people what it's all about?"
>
> "Yes, I would say comprehension."
>
> "Is it not for money?"
>
> "Yes. But the nature of the work is also important."
>
> I had shocked him. The idea of a vocation was new to him and — it was part of his openness — for a while he considered it . . .
>
> He said, with a regard that was like concern, "I would say you are losing something. You are not doing justice to yourself. You have been searching for truth and yet you haven't got the truth."
>
> "Let's get back to the United States."

This scene — and others like it throughout the book — pinpoints the book's constitutional weakness. Naipaul is quick to admit that he is not a religious man — he is an unbeliever among these believers — but the supposed advantages of neutrality and objectivity do not show themselves. Instead of clear insights and unbiased judgments, there is in Naipaul a curious sort of spiritual astigmatism, exaggerating what in religious terms is "normal," distorting his reactions and marring his observations. Instead of showing how the Islamic faith catalyzed that combination of religious zeal and xenophobic hatred, fierce nationalism and moated isolationism, cultural stagnation and revolutionary fervor known as the modern Moslem world, Naipaul provides a William James catalogue of the varieties of religious experience. I finished the book convinced of the intense and even fanatic faith of the Moslem people, but was there ever any doubt? Whether Islamic religiosity differs from that

of the rest of the world is a question Naipaul is not equipped either to pose or to answer. He seems strangely unaware that large portions of the rest of the world (his "universal civilization") cultivate alternative religious identities.

In other words, not only does Naipaul not believe, he doesn't understand what it means to believe. I couldn't help wondering, as he probed Islamic psyches and questioned Islamic expressions of faith, how other religions, Christianity say, would have fared under the same treatment. Your average pious Christian, asked to explain his faith and the way it informs his social and political life, would probably entangle himself in a Gordian knot of logical contradictions and opaque affirmations. What either performance would prove is unclear.

This is not to suggest that there is no difference between Christianity and Islam, or that all religions are fundamentally alike, only that the agnostic is uniquely unqualified to demonstrate where those differences lie. He is like the Occidental to whom all Orientals look alike. All religious people strike him as odd and "unreasonable," and he wastes much time and effort puzzling out attitudes that would immediately be comprehensible to Jews or Christians or even South Sea cannibals.

Naipaul thus dwells on submission to the will of God as though it were an Islamic quirk, and distastefully labels it "the Islamic idea of unity or union; men abased together before the creator, and bound by rigid rules." Yet all major religions — and all the minor ones I am acquainted with — exact, at least in theory, a similar submission, a similar confession of man's littleness in the sight of his Creator. But then, the whole question of a Creator discomfits Naipaul:

> "Do you believe in a creator?"
>
> I said, "No."
>
> "But that is the basis of Islam."
>
> "It's too difficult for me," I said, after we had had some discussion. "I feel lost if I think too much about the universe."

All articles of faith, all claims to revelation seem equally outlandish, equally implausible to Naipaul. He shakes his head over the prospects of students training to become Moslem missionaries: "The message they were going to take into the world was extraor-

dinary: a divinely inspired Prophet, arbitrary rules, a pilgrimage to a certain stone, a month of fasting." How, I wonder, would he react to a message about a god who came down to earth and accepted death for the sake of his creatures?

If Naipaul is uncomfortable with religion, he is very comfortable with modern demythologized Western society. He is grateful for its standard of living and the opportunities it offers him for fulfillment. He is proud of its technical accomplishments and hopeful of its political and economic expertise. He cannot enter into, let alone sympathize with, that disenchantment with the World that is the hallmark of religious man. He observes and records it as a puzzling phenomenon, an unexplained oddity:

> . . . as he read his voice broke. At times he seemed about to sob: Islam as anguish, hell, heaven, redemption. And that, as I understood, was the theme of the Iqbal poem: how, without the Prophet or knowledge of his mission, could the world be endured?

But this, in one way or another, is the theme of all religions: How, without God, could the world be endured? It may be hokum, it may interfere with the enjoyment of life on a natural level. Still, all religions, however much they may quarrel on other points, agree on this one: Religion makes a difference.

Naipaul's religious blind spot — or perhaps I should call it hypersensitivity — tends to polarize reaction to his book. Readers like Naipaul himself, patriotic citizens of "the universal civilization," confident that the acceptance of this civilization, with its medicine and its mechanized farming, its parliamentary systems and its institutions of higher learning, will bring prosperity and contentment to the Third World — these readers will react as Naipaul does and deplore Arabia's inexplicable attachment to this dogmatic religion. They will confound the fervor of Iran's Marxist students with the zeal of her Moslem mullahs, and prescribe as an antidote the benign reasonableness of the secular West, with its pursuit of comfort and exaltation of material well-being.

Those readers, however, who derive "universal civilization" from specific, spiritually fortified Judeo-Christian roots — who do not deny the value of material goods or technical expertise but perceive the need for spiritual fundaments — will have mixed reactions to this book. They will, of course, agree with Naipaul's criticisms of

the Moslem state's confusion of political and religious spheres and its attempt to create a religious utopia. But when Naipaul draws facile connections between these conditions and submission to God, or "rigid rules," or "Islamic" repudiations of self-seeking and materialism, they will be tempted to side with his Moslem subjects.

"Tempted," because there are radical differences — radical *disagreements* — between Islam and the West. It is a pity that Naipaul could not focus on these peculiarly Islamic — as opposed to religious — traits, and thus extend our understanding of this alien part of the world. At times he seems on the verge of doing so, or at least, he pushes the limits of what the "reasonable" man can do:

> The Prophet had founded a state. He had given men the idea of equality and union. The dynastic quarrels that had come early to this state had entered the theology of the religion; so that this religion, which filled men's days with rituals and ceremonies of worship, which preached the afterlife, at the same time gave men the sharpest sense of worldly injustice and made that part of religion.
>
> This late-twentieth-century Islam appeared to raise political issues. But it had the flaw of its origins — the flaw that ran right through Islamic history: to the political issues it raised it offered no political or practical solution. It offered only the faith.

Ultimately, Naipaul's faith in political and practical solutions, in economic expertise and sophisticated parliamentary procedure, collides with Islam's faith in . . . the Faith: "It was the late twentieth century — and not the faith — that could supply the answers — in institutions, legislation, economic systems." Like a latter-day Wilsonian, Naipual wants to make the Islamic world safe for democracy; like a Kiplingesque believer in the White Man's Burden, he wants them to swallow the "universal civilization" whole.

Early in the book an Iranian Moslem tells Naipaul that Islam stands for four things: "Brotherhood, honesty, the will to work, proper recompense for labour." Naipaul's response shows the chasm separating him from these people — and also, perhaps, from some of us: "Still I didn't follow. Why not call for those four things? Why go beyond those four things? Why involve those four things with something as big as Islam?" Tolstoy might have provided him with a clue in "What Men Live By." Poland might provide him with a clue today.

"The vision of life that wins my vote"

Malcolm Muggeridge

I RECENTLY RECEIVED a telephone call telling me that a lady who was standing as an independent pro-life candidate in the Croyden by-election would welcome an opportunity for a talk.

As I am an ardent supporter of the pro-life movement, I readily agreed to a meeting, and asked her to tea.

She duly arrived — a small, vivacious Scottish lady named Marilyn Carr. There was just one thing about her that I did not notice immediately — she had no arms, but managed most ingeniously to make her ten toes deputise for the ten fingers that she hadn't got.

When I asked her if her armlessness was due to her mother having taken Thalidomide during her pregnancy, she smiled, and said the suggestion was flattering in that, if true, it would make her younger than she actually is.

In fact, she was born armless, with little buds where the arms should have come. As the doctor who delivered her put it — and he must have had a gift for poetic imagery somewhat rare in his profession — her arms had budded but never bloomed.

Today, the chances of such a baby surviving would be very small indeed. Someone would surely recommend letting her die of starvation, or otherwise disposing of her.

Thus, Marilyn is a living witness to the pro-life cause; in herself an embodiment of life triumphant, challenging the right of any one human being to decide that another, whether an unborn or born child, whether a fatally ill or senile old person, has no right to go on living in view of circumstances — economic or physical or mental — not conducive to a worthwhile life.

It is the difference between the quality of life and the sanctity of life.

Malcolm Muggeridge has long since become a public institution in England. This article first appeared in the London *Daily Mail* of October 15, 1981, and is reprinted here with permission of the author.

The former being seen in how far the individual concerned may be assumed to be capable of enjoying life, or contributing to life, of exercising the responsibilities of a parent, wage-earner, a husband or wife.

The latter being seen in terms of the potentialities existing in every single human being, young or old, well or sick, intelligent or stupid, from the moment of conception to the moment of death.

Are human beings to be culled like livestock?

No more sick or misshapen bodies, no more disturbed or twisted minds, no more hereditary idiots or mongoloid children. Babies not up to scratch to be destroyed, before or after birth, as would also the old beyond repair.

With the developing skills of modern medicine, the human race could be pruned and carefully tended until only the perfect blooms — the beauty queens, the Mensa IQs, the athletes — remained.

Then at last with rigid population control to prevent all the good work being ruined by excessive numbers, affliction would be ended, and maybe death itself abolished, and the evolutionary process have reached its ultimate destination in a kingdom of heaven on earth.

Against this vision of life without tears in a fleshly paradise stands the Christian vision of mankind as a family whose loving father is God, all of whose members, whatever physical or mental qualities or deficiencies they may have, are equally deserving of consideration, and whose existence has validity, not just in relation to history, but in relation to a destiny reaching beyond time and into eternity.

This is the vision that has buoyed up Western Man through the Christian centuries; inspired his art and literature and music, the building of the great cathedrals, formulated his *mores*, sanctified his saints and mystics.

And the symbol of that vision? — not the quality of life as expressed in the colour supplements, but a stricken body nailed to a cross, and signifying affliction, not as the enemy of life, but as its greatest teacher and enhancement.

Between these two visions we have to choose. Which side are we on? All the signs are that the choice has been made in favour of an earthly paradise. At least the media tell us so. Yet I wonder. There

is one sign at least in the opposite direction that I find impressive.

Probably the best known woman, certainly the best loved, in the world today is not one of the stage or cinema pin-ups, nor even Mrs. Thatcher, but Mother Teresa of Calcutta.

The work for which she has received the Nobel Prize, and which has made her famous, is all in the opposite direction from the consensus.

She and her Sisters of Charity think it worthwhile to bring in dying derelicts from the streets of Calcutta so that before they die, even just for half an hour, they will know what Christian love is.

Equally they bring in babies abandoned, maybe in dustbins, and cherish them.

Thinking of the sanctity of life, there is one scene that always comes into my mind. It occurred when I was walking with Mother Teresa through her children's clinic in Calcutta when we were making a TV programme about her and her work.

"Is it really worthwhile," I asked her, "to salvage these babies when India has such an excess of them?"

For answer, she just picked up one of the babies, a little girl so tiny that it seemed extraordinary that she could live at all. With a kind of glory in her face, and holding the baby up, she said: "See, there's life in her."

So there was, and that life for ever sacred, for ever to be cherished, since that life, as all life, belongs not to our tawdry little plans but to the mighty purposes for which we and our little Earth and the universe in which it is set, came into existence.

APPENDIX A

[*The following letter was printed in* The Times *of London on November 20, 1981; in it, Mr. Muggeridge attempts to explain to his fellow-countrymen (traditionally addressed* via *letters to* The Times*) the strange result of his article in the* Daily Mail, *which is reprinted in this issue. It appeared during the trial of a doctor accused of attempting to kill a "mongol" child; the Attorney General charged the* Daily Mail*'s editor with contempt, of which (as we understand it) he was actually convicted. The doctor was acquitted. Mr. Muggeridge questions the logic of it all, and points out some reasonable conclusions.*]

New Testament Precept on Human Life

Sir, as a working journalist over the last half century, sometimes in an editorial capacity, contributing one way and another to a great variety of publications, and holding forth rather freely and often on radio and television, both in this country and abroad, I thought I had developed a kind of pricking in my thumbs in the presence of anything in the nature of contempt or libel. No such warning signal manifested itself when I was asked, and readily agreed, to do a piece on the, as I see it, truly appalling consequences of coming to accept the principle of euthanasia in getting rid of unduly handicapped children before or after birth, and the debilitated old.

As it happened, a case involving this principle was being heard at the Leicester Crown Court; I knew nothing of it at the time and had not been following its proceedings. It came, therefore, as a great surprise to learn that the Attorney General, Sir Michael Havers, QC, was seeking to bring a committal order against the editor of the *Daily Mail*, the newspaper in which my article appeared, on the ground that its publication was alleged to have "created a substantial risk that the course of justice in the trial would be seriously impeded or prejudiced."

All, in fact, the article did was to expound the case, accepted by Christians for centuries past, against legalizing abortion and euthanasia. If such an exposition does indeed impede the course of justice, then, it would seem to me, still more does the New Testament which, in words infinitely more persuasive and beautiful than mine, presents the same arguments and reaches the same conclusion. Surely, then, the Attorney General should seek a permanent injunction preventing the printing, publishing and circulation of the New Testament if he wants to be sure

that future legal proceedings involving abortion and euthanasia are unimpeded and unprejudiced.

The occasion of writing the article in question was to support the candidature in the Croyden by-election of Marilyn Carr, a highly intelligent and vivacious lady who was born without any arms, but who has managed none the less to create for herself a full and useful life. Thus she was in herself a powerful argument for the pro-Life cause and, although she polled only a very few votes, managed to raise a real issue as distinct from the fantasies in which the representatives of the three major parties trafficked.

I liked particularly one point that she raised: that though she was herself admittedly handicapped by having no arms, plenty of MPs seemed to manage quite well in the House of Commons despite the handicap of having no brains. The action taken by the Attorney General gives an extra bite to this observation.

Yours, etc,

MALCOLM MUGGERIDGE

APPENDIX B

[The following is a photocopy reprint of the full text of Sen. John P. East's subcommittee report (referred to in Rep. Henry Hyde's article in this issue); for reasons of space, the lengthy "Additional and Minority Views" have not been included.]

Calendar No.

[COMMITTEE PRINT]

97th Congress 1st Session	SENATE	Report No. ———

THE HUMAN LIFE BILL—S. 158

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

TO THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

MADE BY ITS

SUBCOMMITTEE ON SEPARATION OF POWERS

DECEMBER ——

U.S. GOVERNMENT PRINTING OFFICE
87-467 O WASHINGTON: 1981

APPENDIX B

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Calendar No.

97TH CONGRESS, 1st Session | SENATE | REPORT No. 97-

THE HUMAN LIFE BILL—S. 158

DECEMBER ——

Mr. EAST, from the Subcommittee on Separation of Powers, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 158]

The Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, to which was referred the bill, S. 158, to recognize that the life of each human being begins at conception and to enforce the fourteenth amendment by extending its protection to the life of every human being, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

I. AMENDMENT IN THE NATURE OF A SUBSTITUTE

Strike out the enacting clause and all after the enacting clause and substitute in lieu thereof the following:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 42 of the United States Code shall be amended at the end thereof by adding the following new chapter:

CHAPTER 101

SECTION 1. (a) The Congress finds that the life of each human being begins at conception.

(b) The Congress further finds that the fourteenth amendment to the Constitution of the United States protects all human beings.

SEC. 2. Upon the basis of these findings, and in the exercise of the powers of Congress, including its power under section 5 of the fourteenth amendment to the

Constitution of the United States, the Congress hereby recognizes that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, each human life exists from conception, without regard to race, sex, age, health, defect, or condition of dependency, and for this purpose "person" includes all human beings.

SEC. 3. Congress further recognizes that each State has a compelling interest, independent of the status of unborn children under the fourteenth amendment, in protecting the lives of those within the State's jurisdiction whom the State rationally regards as human beings.

SEC. 4. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions: *Provided,* That nothing in this section shall deprive the Supreme Court of the United States of the authority to render appropriate relief in any case.

SEC. 5. Any party may appeal to the Supreme Court of the United States from an interlocutory or final judgment, decree, or order of any court of the United States regarding the enforcement of this Act, or of any State law or municipal ordinance that protects the rights of human beings between conception and birth, or which adjudicates the constitutionality of this Act, or of any such law or ordinance. The Supreme Court shall advance on its docket and expedite the disposition of any such appeal.

SEC. 6. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination.

II. PURPOSE OF THE PROPOSED ACT

The purpose of S. 158 is first, to recognize the biological fact that the life of each human being begins at conception; second, to affirm that every human life has intrinsic worth and equal value regardless of its stage or condition; and third, to enforce the fourteenth amendment by ensuring that its protection of life extends to all human beings.

III. NEED FOR THIS LEGISLATION

To protect the lives of human beings is the highest duty of government. Our nation's laws are founded on respect for the life of each and every human being. The Declaration of Independence holds that the right to life is a self-evident, inalienable right of every human being. Embodied in the statement that "all men are created equal" is the idea of the intrinsic worth and equal value of every human life. The author of the Declaration, Thomas Jefferson, explained in later years that "[t]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government." [1]

Today there is a strong concern among many citizens that government is not fulfilling its duty to protect the lives of all human beings. Since 1973 abortion has been available on demand nationwide,[2] resulting in more than one and one-half million abortions per year. Yet this abrupt and fundamental shift in policy occurred without any prior inquiry by any branch of the federal government to determine whether the unborn children being aborted are

[1] Speech to the Republican Citizens of Washington County, Maryland (March 31, 1809) *reprinted in* J. BARTLETT, FAMILIAR QUOTATIONS 472-73 (14th ed. 1968).

[2] The state of the law allowing abortion on demand is explained at pp. 5-6, infra.

living human beings. Nor has any branch of the federal government forthrightly faced the question whether our law should continue to affirm the sanctity of human life—the intrinsic worth and equal value of all human life—or whether our law should now reject the sanctity of life in favor of some competing ethic. Only by determining whether unborn children are human beings, and deciding whether our law should and does accord intrinsic worth and equal value to their lives, can our government rationally address the issue of abortion.

A government can exercise its duty to protect human life only if some branch of that government can determine what human life is. It can afford no protection to an individual without first ascertaining whether that individual falls within a protected class. The principal author of the fourteenth amendment, Congressman John A. Bingham of Ohio, recognized this truism when he stated that, in order to decide whether an individual is protected under the law of our land, "the only question to be asked of the creature claiming its protection is this: Is he a man?" [3] Since the fourteenth amendment expressly confers on Congress the power to enforce the protections of that amendment, including the protection of life, it is appropriate for Congress as well as the Supreme Court to ask whether a particular class of individuals are human beings.

Some branch of government, as a practical matter, *must* have power to answer this basic question. Otherwise, the government would be unable to fulfill its duty to protect each individual that *is* a human being. When the individual under consideration is an unborn human child, the basic question becomes, "When does the life of each human being begin?" Only by examining this question can the government determine whether unborn children are living human beings. Only after addressing this issue can a government intelligently decide whether to accord equal value to the lives of unborn children and whether to protect their lives under the law.

In its hearings on S. 158, the Subcommittee has exhaustively addressed all questions relevant to the protection of lives of unborn children under the fourteenth amendment. Through these hearings we have also come to recognize that the fundamental question concerning the life and humanity of the unborn is twofold. Not only must government answer the biological, factual question of when the life of each human being begins; it must also address the question whether to accord intrinsic worth and equal value to all human life, whether before or after birth.

These two questions are separate and distinct. The question of when the life of a human being begins—when an individual member of the human species comes into existence—is answered by scientific, factual evidence. Science, however, is not relevant to the second question; science cannot tell us what value to give to each human life. This second question can be answered only in light of the ethical and legal values held by our citizens and expressed by the framers of our Constitution.

The two congressional findings contained in section 1 of S. 158 correspond to these two distinct questions. The congressional finding in section 1(a) of the bill addresses the first question and rests on a factual, scientific determination. The congressional finding in section 1(b) of the bill reflects the conclusion of the Subcommittee

[3] CONG. GLOBE, 40th Cong., 1st Sess. 542 (1867).

that the fourteenth amendment answers the second question by affirming the intrinsic worth and equal value of all human lives.

Much confusion has arisen in the Subcommittee's hearings and in public debate over S. 158 because of the failure to distinguish between the two basic questions. Those, on the one hand, who claim that scientific evidence can resolve the abortion issue ignore the significance of the second question. They fail to see that even if unborn children are human beings, government must decide whether their lives are of such value that they should be protected under the law. Those, on the other hand, who deny that science has any relevance to the abortion issue generally focus only on the second question and refuse to acknowledge the possibility of answering the first. They ignore the role science plays in informing us that a particular individual is a member of the human species, a separate individual whose life we must decide either to value or not.[4]

The Subcommittee has taken pains to separate its consideration of the two questions. In this report we shall often refer to the "scientific question" and the "value question" as a convenient shorthand. We have analyzed the testimony of various witnesses and sources of public record as they relate to each question separately. And we report separately our conclusions on each question.

We emphasize that both questions must be answered by some branch of government before the abortion issue can be fully and rationally resolved. The need for Congress to investigate both questions stems partly from the self-professed institutional limitations of our federal judiciary. The Supreme Court, in its 1973 abortion decision, declared itself unable to resolve when the life of a human being 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." *Roe* v. *Wade,* 410 U.S. 113, 159 (1973). The Court went on to explain that a "wide divergence of thinking" exists on the "sensitive and difficult" question of when a human life begins, *id.* at 160; hence, the judiciary is not competent to resolve the question.

As a result of its self-professed inability to decide when the life of a human being begins, the Supreme Court rendered its 1973 abortion decision without considering whether unborn children are living human beings. And because the Court did not consider whether unborn children are living human beings, it was able to avoid an explicit decision on whether our law accords intrinsic worth and equal value to the life of every human being regardless of stage or condition. The Court thus declined to address either of the crucial questions relevant to protecting unborn children under the law: the Court addressed neither the scientific question nor the value question. The Court's entire 1973 opinion concerning the power of states to protect unborn children—including the Court's

[4] For instance, the medical and scientific witnesses who testified against S. 158 universally argued that the question when human life begins is a "moral, religious or philosophical" question rather than a scientific one. In context, it is clear that they were interpreting the question, "Is it a human being?" not as an inquiry about whether a certain being is an individual member of the human species, but as a value question concerning what rights ought to be given to such a creature. *See* pp. 10–15, *infra.* Similarly, the doctors who responded to a questionnaire sent by Senator Baucus tended to regard "human being" as a semantic construct presupposing a conclusion that the being in question is entitled to certain rights, rather than as a designation for all individual members of the human species.

ruling on personhood of the unborn—must be read in light of this failure to resolve the two fundamental questions concerning the existence and value of unborn human life.

That a judicial decision addressing neither of these fundamental questions has led to a national policy of abortion on demand throughout the term of pregnancy is a great anomaly in our constitutional system. It is important to examine the judicial reasoning that led to this result. The Court held that "the right of personal privacy includes the abortion decision," but added that "this right is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154. Because it did not resolve whether unborn children are human beings, the Court could not make an informed decision on whether abortions implicate the interest and duty of the states to protect living human beings. Still, without purporting to know whether unborn children are living human beings, the Court stated by fiat that they are not protected as persons under the fourteenth amendment.[5]

Then the Court created judge-made rules governing abortions. 410 U.S. at 163-65. During the first three months of an unborn child's life, the states may do nothing to regulate or prohibit the aborting of the child. In the next three months of the unborn child's life, the states may regulate only the manner in which the child is aborted; but abortion remains available on demand. In the final three months before the child is born, the states may prohibit abortions except when necessary to preserve the "life or health of the mother." *Id.* at 165.

The apparently restrictive standard for the third trimester has in fact proved no different from the standard of abortion on demand expressly allowed during the first six months of the unborn child's life. The exception for maternal health has been so broad in practice as to swallow the rule. The Supreme Court has defined "health" in this context to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Doe* v. *Bolton,* 410 U.S. 179, 192 (1973). Since there is nothing to stop an abortionist from certifying that a third-trimester abortion is beneficial to the health of the mother—in this broad sense—the Supreme Court's decision has in fact made abortion available on demand throughout the pre-natal life of the child, from conception to birth.

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[5] The Court devoted very little analysis to its holding that the word "person" in the fourteenth amendment does not include the unborn. Justice Blackmun noted first that of the *other* uses of the word "person" in the Constitution—such as the qualifications for the office of President and the clause requiring the extradition of fugitives from justice—"nearly all" seem to apply only postnatally, and "[n]one indicates, with any assurance, that it has any possible pre-natal application." 410 U.S. at 157. As Professor John Hart Ely has pointed out, the Court might have added that most of these provisions were "plainly drafted with *adults* in mind, but I suppose that wouldn't have helped." Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade,* 82 YALE L. J. 920, 925-26. (1973). Justice Blackmun also noted that "throughout the major portion of the nineteenth century prevailing legal abortion practices were far freer than they are today. . . ." 410 U.S. at 158. This statement seems not to reflect an awareness that the relatively permissive attitude toward abortion prior to quickening that prevailed in the *early* nineteenth century was overwhelmingly rejected by the very legislatures that ratified the fourteenth amendment. It was these same legislatures which adopted strict anti-abortion laws. These laws in turn resulted from the consensus in the medical profession, based on recent scientific discoveries, that the unborn child was a human being from the moment of conception. *See* pp. 10, 24-25, *infra.* Although Justice Blackmun mentioned these political and scientific developments in an earlier portion of his opinion, 410 U.S. at 138-142, he did not discuss their relevance to an understanding of the consensus at the time of the adoption of the fourteenth amendment on whether the word "person" includes the unborn.

Statistics such as those of the District of Columbia showing that more children are aborted than are born alive demonstrate the availability of abortion on demand.[6] The news media have reported some of the shocking results of abortion on demand during the third trimester, including the purposeful killing of babies who survive an abortion procedure. *See* Jeffries & Edmonds, "Abortion: The Dreaded Complication," *Philadelphia Inquirer,* Aug. 2, 1981, Today Magazine, at 14. Whether the Supreme Court intended such an extreme result is not clear.[7]

Roe v. *Wade* has been widely criticized by constitutional scholars; it is frequently cited as the most extreme example of a case in which the Supreme Court substituted its own judgment for the judgments of elected legislatures. *See, e.g.,* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 Fordham L. Rev. 807 (1973); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment,* 63 Calif. L. Rev. 1250 (1975); Ely, *supra* note 5. While some critics assailed the decision on the ground that unborn children are human beings who ought to be protected by law, the majority of the constitutional scholars who attacked *Roe* made it clear that they personally favored permissive abortion laws, but objected to the Court's decision on the ground that under our Constitution legislatures rather than the federal courts have the power to make abortion policy. In the words of Professor Ely, *Roe* "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." Ely, *supra* note 5, at 947.

Not the least of the problems with *Roe* v. *Wade* was that it did not adequately explain either the constitutional or factual bases for its holdings or their precise scope. For instance, it has been suggested that the court's holding that the states may not protect unborn children rests not on the Court's uncertainty about when life begins, but on the Court's endorsement of a rule of constitutional law to the effect that the class of "fourteenth amendment persons" does not necessarily include all human beings. *See The Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary,* 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings on S. 158*] (May 21 transcript at 94-95) (testimony of Professor William Van Alstyne). *See also* note 5, *supra.* Under this analysis, even if there were a universal consensus to the effect that unborn children are human beings, they would have no constitutional rights and could not be protected by law. If this was actually the holding of *Roe* v. *Wade,* then the possibility that new classes of human beings will be held not to be "fourteenth amendment persons" gives the decision profound and disturbing implications beyond the abortion context.

A congressional determination that unborn children are human beings and that their lives have intrinsic worth and equal value will encourage the Court to reexamine the results and the reason-

[6] At hearings before another Subcommittee of the Senate Committee on the Judiciary, Dr. Irwin M. Cushner, who testified against restrictions on abortion, stated that no more than two percent of induced abortions are performed "for clinically identifiable reasons," and that no more than one percent are performed to save the life of the mother or for any other purpose related to physical health. Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, October 14, 1981.

[7] Chief Justice Burger, for example, stated in a separate opinion that the Court was not endorsing a constitutional right to abortion on demand. *Doe* v. *Bolton,* 410 U.S. 179, 208 (1973) (Burger, C.J., concurring).

ing of *Roe* v. *Wade*. In *Roe* the Court expressed a desire to decide the abortion issue "consistent with the relative weights of the respective interests involved . . . ." 410 U.S. at 165. The Court's view of the relative weight of the interests of the unborn child was necessarily influenced by the Court's professed inability to determine whether the unborn child was a living human being. It is difficult to believe that the Court would again balance the respective interests in such a way as to allow abortion on demand, if the Court were to recognize that one interest involved was the life of a human being.

IV. THE SCIENTIFIC QUESTION: WHEN DOES A HUMAN LIFE BEGIN

During the course of eight days of hearings, fifty-seven witnesses testified on S. 158 before the Subcommittee. Of these witnesses, twenty-two, including world-renowned geneticists, biologists, and practicing physicians, addressed the medical and biological questions raised by the bill. Eleven testified in support of the bill and eleven in opposition.

The testimony of these witnesses and the voluminous submissions received by the Subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: the life of a human being begins at conception, the time when the process of fertilization is complete. Until the early nineteenth century science had not advanced sufficiently to be able to know that conception is the beginning of a human life; but today the facts are beyond dispute.

Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being—of a being that is alive and is a member of the human species. There is overwhelming agreement on this point in countless medical, biological, and scientific writings. Extensive quotation from such writings would be unnecessarily redundant except for the strenuous efforts by some parties to deny or obscure this basic fact. The following are only a limited sample from the scientific literature:

> *Zygote.* This cell results from fertilization of an oocyte by a sperm and is *the beginning of a human being.*
>
> * * * * * * *
>
> *Development begins at fertilization,* when a sperm unites with an oocyte to form a *zygote* (from the Greek *zygotus,* meaning "yoked together"). Each of us started life as a cell called a zygote.

K. Moore, *The Developing Human* 1, 12 (2d ed. 1977).

> In this first pairing, the spermatozoon has contributed its 23 chromosomes, and the oocyte has contributed its 23 chromosomes, thus re-establishing the necessary total of 46 chromosomes. The result is the conception of a unique individual, unlike any that has been born before and unlike any that will ever be born again.

M. Krieger, *The Human Reproductive System* 88 (1969).

> [A]ll organisms, however large and complex they may be when full grown, begin life as but a single cell.

> This is true of the human being, for instance, who begins life as a fertilized ovum . . . .

I. Asimov, *The Genetic Code* 20 (1962).

> It is the penetration of the ovum by a spermatozoon and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of *fertilization* and marks the initiation of the life of a new individual.

B. Patten, *Human Embryology* 43 (3d ed. 1968).

> The formation, maturation and meeting of a male and female sex cell are all preliminary to their actual union into a combined cell, or *zygote,* which definitely marks the beginning of new individual.

L. Arey, *Developmental Anatomy* 55 (7th ed. 1974).

> A human being originates in the union of two *gametes,* the ovum and the spermatozoon.

J. Roberts, *An Introduction to Medical Genetics* 1 (3d ed. 1963).

> Bisexual reproduction is characteristic of all vertebrates, and *gametogenesis* (the production of *germ cells*) is its first phase. The next phase, the beginning of the development of a new individual, is the fusion of two germ cells (*gametes*) of different nature; one, the *spermatozoon* from the male parent; the other, the *ovum* from the female parent. The result of this fusion is the formation of the first cell of the new individual, the *zygote.*

W. Hamilton & H. Mossman, *Human Embryology* 14 (4th. ed 1972).

> The zygote thus formed [by the moving together of two sets of chromosomes] represents the beginning of a new life.

J. Greenhill & E. Friedman, *Biological Principles and Modern Practice of Obstetrics* 23 (1974).

> The zygote is the starting cell of the new organism

S. Luria, *Thirty-Six Lectures in Biology* 146 (1975).

> A new individual is initiated by the union of two gametes—a male gamete, or *spermatozoon,* and a female gamete, or *mature ovum.*

J. Brash, *Human Embryology* 2 (1956).

> Fertilization is significant in that new life is created, but specifically the cardinal features of fertilization are that (1) the diploid number of chromosomes [46] is reconstituted and (2) the sex of the conceptus is designated chromosomally.

J. Thomas, *Introduction to Human Embryology* 52 (1968).

> A new individual is inaugurated in a single cell (zygote) that results from the union of a male gamete (spermatozoön) with a female gamete (ovum or egg).

T. Torrey, *Morphogenesis of the Vertebrates* 47 (3d ed. 1971).

> The fertilized egg cell—or zygote—contains nuclear material from both parents. It marks the beginning of the life of a new human being and is a useful focal point for presenting all the diverse aspects of organic reproduction.

G. Simpson & W. Beck, *Life: An Introduction to Biology* 139 (2d ed. 1965).

Many witnesses who appeared before the Subcommittee reaffirmed the scientific consensus on this point. Dr. Jerome Lejeune of the Université René Descartes in Paris, discoverer of the chromosomal disease which causes mongolism, testified that, "[l]ife has a very, very long history, but each individual has a very neat beginning—the moment of its conception."[8] *Hearings on S. 158* (April 23 transcript at 18).

Similarly, Dr. Watson Bowes, Professor of Obstetrics and Gynecology at the University of Colorado School of Medicine, stated, "If we are talking, then, about the biological beginning of a human life or lives, as distinct from other human lives, the answer is most assuredly that it is at the time of conception—that is to say, the time at which a human ovum is fertilized by a human sperm." *Id.* at 61. Dr. Bowes ended his prepared statement as follows: "In conclusion, the beginning of a human life from a biological point of view is at the time of conception. This straightforward biological fact should not be distorted to serve sociological, political, or economic goals." *Id.* at 65.

Dr. Hymie Gordon, Professor of Medical Genetics and physician at the Mayo Clinic, affirmed this consensus and recognized the distinction between the scientific question and the value question:

> I think we can now also say that the question of the beginning of life—when life begins—is no longer a question for theological or philosophical dispute. It is an established scientific fact. Theologians and philosophers may go on to debate the meaning of life or the purpose of life, but it is an established fact that all life, including human life, begins at the moment of conception.

Id. at 31-32.

Dr. Gordon further observed:

> I have never ever seen in my own scientific reading, long before I became concerned with issues of life of this nature, that anyone has ever argued that life did not begin at the moment of conception and that it was a human conception if it resulted from the fertilization of the human egg by a human sperm. As far as I know, these have never been argued against.

Id. at 52.

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[8] Various possible biological nuances on this fact do not detract from the scientific facts relevant to this subcommittee's findings. One witness testified that cases in which twins arise from a single embryo suggest that the individual has not yet been "stably constituted" until the point when twinning occurs. Hearings on S. 158 (May 20 transcript at 19) (testimony of Dr. Clifford Grobstein). But even in such exceptional cases of "homozygous" twins, there is a being in existence from conception who is alive and human. That we can describe the formation of twins merely emphasizes that even at the earliest stages after conception we can have scientific knowledge of the existence of distinct, individual human beings.

The same witness also described the experimental process of the fusion of nonhuman embryos. *Id.* But such experiments have never been successfully performed on human beings, and even in other species, such as mice, fusion cannot be performed except within minutes of conception. Hearings on S. 158 (April 23 transcript at 22) (testimony of Dr. Lejeune).

Dr. Micheline Matthews-Roth, a principal research associate in the Department of Medicine at the Harvard Medical School, after reviewing the scientific literature on the question of when the life of a human being begins, concluded her statement with these words:

> So, therefore, it is scientifically correct to say that an individual human life begins at conception, when egg and sperm join to form the zygote, and that this developing human always is a member of our species in all stages of its life.

Id. at 41-42.

The scientific consensus on the biological fact of the beginning of each human life has existed ever since the medical and scientific communities became aware of the process of conception in the mid-ninteenth century. In 1859 a committee of the American Medical Association unanimously reported its objection to the widespread unscientific belief "that the foetus is not alive till after the period of quickening." The committee unanimously recommended a resolution for the Association to protect against all abortions as an "unwarrantable destruction of human life," except when performed to preserve the life of the mother. 12 American Medical Association, *The Transactions of the American Medical Association* 75-78 (1859). The committee emphasized that the true nature of abortion was not a "simple offense against public morality and decency," nor an "attempt upon the life of the mother" but rather the destruction of her child. The committee therefore called upon the Association to recommend to governors and legislators of the states that they protect human life, by law, from the time of conception. During the second half of the nineteenth century, following the formation of a consensus in the medical and scientific community on the beginning of each human life, the overwhelming majority of the states came to protect the lives of unborn children from the time of conception rather than the time of quickening. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 Fordham L. Rev. 807, 827-33 (1973).

Until recent years, no serious challenge was made to the straightforward scientific fact that the life of a human being begins at conception. As recently as 1963, Planned Parenthood Federation of America, now a strong proponent of legalized abortion in Congress and before this subcommittee, published a pamphlet entitled *Plan Your Children for Health and Happiness,* which acknowledged: "An abortion requires an operation. It kills the life of a baby after it has begun."

The biological consensus that conception marks the begining of the life of a human being has recently been confirmed by the process of creating a new human life outside the mother: the "test-tube baby." *See Hearings on S. 158* (April 23 transcript at 22-23) (testimony of Dr. Lejeune).

It may at first seem difficult to reconcile the existence of such a broad consensus with the testimony of some witnesses opposing S. 158 before this subcommittee who emphatically denied that it is possible to determine when a human life begins. If the facts are so

clear, it is crucial to understand how, for example, one noted professor of genetics from Yale University School of Medicine could say that he knows of no scientific evidence that shows when actual human life exists.[9]

Such statements appear on the surface to present a direct contradiction to the biological evidence discussed above. The explanation of this apparent contradiction lies in the existence of the two distinct questions identified above, the scientific question and the value question. We must consider not only whether unborn children are human beings but also whether to accord their lives intrinsic worth and value equal to those of other human beings. The two questions are separate and distinct. It is a scientific question whether an unborn child is a human being, in the sense of a living member of the human species. It is a value question whether the life of an unborn child has intrinsic worth and equal value with other human beings.

Those witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question rather than the scientific question. No witness raised any evidence to refute the biological fact that from the moment of human conception there exists a distinct individual being who is alive and is of the human species. No witness challenged the scientific consensus that unborn children are "human beings," insofar as the term is used to mean living beings of the human species.

Instead, these witnesses invoked their value preferences to redefine the term "human being." The customary meaning of "human being" is an individual being who is human, *i.e.,* of the human species. This usage is that of the medical and scientific writers quoted above and of all the medical textbooks to which the Subcommittee has been referred; of Doctors Lejeune, Gordon, and Matthews-Roth, who testified before the Subcommittee; of the American Medical Association in 1859; and of Planned Parenthood in 1963. In this sense a "human being" is something that can be identified by science. Whether a living being is human is thus, in the words of Dr. Lejeune, a matter of "plain experimental evidence." *Hearings on S. 158* (April 23 transcript at 25). Disregarding the customary scientific definition of human being, some witnesses sought to make "human being" and "humanness" into undefined concepts that vary according to one's values. They took the view that each person may define as "human" only those beings whose lives that person wants to value. Because they did not wish to accord intrinsic worth to the lives of unborn children, they refused to call them "human beings," regardless of the scientific evidence.

This technique of argument has been openly advocated by one commentator who writes that "[w]hether the fetus is or is not a human being is a matter of definition, not fact; and we can define any way we wish." Hardin, *Abortion—or Compulsory Pregnancy?* 30 J. of Marriage & the Family 246, 250 (1968). This line of argument does not refute the consensus answer to the scientific question; instead it evades the scientific question by focusing solely on the value question. By adopting this line of argument, some witnesses appearing before the Subcommittee, notably Dr. Rosenberg, were able to testify that they knew of no scientific evidence showing

[9] Hearings on S. 158 (April 24 transcript at 24) (testimony of Dr. Leon Rosenberg).

when actual human life exists. That he was speaking only to the value question is evident from his explanation that "science, per se, doesn't deal with the complex quality called 'humanness' any more than it does with such equally complex concepts as love, faith, or trust." *Hearings on S. 158* (April 24 transcript at 25).

A careful examination reveals the true nature of this line of argument. By redefining "human being" according to one's value preferences, one never has to admit believing that some human lives are unworthy of protection. Conveniently one can bury the value judgment that some human lives are not worth protecting beneath the statement that they are not human beings at all. An editorial in the journal of the California Medical Association has explained why this line of argument appeals to those who reject the traditional ethic of the sanctity of human life, which accords intrinsic worth and equal value to all human lives:

> 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.

A New Ethic for Medicine and Society, 113 California Medicine 67, 68 (1970).

The Subcommittee rejects as misleading semantic efforts to manipulate the English language and to redefine "human being" according to particular value preferences; instead we adhere to the customary meaning of "human being" as including every living member of the human species. S. 158 embodies the Subcommittee's finding, in accordance with the overwhelming consensus of scientific authority, that the life of a human being begins at conception. Our analysis of the leading works on embryology and fetal development indicates that witnesses who disputed that the life of a human being begins at conception reflect not scientific judgment, but rather the value preference of certain members of the scientific community[10] against protecting the life of unborn human beings.[11]

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[10] A recent survey by a disinterested insurance company found that the two groups in society most favorable toward abortion were the scientific and medical community and the legal profession. While 65 percent of the general public believe that abortion is immoral, only 25 percent of doctors and other scientists and only 25 percent of lawyers express such a belief. THE CONNECTICUT MUTUAL LIFE REPORT ON AMERICAN VALUES IN THE 80s 219 (1981).

[11] Practical realities sometimes make it impossible for pro-abortion doctors to evade the fact that unborn children are living human beings. The *Philadelphia Inquirer,* in its Today magazine section on Sunday, August 2, 1981, ran a cover story by Liz Jeffries and Rick Edmonds entitled "Abortion: The Dreaded Complication." The "complication" described in the article, and so dreaded by abortionist doctors, is that some babies will survive an abortion procedure and be born alive. The article describes one instance in which a live two and one-half pound baby boy survived an abortion procedure: "Dismayed, the second nurse . . . . deposited it . . . on the stainless steel drainboard of a sink in the maternity unit's Dirty Utility Room—a large closet where bedpans are emptied and dirty linens stored. . . . '[The patient's physician] told me to leave it where it was,' the head nurse testified later, 'just to watch it for a few minutes, that it would probably die in a few minutes.' " *Id.* at 14.

The Subcommittee is appalled that some in the medical profession show such disdain for the value of a human life. But such tragic events do make it impossible to ignore that the unborn

If the United States government is to give reasonable consideration to the abortion issue it must start from the fact that unborn children are human beings. The hearings before this subcommittee show that this fact is not seriously in doubt; it is questioned only by means of efforts to redefine "human being" in a purely subjective manner. No governmental body that approaches the abortion question with honesty can accept semantic gymnastics that obscure the real issue. Accordingly, we turn next to the real issue in dispute, whether to accord intrinsic worth and equal value to all human lives regardless of stage or condition.

V. THE VALUE QUESTION: SHOULD WE VALUE ALL HUMAN LIVES EQUALLY?

The answer to the scientific question casts the value question in clear relief. Unborn children are human beings. But should our nation value all human lives equally? Scientific evidence is not relevant to this question. The answer is a matter of ethical judgement.

Deeply engrained in American society and American constitutional history is the ethic of the sanctity of innocent human life. The sanctity-of-life ethic recognizes each human life as having intrinsic worth simply by virtue of its being human. If, as a society, we reject this ethic, we must inevitably adopt some other standard for deciding which human lives are of value and are worthy of protection. Because the standards some use to make such decisions turn on various qualities by which they define which lives are worthy of protection, the alternative to the sanctity-of-life ethic is often termed the "quality-of-life ethic." A sharp division exists today between those who affirm the sanctity-of-life ethic and those who reject it in favor of the quality-of-life ethic. The Supreme Court has never purported to decide which ethic our Constitution mandates for valuing the lives of human beings before birth. Nevertheless, deciding which ethic should apply is fundamental to resolving the abortion issue under the Constitution.

A few proponents of abortion have conceded that the real issue at stake is the intrinsic value of human life. The California Medical Association journal California Medicine, for exampe, has recognized the relationship between the rejection of the sanctity-of-life ethic and the advocacy of abortion:

> In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right, and even necessary.

A New Ethic for Medicine and Society, 113 California Medicine 67, 68 (1970). Similarly, some witnesses who appeared before the Subcommittee to oppose S. 158 tacitly rejected the sanctity of human life. For example, one witness stated that "[a]t some point as the amazing chain of events that results in a fertilized egg becoming a human being unfolds, we acquire the basis for those attributes that make us humans, but precisely when I cannot say." *Hearings on S.*

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children being aborted today are human beings. Other medical realities further confirm this fact. For example, babies within their mothers' wombs can now be treated to alleviate various disorders. The doctors treating them do not try to redefine them as non-human. When doctors or scientists deny in selected contexts that unborn children are human beings, their statements should be recognized as evasions of facts by those for whom the facts are inconvenient.

158 (May 20 transcript at 24) (testimony of Dr. James Neel). By this view, only after a developing member of the human race has acquired certain attributes or qualities is he or she accorded value as a "human being."

Advocates of a quality-of-life ethic vary in the qualities they choose as a standard for which human lives to value. The common element of every "quality of life" view, however, is a denial of the intrinsic worth of all human life, along with an attempt to define what qualities must be present in a human being before its life is to be valued. Although the scientific witnesses who adopted the quality-of-life ethic did not state explicitly the theoretical basis for this ethic, it has been the subject of frequent commentary in modern literature on medical ethics. A review of this literature helps in examining this alternative to the sanctity-of-life ethic.

A clear, straightforward statement of the quality-of-life ethic is found in an article by religion professor George H. Ball, *What Happens at Conception?* Christianity and Crisis 274 (Oct. 19, 1981). Professor Ball asserts that "mere biological membership in the species *homo sapiens* does not make one a human being." *Id.* at 286. The quality that Professor Ball requires before he will recognize a being as human is "consciousness of self." He summarizes his quality-of-life standard with these words: "Until a living being can take conscious management of life and its direction, it remains an animal." *Id.*

Professor Ball shows more willingness than many others to follow his theory to its logical conclusion: "Thus, shocking as it may seem, a newly born infant is not a human being." *Id.*

Candidly, Professor Ball articulates what so many other advocates of a quality-of-life ethic leave to inference. He rejects the customary biological definition of the term "human being." Individuals such as the newborn, who are human beings by any ordinary usage of language, are not human beings in his lexicon. Instead, "human beings" are only those whose lives have a certain quality, a quality which he specifies to be "consciousness of self." Professor Ball does not deny the biological facts of human life; he denies that all human lives have intrinsic worth and equal value.

In another instructive example, Professors Raymond S. Duff and A. G. M. Campbell of the Yale Medical School make clear the opposition between the sanctity-of-life ethic and the quality-of-life ethic. The professors describe the death of certain handicapped infants by starvation, or other deliberate forms of denial of normal care, as a "management option." Duff & Campbell, *Moral and Ethical Dilemmas in the Special-Care Nursery,* 289 New Eng. J. of Med. 890 (1973). Laws against killing such handicapped infants by inattention, they conclude, "should be changed." *Id.* at 894. The quality-of-life ethic is superior to the sanctity-of-life ethic:

> Recently, both lay and professional persons have expressed increasing concern about the quality of life for these severely impaired survivors and their families. Many pediatricians and others are distressed with the long-term results of pressing on and on to save life at all costs and in all circumstances. Eliot Slater stated, "If this is one of the consequences of the sanctity-of-life ethic, perhaps our formulation of the principle should be revised."

Id. at 890 (footnotes omitted).

Professors Duff and Campbell also expressed a willingness to redefine especially unfortunate newborn human beings as not human beings at all. According to them, "Such very defective individuals were considered to have little or no hope of achieving meaningful 'humanhood.' For example, they have little or no capacity to love or be loved." *Id.* at 892 (footnote omitted).

This subcommittee rejects the notion that our definition of human being should depend on who is loved or unloved, wanted or unwanted. Though human suffering often accompanies many unfortunate cases of mental and physical handicap, it cannot be allowed to obscure the fact that such unfortunate individuals are indeed human beings. Attempts to redefine "human being" in such cases merely obscure the ethical and moral issues that underlie any public abortion policy.

Our constitutional history leaves no doubt which ethic is written into our fundamental law. The Declaration of Independence expressly affirms the sanctity of human life:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.

The proponents of the fourteenth amendment argued for the amendment on the basis of these principles. Congressman John A. Bingham of Ohio, who drafted the first section of the fourteenth amendment, stated after the adoption of the Joint Resolution of Congress proposing this amendment:

> Before that great law [of the United States,] the only question to be asked of the creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.

Cong. Globe, 40th Cong., 1st Sess. 542 (1867).

Similarly, Abraham Lincoln emphasized the importance of holding to the concept of the sanctity of human life and of never denying the inalienable value of every human being.

> I should like to know if taking this old Declaration of Independence, which declares that all men are equal upon principle and making exceptions to it where will it stop. If one man says it does not mean a negro, why not another say it does not mean some other man? If that declaration is not the truth, let us get the Statute book, in which we find it and tear it out! . . . let us stick to it then . . . let us stand firmly by it then.

Speech during the Lincoln-Douglas senatorial compaign (July 10, 1858), *reprinted in* 2 *The Collected Works of Abraham Lincoln* 484, 500–01 (R. Basler ed. 1953) (footnote omitted).

As the framers planned it, all human beings were to fall within the ambit of the amendment's protection. Congressman Bingham spoke of the rights guaranteed by the amendment as applying to "any human being." *Cong. Globe,* 39th Cong., 1st Sess. 1089 (1866). Bingham also said the amendment would protect the rights of "common humanity." *Cong. Globe,* 40th cong., 2d Sess. 514 (1868).

Senator Jacob M. Howard of Michigan, who sponsored the amendment in the Senate, regarded it as applicable to any member of the human "race." *Cong. Globe,* 39th Cong., 1st Sess. 2766 (1866). Echoing the familiar phrases of the Declaration, these men sought to give added legal protection to rights that the founders of our republic had declared fundamental, paramount among which is the right to life. The fourteenth amendment stands upon the principle that all human life has intrinsic worth and equal value. To sacrifice the sanctity-of-life ethic is thus to abrogate the fourteenth amendment.

The Supreme Court itself has strongly implied support for the sanctity-of-life ethic, by holding that "person" must include all living human beings:

> We start from the premise that illegitimate children are not "nonpersons." They are humans, live, and have their being.

Levy v. *Louisiana,* 391 U.S. 68, 70 (1968). In its 1973 abortion decision, the Supreme Court did not consider whether unborn children fit within this definition of "person." Because it found itself unable to resolve the question of when human life begins, the Court did not face this question. If, in a case arising as a result of S. 158, the Supreme Court should accept this subcommittee's finding that unborn children are living human beings, the Court would then be squarely presented with the question whether the *Levy* definition of human personhood applies equally to the unborn.

Supreme Court justices have strongly affirmed the principle of the sanctity of human life in cases arising in the context of capital punishment. Justice Brennan refers to our society as "a society that . . . strongly affirms the sanctity of life . . . ." *Furman* v. *Georgia,* 408 U.S. 238, 286 (1972) (Brennan, J., concurring). This ethic accords supreme value to the life of each human being simply by virtue of its humanity. "The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings." *Id.* at 270. Such punishment, he observes, "may reflect the attitude that the person punished is not entitled to recognition as a fellow human being." *Id.* at 273.

The sanctity-of-life ethic affirmed in these statements, we believe, is a concept at least as important in the context of abortion as in the context of capital punishment. The Subcommittee does not express any view on whether, under our Constitution, a convicted criminal may be punished by forfeiting his life. We merely observe that the sanctity-of-life ethic demands the utmost respect for the value of innocent lives.

It is true, of course, that the Justices did not make similar observations in the 1973 abortion decision. Once again, it is crucial to note, however, that they also professed not to know whether the unborn were living human beings. Views of Supreme Court Justices can certainly change as the Justices acquire a deeper understanding of the facts on which constitutional rules must operate. For instance, the Court itself has said that the interpretation of the eighth amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States,* 217 U.S. 349, 378 (1910). In like fashion, the fourteenth amendment's protection of life can certainly acquire meaning as scientific facts concerning the beginning of

human life enlighten public opinion and as Congress affirms the principle of the sanctity of life.

It is instructive to note that the highest court of West Germany accorded constitutional protection to unborn children precisely because the court affirmed the principle of the sanctity of human life. The "Basic Law," or the Bonn constitution, of West Germany guarantees the "right to life." The court explained this guarantee as a reaction against the Nazi regime's idea of "Destruction of Life Unworthy to Live" and as an "affirmation of the fundamental value of human life . . . ." Therefore, the court concluded:

> The development process thus begun is a continuous one which manifests no sharp caesuras and does not permit any precise delimitation of the various developmental stages of the human life. It does not end with birth either; the phenomena of consciousness specific to human personality, for instance, do not appear until some time after birth. Therefore the protection of Article 2, paragraph 2, sentence 1, of the Basic Law may not be limited either to the "completed" human being after birth nor to the independently viable *nasciturus*. The right to life is guaranteed to everyone who "lives;" no distinction can be made between individual stages of the developing life before birth or between prenatal and postnatal life.
>
> c) In countering the objection that "everyone" in common parlance and in legal terminology generally denotes a "completed" human person, [and] that, therefore, a purely verbal interpretation militates against the inclusion of the prenatal life in the range of efficacy of Article 2, paragraph 2, sentence 1, of the Basic Law, it must be emphasized that in any event the sense and purpose of this constitutional provision require that the protection of life be also extended to the developing life. The safeguarding of human existence against transgressions of the State would be incomplete if it did not also comprise the preliminary phase of the "completed life," the prenatal life.

Decision of February 25, 1975, [1975] 39 BVerfGE 1.

The West German court recognized the dangers that can follow when a society rejects the idea that all human lives have intrinsic worth. If American law comes to reject the principle of the sanctity of human life, there will be no secure protection for the lives of those, born or unborn, who are weakest and most vulnerable. Some judges have already expressed a belief that the life of a physically or mentally handicapped individual is of less value than the life of other persons. Even before *Roe* v. *Wade* a federal judge found that the state interest is "virtually nil" in protecting the life of an unborn child who is "likely to be born a mental or physical cripple." *Abele* v. *Markle,* 342 F. Supp. 800, 804 (D. Conn. 1972). To kill such a child before birth, the judge believed, would be a "therapeutic" measure. *Id.* Similarly, another federal judge has belittled the value of the life of any unborn child who is "defective" or "intensely unwanted by its future parents." *Doe* v. *Scott,* 321 F. Supp. 1385, 1391 (N.D. Ill. 1971).

Fortunately, federal courts have not carried such reasoning to its logical conclusion. So far they have not ruled that newborn babies

who are physically or mentally handicapped and unwanted by their parents are somehow less than human. A Nobel Prize-winning scientist and proponent of the quality-of-life ethic, however, has made just such a suggestion:

> If a child were not declared alive until three days after birth, then all parents could be allowed the choice . . . . The doctor could allow the child to die if the parents so chose and save a lot of misery and suffering.

Interview with James. D. Watson, *Children from the Laboratory,* 1 Prism 12, 13 (1973).

Because it affirms the Constitution, the Subcommittee cannot accept any legal rule that would allow judges, scientists, or medical professors to decide that some human lives are not worth living. We must instead affirm the intrinsic worth of *all* human life. We find that the fourteenth amendment embodies the sanctity of human life and that today the government must affirm this ethic by recognizing the "personhood" of all human beings. Earlier we found, based upon scientific examination, that the life of each human being begins at conception. Now, basing our decision not upon science but upon the values embodied in our Constitution, we affirm the sanctity of all human life. Science can tell us whether a being is alive and a member of the human species. It cannot tell us whether to accord value to that being. The government of any society that accords intrinsic worth to all human life must make *both* a factual determination recognizing the existence of all human beings *and* a value decision affirming the worth of human life.

VI. LEGAL EFFECT OF S. 158

The provisions of section two of S. 158 follow necessarily from the findings of S. 158 and of this subcommittee: first, that unborn children are human beings, and, second, that the lives of all human beings have intrinsic worth and equal value. The sanctity-of-life ethic embodied in the fourteenth amendment requires that all human beings be recognized as persons for purposes of the protection of life secured by the fourteenth amendment. The ethic embodied in this amendment does not allow government to deny the value of any human life on grounds of race, sex, age, health, defect, or condition of dependency. Unborn children, because they are human beings, must therefore be persons entitled to the fourteenth amendment's protection of life. Section two of S. 158 enforces the amendment's protection of life by guaranteeing that that protection applies to all human beings, including unborn children.

The first effect of S. 158 is to require the Supreme Court to reconsider its holding in *Roe* v. *Wade* that unborn children are not persons entitled to protection of their lives under the fourteenth amendment. With the findings of S. 158, the Court faces a fundamentally different issue than it faced in *Roe* v. *Wade.* In that case it addressed the personhood issue without purporting to know whether unborn children are human beings and without considering whether all human lives are to be accorded intrinsic worth and equal value under our Constitution. Now, the findings of S. 158 would appear to bring the question of the personhood of unborn children within the holding of *Levy* v. *Louisiana,* in which the

Court stated that individuals who are "humans, live, and have their being" cannot be "nonpersons." 391 U.S. 68, 70 (1968). Upon review of S. 158, it will be for the Supreme Court to resolve the inconsistency between *Levy* and *Roe* and to make the ultimate constitutional decision whether unborn children are persons entitled to protection of the fourteenth amendment right to life.

The second legal effect of S. 158 will be to require the Supreme Court to reconsider its 1973 holding that found the right of privacy to include abortion and that permitted abortion on demand throughout the term of pregnancy. In *Roe* v. *Wade*, the court observed that any decision of the abortion issue must be "consistent with the relative weights of the respective interests involved . . . ." 410 U.S. at 165. The findings of S. 158 pose a question concerning the respective interests involved in abortion, but that question is fundamentally different from the question the Court addressed in *Roe* v. *Wade*. The Court never considered whether the interest in having an abortion outweighs the interest in the life of a human being whose life is accorded intrinsic worth. The congressional findings in S. 158 will require the Court to reexamine whether the respective interests involved in an abortion can justify a judicial policy of abortion on demand. In *Roe* v. *Wade* the Court already stated:

> 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.

410 U.S. at 156–57.

If the Supreme Court follows this reasoning, upon enactment of S. 158 into law, states will be able to protect unborn children by laws similar to those widely enforced before the Supreme Court struck down anti-abortion laws in 1973. S. 158 also expresses the incontrovertible principle of constitutional law that states have authority to protect the lives of those they rationally regard as human beings. Whatever the scope of the right to privacy may be, it cannot include a right to kill a human being.

The third legal effect of S. 158 is that no state will be able to deprive an unborn child of life without due process of law. Under Supreme Court precedent, states could thus perform or fund abortions only when necessary to protect compelling state interests. Protection of the life of the mother would surely be interpreted as one such compelling state interest. *See Roe* v. *Wade*, 410 U.S. at 173 (Rehnquist, J., dissenting). Other difficult cases will be resolved by the courts on a case-by-case basis. It seems apparent, however, that in light of S. 158 no state could fund or perform abortions on demand.

What S. 158 will not do is also important to recognize. First, S. 158 establishes no criminal penalties; the passage of S. 158 will not make abortion a crime.

Second, while S. 158 will prevent states from funding or performing abortions on demand, it will not automatically prevent the performance of abortions by private means. The fourteenth amendment only provides that no *state* shall deprive any person of life without due process of law. *See Martinez* v. *California*, 444 U.S. 277, 284 (1980). The amendment does not directly affect private action; therefore S. 158 will not directly affect the performance of

abortions by private clinics. A state's failure to act to protect unborn children against privately performed abortions, moreover, would not likely be deemed state action. *See Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Reitman* v. *Mulkey*, 387 U.S. 369, 381 (1967) (equal protection clause applies to private action only when the state has acted affirmatively to "encourage and involve the State in private discrimination"); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 721-22 (1961) ("private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it").

Consequently, abortions will become illegal in the wake of S. 158 only if state legislatures choose to make them illegal. It is incorrect to state that S. 158 will make abortion "murder." S. 158 will not make abortion murder because it does not even make abortion a crime. Further, states are not likely to make abortion murder, since before 1973 all state anti-abortion laws established abortion either as a lesser degree of homicide or as a crime against the person designated only as "abortion," with leser penalties. This subcommittee regrets that the widespread journalistic use of the term "murder" in connection with S. 158 has engendered unwarranted emotionalism on this topic; such reports reflect a misunderstanding of this bill.

The third thing S. 158 will not do is allow states to outlaw any forms of contraception. S. 158 allows states to protect unborn children only after they have come into existence at conception. Contraceptives, by definition, prevent conception. They do not terminate the life of any living human being. Furthermore, drugs and devices that do act to perform abortions after conception will not be prohibited following enactment of S. 158 unless states so legislate.

Fourth, S. 158 will not require state lesislatures to categorize abortion as murder. State legislatures will have descretion, within limits of reason, to set penalties for abortion as for any other crime. They may consider mitigating circumstances for the crime of abortion, just as for any other degree of homicide or any other crime. States, furthermore, may make exceptions from an abortion statute where there is a compelling state interest for doing so. Such an interest would certainly exist in a case where an abortion was necessary to save the life of the mother, assuming that in such cases all practicable means are taken to preserve the life of the child. Here, as before, other difficult cases will have to be resolved by the courts on a case-by-case basis.

VII. CONSTITUTIONALITY OF S. 158

Congress has constitutional power to enact S. 158 despite the holding of *Roe* v. *Wade* that unborn children are not persons and there is a right to abort them. The findings of S. 158 that unborn children are human beings as a matter of biological fact and that the sanctity-of-life ethic is central to our Constitution create a fundamentally different question of constitutional law than the Supreme Court faced in *Roe* v. *Wade*. The factual question whether unborn children are human beings is central to deciding whether their lives are protected by a constitutional amendment that is intended to protect all human beings. The value decision of wheth-

er to accord intrinsic worth and equal value to all human life is also central to the enforcement of the fourteenth amendment's protection of life. The Supreme Court's *Roe* v. *Wade* opinion found the judiciary unable to address the first question, whether unborn children are human beings. It did not therefore address the question whether the lives of unborn human beings are to be accorded intrinsic worth and equal value along with other human lives. When the Supreme Court faces these two congressional determinations in the course of reviewing the constitutionality of S. 158, it will therefore face a constitutional question far different from that decided in *Roe* v. *Wade.*

Congress has the authority and, indeed, the duty to address questions of fact and value that are central to the interpretation and enforcement of constitutional provisions. The task of interpreting the Constitution in the context of specific cases is ultimately for the Supreme Court. But when the Supreme Court has professed an inability to address underlying questions that are fundamental to the interpretation of a constitutional provision, Congress is entirely justified in expressing its view on such questions, subject to Supreme Court review. Those who argue that Congress cannot address the questions of when a human life begins and what value to accord human life and unborn children are in effect arguing that no branch of the federal government can address these questions. Such an argument would mean that, even if unborn children are human beings, even if the Constitution accords intrinsic worth and equal value to all human lives, nevertheless no branch of government could recognize such facts and protect unborn children. Such a result would be absurd. Government cannot be powerless to recognize facts and make value decisions essential to the enforcement of a right so fundamental as the right to life.

The purpose of this legislation is not to impair the Supreme Court's power to review the consitutionality of legislation, but to exercise the authority of Congress to disagree with the result of an earlier Supreme Court decision based on an investigation of facts and on a decision concerning values that the Supreme Court has declined to address. The Supreme Court retains full power to review the constitutionality of S. 158, and the Subcommittee believes that the bill *should* be reviewed by the Supreme Court. A primary purpose of S. 158 is precisely to produce a new consideration by the Supreme Court of its abortion decision in light of both the biological facts concerning unborn human life and the principle that all human life is of intrinsic worth and equal value. If the Supreme Court finds the determinations of Congress to be persuasive, it will change its constitutional decision as to the availability of abortion on demand. If the Supreme Court finds Congress's determinations unsubstantiated and unpersuasive, it can refuse to follow them. In either case, the Supreme Court will have an opportunity to interpret S. 158 in light of the Constitution.

Some critics of S. 158 argue that even if *Roe* v. *Wade* was wrongly decided and ought to be overruled, S. 158 is unconstitutional because Congress must act in conformity with Supreme Court decisions until the Court itself chooses to overrule them. This criticism rests on a profound misapprehension of the doctrine of judicial review espoused in *Marbury* v. *Madison* 5 U.S. (1 Cranch) 137 (1803). Under *Marbury,* the Supreme Court, presented

with a proper case, must rule in accordance with its own interpretation of the Constitution rather than with a contrary congressional interpretation, because the Justices have taken an oath to uphold the Constitution. As Chief Justice Marshall stated in *Marbury*, automatic judicial deference to a legislative interpretation of the Constitution would constitute an implicit violation of the Justices' oath of office; the Justices would thereby "close their eyes on the constitution, and see only the law." 5 U.S (Cranch) at 178. It does not follow, however, that once the Court has interpreted a provision of the Constitution members of Congress must automatically defer to the judicial interpretation. Indeed, members of Congress take the same oath that the Justices take to uphold the Constitution. Confronted with a proposed law that is consistent with his own honest construction of the Constitution and with his view of sound policy, but that conflicts with what he regards as an erroneous Supreme Court decision, a member of Congress has at least the right and perhaps the duty to vote for the bill. To do otherwise would be to close his eyes on the Constitution and see only the case. Through its power to issue judgments that are binding on the parties to litigation, the Supreme Court will as a practical matter generally have the final word in any dispute over constitutional interpretation. But this does not preclude the possibility of a responsible dialogue between Congress and the Court.

As an attempt to influence the Supreme Court to change a constitutional decision, S. 158 calls to mind Abraham Lincoln's approach to the Supreme Court's *Dred Scott* decision of 1857. President Lincoln observed in his first inaugural address that for any erroneous Supreme Court decision there is "the chance that it may be over-ruled, and never become a precedent for other cases . . . ."[12]

Throughout his vigorous campaign against the *Dred Scott* decision, Abraham Lincoln emphasized an approach that would influence the Supreme Court to reverse its decision:

> We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject.[13]

In taking this position, Lincoln acknowledged the role of the Supreme Court in reviewing the constitutionality of legislation:

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court . . . [and that such decisions] are also entitled to very high respect and consideration, in all paralel [*sic*] cases, by all other departments of the government.[14]

To influence the Supreme Court without denying its proper role within our constitutional structure, Lincoln argued that the *Dred Scott* decision should be opposed as a

> Political rule which shall be binding . . . on the members of Congress or the President to favor no measure that

[12] First Inaugural Address (March 4, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (R. Basler ed. 1953).

[13] Speech during the Lincoln-Douglas senatorial campaign (October 13, 1858), *reprinted in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (R. Basler ed. 1953).

[14] First Inaugural Address (March 4, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (R. Basler ed. 1953).

> does not actually concur with the principles of that decision.[15]

Rather, he advocated:

> If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that Dred Scott decision, I would vote that it should.[16]

When Congress votes for a measure contrary to a Supreme Court decision which congressmen feel is erroneously decided, the Supreme Court upon review of that statutory measure will have an opportunity to reverse its earlier decision.

Commentators have sought to define the proper limits of this approach by Congress toward decisions it considers erroneous. The distinguished scholar of constitutional law at Columbia University, Herbert Wechsler, has commented on Lincoln's idea of pursuing the "chance" that an erroneous ruling "may be over-ruled" by the Supreme Court. Wechsler states: "When that chance has been exploited and has run its course, with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting on repeated litigation?" Wechsler, *The Courts and the Constitution,* 65 Colum. L. Rev. 1001, 1008 (1965). S. 158 is not inconsistent with this view of the limits on Congress' role. The Supreme Court has yet to reexamine its abortion decision of 1973, and certainly it has never reexamined it in light of the biological facts concerning the humanity of unborn children and the importance of the principle of the sanctity of human life. The Court deserves a chance to reconsider its decision before Congress and the states proceed to enact a constitutional amendment reversing *Roe* v. *Wade.*

If the Supreme Court considers Congress's finding in S. 158 that unborn children are human beings, and if the Court considers the principle that all human lives are of intrinsic worth and equal value, then the Court should uphold S. 158 and change its earlier decision that legal abortion on demand is required by the Constitution. Both the explicit wording and plain intent of the fourteenth amendment and the Supreme Court's decisions concerning Congress's power to enforce the fourteenth amendment support S. 158. The framers of the fourteenth amendment, as shown at page 16, *supra*, intended it to be universal in its application and to apply to "any human being." *Cong. Globe,* 39th Cong., 1st Sess. 1089 (1866) (remarks of Congressman Bingham). The fourteenth amendment does not qualify the term "person" or limit protection to a certain class or race or type of human being. It speaks in absolutes and declares unequivocally that no state shall deny *any* person *life,* liberty or property without due process of law. In the hearings held by the Subcommittee, no legislative history whatsoever was cited by any of the witnesses to indicate that the framers of the four-

[15] Speech during the Lincoln-Douglas senatorial campaign (October 13, 1858), *reprinted in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (R. Basler ed. 1953).

[16] Speech during the Lincoln-Douglas senatorial campaign (July 10, 1858), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 484, 495 (R. Basler ed. 1953). Lincoln's view was consistent with that of Andrew Jackson in his message of 1832 vetoing the Act to recharter the Bank of the United States: "The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve." 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1145 (J. Richardson ed. 1897).

teenth amendment intended the term "person" to be a restrictive term including fewer than all human beings. Any suggestion that some human beings can be "nonpersons" under the law simply echoes the holding of *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1857) a decision the fourteenth amendment was intended to reverse.

It is true, of course, that Congress did not debate the question of abortion during its consideration of the fourteenth amendment. Some of the witnesses who appeared before the Subcommittee to testify against S. 158 indicated that this absence of debate was dispositive regarding the intent of the framers. It is no less true, however, that the architects of our fourteenth amendment liberties did not address the right of privacy, or whether the due process clause prohibited the states from outlawing abortion, pornography, prayer in the public schools, searches and seizures of illicit drugs in the glove compartments of automobiles, and countless other activities that the courts have held to be under the aegis of the fourteenth amendment. As Justice Marshall observed, this is a Constitution we are construing, a document which lays down general principles that are applicable to human affairs in every stage of our historical development:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument but from the language. . . . . we must never forget, that it is *a constitution* we are expounding.

McCulloch v. *Maryland* 17 U.S. (4 Wheat.) 316, 407 (1819).

To interpret the word "person" in its narrowest sense, and to insist that it does not encompass prenatal life because the authors of the fourteenth amendment neglected to debate the issue of abortion (which the states were then regulating to the apparent satisfaction of the framers of the amendment) makes no more sense than to argue that infants or senior citizens are not "persons" within the meaning of the amendment because the framers never discussed infanticide or euthanasia. Although the principal immediate motive of the framers was to protect the rights of ex-slaves, the fourteenth amendment, courts have long recognized, protects the right of other classes of human beings.

At the time Congress was debating the fourteenth amendment and the states were ratifying the amendment, it was widely known that the life of a human being begins at conception. During the period from 1848 to 1876 almost all the states changed the common law standard, which had protected the unborn child only from the point of quickening, the time the mother first perceived the movement of the child. The new statutes "explicitly accepted the . . .

assertions" of leaders of the American Medical Association that "interruption of gestation at any point *in* a pregnancy should be a crime . . . ." J. Mohr, *Abortion in America* 200 (1978). *See Hearings on S. 158* (June 10 transcript at 84–85) (testimony of Professor Joseph Witherspoon); *Hearings on S. 158* (June 1 transcript at 108–10) (testimony of Professor Victor Rosenblum). In the mid-nineteenth century, doctors had learned that the unborn child was a distinct living being even prior to quickening. Statutes protecting the unborn child from the moment of conception resulted from the American Medical Association's campaign for strict anti-abortion laws, a campaign undertaken in response to advances in the knowledge of embryology. The AMA successfully sought to persuade states to protect every unborn child because abortion was the "unwarrantable destruction of human life." 12 American Medical Association, *The Transactions of the American Medical Association* 75, 78 (1859). As Professor Rosenblum pointed out in his testimony before the Subcommittee:

> Since the 14th Amendment with its broad protection of the lives of all persons was ratified by State legislatures while these very same legislatures, persuaded by newly-discovered scientific and medical evidence, were extending the protection of the criminal law to encompass *all* the unborn from the time of conception or fertilization, it is a fair assumption that the unborn were not excluded from those "persons" covered by the Amendment.

Hearings on S. 158 (June 1 transcript at 111) (emphasis and quotation marks added to conform to written statement).

To understand the views of the framers of the fourteenth amendment with regard to the personhood of unborn children we must not confine our search to a survey of the criminal laws. These legislators were children of their culture, of thousands of years of a Judaeo-Christian civilization in which protection of human life had been "an almost absolute value in history." Noonan, "An Almost Absolute Value in History," in *The Morality of Abortion* 1 (J. Noonan ed. 1970).

Ancient civilizations differed in their views on the value of human life and, consequently, on their views of abortion. The oath of Hippocrates, which we trace to ancient Greece, and which, until recently, set the standard for the medical profession, affirms the value of all human life. It required physicians entering the practice of medicine to swear that they "will not give to a woman an abortive remedy." [17]

On the other hand, the Romans, with some exceptions,[18] not only allowed abortion but practiced it extensively. A reason is that

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[17] L. Edelstein, THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION" 3 (1943).

[18] The second-century Greco-Roman gynecologist Soranus noted that the physicians of his day were divided into two camps. One party followed Hippocrates whom Soranus quotes as saying, "'I will give to no one an abortive.'" This party believed that "it is the specific task of medicine to guard and preserve what has been engendered by nature." The other party, among whom Soranus included himself, allowed abortion but only under certain limited conditions:

"The other party prescribes abortives, but with discrimination, that is, they do not prescribe them when a person wishes to destroy the embryo because of adultery or out of consideration for youthful beauty; but only to prevent subsequent danger in parturition if the uterus is small and not capable of accommodating the complete development, or if the uterus at its orifice has knobby swellings and fissures, or if some similar difficulty is involved."

SORANUS GYNECOLOGY. 1.60 at p. 63 (O. Temkin trans. 1956). These limitations on abortion were more honored in theory than in practice and Soranus had to warn his ideal midwife that

the Roman government imposed a narrow definition of citizenship and permitted a general disregard for the value of human life in non-citizens. The result was widespread practice of slavery, infanticide, killing for sport, torture and other forms of barbarity, along with abortion.

The principle of the intrinsic value of human life entered the Western world as the new Judeo-Christian ethic clashed with this Roman and pagan view which awarded rights only to select individuals.[19]

Significantly, the earliest Christian writing outside the New Testament, the *Didache (Teaching of the Twelve Apostles)*, clearly prohibits abortion and infanticide, stating that, "You shall not slay the child by abortions. You shall not kill what is generated" and this teaching accords with that of other leading Christians of the time.[20]

The triumph of this Judeo-Christian sanctity-of-life ethic established in Western civilization a principle of protecting all individuals, not merely a select category of persons defined arbitrarily by the state. When nineteenth-century American legislators passed laws protecting unborn children from the moment of conception they acted from the same recognition of this principle that had led them to ratify the fourteenth amendment. At any rate, no statute that enforces the fourteenth amendment would violate the Constitution merely by defending the sanctity of life. That principle undergirds the amendment and a defense of it is a defense of the Constitution.

The constitutionality of S. 158 is further supported by Supreme Court opinions concerning the power of Congress to enforce the fourteenth amendment. Not only the majority opinions, but also minority opinions taking a more restrictive view of this congressional power, support the constitutionality of S. 158. Supreme

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"she must not be greedy for money, lest she give an abortive wickedly for payment." *Id.* 1.4 at p. 7.

[19] See Lactantius, *The Divine Institutes* 6.20 in 49 THE FATHERS OF THE CHURCH 450-55 (M. McDonald trans. 1964) for a typical early Christian critique of the inhumanity of Roman values. Lactantius enumerates the ways in which the Romans degrade humanity. Beginning first with the Roman games he declares:

"For, although a man be condemned deservedly, whoever reckons it a pleasure for him to be strangled in his sight defiles his own conscience, just as surely as if he were a spectator and participant of a murder which is performed secretly. They call these games, however, in which human blood is spilled. So far has humanity departed from men that, when they kill the very life of men, they think that they are playing, but they are more harmful than all those whose blood they use for their pleasure."

Id. at 451. After concluding his discussion of the public killing that characterized the games, Lactantius then turns to the Romans' brutal attitudes towards infants, attitudes that promoted infanticide and abortion:

"It is always wrong to kill a man whom God has intended to be a sacrosanct creature. Let no one, then, think that it is to be conceded even, that newly born children may be done away with, an especially great impiety! God breaths souls into them for life, not for death. Yet men, lest they stain their hands with that which is a crime, deny light not given by them to souls still fresh and simple. Does someone think that they will be sparing of a stranger's blood who are not of their own? These are without any question criminal and unjust."

Id. at 452.

Some Romans sought to assuage their consciences by not actually killing an unwanted infant, leaving it out to die by exposure instead. They rationalized that if the gods wished to save the infant they would then do so just as they saved Oedipus in the myth. Lactantius castigates this practice as more cruel, if possible, than simple murder:

"What of those whom a false piety forces to expose? Are they able to be judged innocent who cast their own members as prey for dogs and kill whatever is in them more cruelly than if they had strangled it?"

Id. at 452-53.

[20] DIDACHE 2.2. In the first few centuries after Jesus, the Christian writers who mentioned abortion opposed it. Included in their number were Clement of Alexandria, Tertullian, Cyprian, John Chrysostom, Jerome, and Augustine. *See* NOONAN, *supra*, at 11-18.

Court decisions recognize broad power in Congress under section 5 of the fourteenth amendment to "enforce, by appropriate legislation, the provisions of this article." The Court has upheld the power of Congress to make findings relevant to the enforcement of fourteenth and fifteenth amendment rights, and to enforce those amendments consistent with such findings. *See South Carolina* v. *Katzenbach,* 383 U.S. 301, 333-34 (1966). Even when Congress has made no relevant findings, the Court has upheld the power of Congress to expand the substantive scope of a fourteenth amendment right beyond the Court's previous interpretation. *Katzenbach* v. *Morgan,* 384 U.S. 641, 648-49 (1966). In *Katzenbach* v. *Morgan* the court found broad authority in Congress to interpret the provisions of the fourteenth amendment independent of the interpretations of the judicial branch, whenever Congress acts to "expand" fourteenth amendment rights. *Id.* at 648-49.

As it faces the problem of abortion, Congress has before it a uniquely appropriate occasion for exercising this power to find facts and make judgments relevant to the interpretation of fourteenth amendment rights. The Supreme Court's professed inability to address and resolve the question whether unborn children are human beings has left a gap in the knowledge necessary for the federal government to enforce the fourteenth amendment right to life. The congressional findings in S. 158 concerning the facts and value of human life in unborn children can now fill this gap and allow a thoroughly informed decision by both the legislative and the judicial branches concerning the power of states to protect unborn children.[21]

Former Solicitor General Robert Bork testified before the Subcommittee that S. 158 was consistent with the *Katzenbach* v. *Morgan* decision but that *Katzenbach* was wrongly decided. *Hearings on S. 158* (June 1 transcript at 10-11). Even if one takes a narrower view than that of the *Katzenbach* v. *Morgan* opinion of Congress's power to enforce the fourteenth amendment, S. 158 is still constitutional. Justice Harlan dissented from *Katzenbach* v. *Morgan* and outlined a narrow enforcement power for Congress. But even the terms of Justice Harlan's theory allow a role for Congress in cases such as S. 158:

> To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect.

384 U.S. at 668 (Harlan, J., dissenting). S. 158 sets forth "legislative facts" relevant to the issue of abortion in its determination that unborn children are human beings. If the Supreme Court defers to this finding, as Justice Harlan would seem to suggest it should, the Court will have to find that the fourteenth amendment protects the lives of unborn children unless the Court denies that their lives have intrinsic worth and equal value. Another matter the Court should take into consideration is the finding of S. 158 concerning the importance of the sanctity of human life and the protection

[21] For a discussion of Supreme Court respect for congressional judgments on matters of "value" rather than "fact," *see* footnote 22, *infra.*

afforded all human life by the fourteenth amendment.[22] Both these findings of S. 158, considered in tandem, will require a re-evaluation of the Supreme Court's *Roe* v. *Wade* decision.

Such an exercise of Congress's enforcement power accords with former Solicitor General Bork's view that

> 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. A constitutional role of even such limited dimensions is not to be despised.

R. Bork, *Constitutionality of the President's Busing Proposals*, 5–6 (American Enterprise Institute 1972). Here Bork expresses substantially the same view as Abraham Lincoln's, that Congress can affirm a principle at odds with a prior Supreme Court decision that is contrary to the Constitution, and so perhaps influence the Court to overrule that decision. Members of Congress have a duty to cast their votes according to their own honest view of the Constitution. If that view is at odds with a Supreme Court decision, it is appropriate to give the Court the opportunity to conform its decision to the Constitution. S. 158 does not seek to evade judicial review; it invites judicial review. The purpose of S. 158 will be best fulfilled if the Supreme Court considers on its merits each statement of fact and value made in the bill, and then tenders a constitutional judgment accordingly.

It is crucial to note, therefore, that the constitutionality of S. 158 does *not* depend on one's view of *Katzenbach* v. *Morgan* and the scope of Congress's power to enforce the fourteenth amendment. The Subcommittee does not take the position that Congress has a plenary power under the enforcement clause of the fourteenth amendment to create new rights or refashion the substantive content of constitutional rights. No matter how narrow one believes Congress's power should be, it is not inappropriate for Congress to make factual findings and value decisions on questions fundamental to the interpretation of the fourteenth amendment, when the Supreme Court has declared its own inability to address those questions. Congress's attempt with S. 158 at influencing the Supreme Court to reexamine *Roe* v. *Wade* in light of congressional findings is *the most responsible* means to address an erroneous Supreme Court decision, a means President Lincoln clearly recognized. A constitutional amendment will be necessary only if the Supreme Court in reviewing S. 158, refuses to modify the result imposed by *Roe* v. *Wade*.

Finally, Congress should reject the view that S. 158 would "establish a religion" because it affirms the moral principle of the sanctity of human life. The signers of the Declaration of Independence and the framers of the fourteenth amendment obviously believed

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[22] Professor Archibald Cox, who in his testimony before the subcommittee suggested a narrow reading of Katzenbach in the context of S. 158, earlier suggested a broader reading of the decision: ". . . Congress has power under section 5 of the fourteenth amendment to extend the practical application of the amendment's broad constitutional guarantees upon its own findings of fact, characterizations, and resolution of *questions of proportion and degree*." Cox, *The Role of Congress in Constitutional Determinations* 40 CINN. L. REV. 199, 238 (1971) (emphasis added). The question of the sanctity of all human life involves more than the compilation of raw data; whether to regard all biological members of the human species as "human beings" would seem to be the sort of characterization, or resolution of a question of proportion and degree, which Cox's earlier view would suggest Congress has the power to make under section 5.

that the sanctity of human life is a principle *embodied* in our governmental order, not a principle in violation of that order. Indeed, the Supreme Court has expressly held that legislation concerning abortion does not violate the establishment clause merely because it "happens to coincide or harmonize with the tenets of some or all religions." *Harris* v. *McRae*, 448 U.S. 297, 319 (1980) (quoting *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961)).

The assertion of some witnesses before the Subcommittee that citizens may not bring their religious beliefs to bear on public policy questions is an affront not only to well-established constitutional principles, but also to the right of religious believers to participate in the political process. *See, e.g., Hearings on S. 158* (June 12 transcript at 42-43, 46-47) (testimony of Rev. William Thompson); *id.* at 56 (testimony of Rabbi Henry Siegman); *id.* at 87-90 (testimony of Rev. Paul Simmons). The Supreme Court has aptly observed:

> Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right.

Walz v. *Tax Commission*, 397 U.S. 664, 670 (1970). When the subject matter of legislation concerns a legitimate sphere of government activity—and protecting human life is the *most* clearly legitimate and basic sphere of government activity—citizens and legislators have a right to advocate such legislation for religious as well as secular motives.

VIII. WITHDRAWAL OF JURISDICTION OF LOWER FEDERAL COURTS

Section 4 of S. 158 withdraws lower federal court jurisdiction to grant declaratory or injunctive relief in certain types of abortion cases. It expressly leaves the jurisdiction of the Supreme Court intact. The intent of this provision is to make state courts the original forum for injunction and declaratory judgment cases concerning abortion, and to ensure that the Supreme Court will have the benefit of the views of the state courts when it exercises its ultimate power of appellate review over decisions of the highest state courts involving questions of federal law.

This allocation of jurisdiction between state and federal courts in abortion cases serves important interests in the federal system. Until 1973 the states had power to determine, at least in the first instance, what protection should be extended to unborn children. Because S. 158 recognizes unborn children as living human persons, the Supreme Court should once again allow states to make legislative determinations to protect unborn children. State action to protect unborn children is likely, however, to encounter legal challenges. In any such challenges, state courts should have the initial opportunity to resolve relevant issues without interference from lower federal court injunctions or declaratory judgments. State courts are best suited to interpret state statutes in a way that carries out the will of the legislature and yet conforms to the requirements of the Constitution.

Reserving such issues to state courts in the first instance will not jeopardize constitutional rights, because, under article VI of the

Constitution (the supremacy clause), state courts are bound by the Constitution just like federal courts.[23] The Supreme Court, moreover, will retain its power of appellate review over questions of constitutional interpretation. Its deliberations should benefit from the opportunity to consider the views of state courts on matters traditionally resolved under state law.

This withdrawal of lower federal court jurisdiction is consistent with the Constitution and with Supreme Court precedent. The power of Congress to limit the jurisdiction of lower federal courts has been sustained in every Supreme Court decision in which the issue was presented, and the Court has endorsed this power in the broadest terms. *See, e.g., Palmore v. United States*, 411 U.S. 389, 400-01 (1973) (Congress has the sole power of creating inferior federal courts and of "withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good," quoting *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845).); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 449 (1850) (". . . Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.").

Clear precedent exists for Congressional legislation removing a particular class of controversies from the federal courts. The Norris-La Guardia Act, 29 U.S.C. §§101-115, for example, withdrew from the federal courts jurisdiction to issue injunctions in labor disputes. In *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 330 (1938), the Supreme Court recognized the constitutionality of the Act. The withdrawal of jurisdiction in S. 158 is equally appropriate as a means to ensure state judicial review of state anti-abortion statutes.

IX. AMENDMENTS ADOPTED BY THE SUBCOMMITTEE ON SEPARATION OF POWERS

Prior to making its favorable recommendation on S.158 the Subcommittee on Separation of Powers amended the bill in several respects in response to suggestions of both supporters and opponents of the bill.

Section 1(a). This section as amended now reflects in clear and concise form the facts summarized at pages 7 to 13 of this report. The words "a significant likelihood" have been deleted because no evidence presented at the Subcommittee's hearings cast any doubt on the biological fact that conception marks the beginning of the life of a human being. Challenges to this finding by witnesses at the hearings were not challenges to the biological facts; they were either (1) attempts to redefine "human being" as including less than every member of the human species, or (2) denials that science can help decide which human beings to accord value to as persons. Both arguments concern the value given to human life, not the fact of the existence of a living human being.

[23] This analysis assumes that state court systems can provide speedy adjudication of suits for injunctive and declaratory relief, with speedy review by means of interlocutory appeals if necessary. Speedy adjudication is of particular concern in the context of abortions, since an abortion delayed is an abortion denied, and an abortion performed is a human life irrevocably ended. If any states fail to provide such speedy review, it might be held under the reasoning of *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) that lower federal court jurisdiction was constitutionally required with respect to that particular state. As to other states the jurisdictional limitation would still be valid.

The Subcommittee's decision on questions of value is reflected separately in section 1(b).

The Subcommittee has deleted the words "actual human life" because they are redundant. Once the life of a human being has begun, it constitutes a human life, not a potential human life.

Section 1(a) as revised substitutes the phrase "the life of each human being begins at conception" for the phrase "human life exists from conception" to make clear that the unborn child is an individual human being and not a form of "life" comparable to a sperm cell, an unfertilized ovum or a piece of fingernail tissue. Some witnesses suggested that the original language was ambiguous in this respect. *See e.g., Hearings on S. 158* (May 20 transcript at 18) (testimony of Dr. Clifford Grobstein).

Section 1(b). The Subcommittee amended the original language which had stated that the fourteenth amendment to the Constitution of the United States "was intended to protect all human beings." It now reads simply that the amendment "protects all human beings." Senator Baucus proposed that the language concerning the intent of the framers of the Constitution be omitted entirely, on the ground that the Congressional debates on the fourteenth amendment did not include discussions of abortion. Senator Hatch proposed a substitute amendment in the form of the present language, which the Subcommittee accepted on the ground that it substantially restates the original language. The Constitution protects all those whom its framers intended it to protect, and the purpose of the fourteenth amendment was to eliminate the constitutional regime in which some human beings were legally an inferior class not entitled to the rights enjoyed by other human beings. *See* pp. 16, 23–25, *supra.* Section 1(b) recognizes that under the fourteenth amendment no class of human beings can be regarded as "nonpersons."

Section 2. This section is similar to the third paragraph of section 1 of the original bill. The only changes are as follows:

(1) The Subcommittee has substituted the word "recognizes" for "declares" and "shall be deemed" and "shall include" to make it clear that Congress is not making unborn children into human beings; it is recognizing that they are in fact human beings. Congress is not defining human life, it is recognizing human life. The only matter of definition involved is that S. 158 adopts the customary meaning of "human beings" as including every living member of the human species.

(2) The Subcommittee has inserted the word "each" before "human life" to emphasize that the bill deals with individuals, not protoplasm or life in an amorphous sense. See the discussion of this issue in connection with section 1(a) above.

Section 3. This section is new. It states an alternative theory supporting the result the bill seeks to achieve.

Most constitutional scholars agree that *Roe* was wrongly decided, and that the states can prohibit abortion without violating any provision of the Constitution. Sections 1(a) and 1(b) of S. 158 afford states a justification to protect unborn children because the unborn are entitled to the fourteenth amendment right to life. Section 3 provides that even if the Supreme Court rejects Congress's findings in sections 1(a) and 1(b), the states can still legislate concerning abortion because they have authority under the Constitution to

protect human life, a power that the states have exercised throughout our history. The power to protect human beings extends to those individuals whom the state rationally regards as human beings. The hearings before the Subcommittee leave no doubt that it is rational to regard unborn children as human beings.

Section 3 is severable. Thus if the Court were to decide that Congress is constitutionally empowered to find facts with which the Court will inform its own judgments, but is constitutionally forbidden even to express its opinions on questions of law, the Court might "strike down" section 3; but it should still give sections 1 and 2 the full force to which they would otherwise be entitled.

Section 4. This language, similar to that of section 2 of the original bill comprises the limitation on jurisdiction of the lower federal courts to injunctive relief in abortion-related cases. The Subcommittee amended the section to make it clear that nothing in the section is intended to deny jurisdiction to the Supreme Court.

Section 5. This section is similar to one originally proposed in H.R. 3225, the House counterpart to S. 158. It does two things: first, by providing immediate Supreme Court review of lower court decrees, it prevents a situation in which the validity of the bill could be in doubt for years. Second, it makes clear that the bill is not a congressional "challenge" to the Court's authority: S. 158 does not oppose judicial review; rather, it invites immediate judicial review.

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