the HUMAN LIFE REVIEW

SPRING 1987

Featured in this issue:

Also in this issue:

Djibril Diallo • Thomas Molnar • Archbishop Kevin McNamara
Annette Oestreicher • Joseph Sobran • Murray Kempton

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. . . FROM THE PUBLISHER

This is the 50th issue of the *Human Life Review.* A milestone of sorts because when we began this effort in 1975 we didn't know if we'd get past the first issue, much less the 50th. But here we are still plugging away, trying to bring you the best-reasoned arguments available anywhere on the "life" issues. This Spring issue is no exception. In what has become our "unusual" edition because of the different subject matter we tend to cover, you will find a thorough mix of thought-provoking pieces I think you will enjoy.

We note that Mr. Allan Carlson's article first appeared in the Rockford Institute's *Persuasion at Work*; well, it has been re-titled *The Family in America.* It is bigger and even better than before (which is high praise), and is available from the Institute: address *The Family in America*, P.O. Box 416, Mount Morris Il 61054 (current rate $17.95 for 12 monthly issues).

Readers who admire (as we do) Francis Canavan's remarkable ability to write fine prose while explaining complicated legal issues will certainly enjoy his book *Freedom of Expression*, which is available from the Carolina Academic Press (P.O. Box 8795, Forest Hills Station, Durham, N.C. 27707; $9.95 per copy).

We also note that the *Sceptre Bulletin* is one of those "little" magazines that carries much interesting stuff: it is published at 1 Leopold Road, London W3 5PB England; if interested we suggest you write for a sample copy and ask for subscription rates in U.S. dollars.

The introduction quotes from Walker Percy's new novel, which will undoubtedly cause quite a stir (one reviewer calls Percy a "Right to Lifer"); we expect to have more about it (perhaps even an excerpt) in the next issue. Meanwhile, we're told that you can get a signed copy of *The Thanatos Syndrome* by calling The Kumquat Bookstore at (504) 892-0686.

You will find full information about previous issues, bound volumes, microfilm copies, etc., on page 128.

EDWARD A. CAPANO
Publisher

THE HUMAN LIFE REVIEW

SPRING 1987

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INTRODUCTION

MR. WALKER PERCY IS, we'd say, the finest American novelist alive. We read his latest book, *The Thanatos Syndrome*, with particular interest because, as it happens, it deals with familiar subjects. For instance, on page 127, one character (an alcoholic, supposedly-deranged old priest) says to the doctor hero:

> You are a member of the first generation of doctors in the history of medicine to turn their backs on the oath of Hippocrates and kill millions of old useless people, unborn children, born malformed children, for the good of mankind—and to do so without a single murmur from one of you. Not a single letter of protest in the august *New England Journal of Medicine.*

Our friend John Matthews certainly had not read Percy's new novel when he wrote our lead article, which begins:

> The largest single cause of death in the United States over the past 20 years has been the medical profession. Not through malpractice, nor through error or ignorance, but quite deliberately and with full conscious intention.

Understandably, many doctors (Percy is one himself, by the way) will not appreciate that kind of thing. Yet it remains surprising that it has not been said sooner, and more often. The Abortion Holocaust has reached grotesque proportions for anyone who believes (not "feels"), as Mr. Matthews obviously does, "that what you do when you abort a so-called 'fetus' is to kill someone." He supplies the grisly statistics, and ranges far afield about the morality of it all—the latest plague, AIDS, gets its share of attention—but he comes back to the point that amazes him: most of us, he says, "would not even dream of killing for money. Abortionists do, and they can become rich—quite legally—doing it. But they don't seem to boast about it a lot. Too much publicity is said to be medically unethical." Strong stuff. We can't remember when we last opened an issue with anything stronger. But as we say, if you believe what Mr. Matthews believes, you should find him compelling reading.

You might also enjoy a quick change of pace, and our colleague Francis

Canavan, S.J., provides just that, albeit beginning with another grim subject. As you know, our Supreme Court decided (last June) that the Constitution does *not* confer "a fundamental right upon homosexuals to engage in sodomy." But it did so by the narrowest margin of one vote: the four-member minority strongly dissented, asserting the same "right of privacy" that supposedly protects the "liberty" of abortion.

As Father Canavan points out, the decision itself is hardly surprising, given the current AIDS epidemic. But the reasoning of the dissenters *is* surprising, and merits careful examination. Which is exactly what Canavan gives it, in his accustomed cool and reasonable style (if there is a more skilled exegete of constitutional complexities, we don't know him). His point is important to legal "laymen"—i.e., his fellow *citizens*—he urges us to "kick the habit of thinking that any action of government which is unjust, unwise, or undesirable must therefore be unconstitutional," and reminds us that the Court is quite capable of "preaching an ideology and calling it constitutional law." *Amen.*

Americans, we're told, love "facts"—certainly our newspapers and magazines are crammed with data, complete with charts and graphs, about all kinds of things, not least long-winded reports on "overpopulation"—it's become a perennial favorite. Usually, after repeated warnings of Standing-Room-Only-Coming-Soon, back-page stories report that population growth has fallen short of predictions, whereupon Planned Parenthood claims credit, and so on. Without question, people continue to increase and multiply in many parts of the world—but not in *ours*: less than 40 years back, the "Western" nations numbered 30% of the total; the figure is now less than half that and, if current "fertility" trends continue, it will sink to below *five* percent within a century.

"The geopolitical implications of this change," writes Mr. Allan Carlson dryly, "are large." They sure are. What is at stake is the West's survival, and the reader may well wonder how Carlson can write so calmly about what is (to anyone with children, surely) a frightening forecast. True, as he explains, Europe is de-populating much faster than we are. But Europe does not live atop the burgeoning masses of Latin America (as a friend of ours says, "Teach your kids Spanish!"). Our "trends" can be disrupted *via* simple displacement by other peoples.

Of course abortion has played a key role: it is both cause and effect of our anti-child (and *therefore* anti-future) mentality. And because we have failed to assess—lulled as we are by the "overpopulation" myth—the social and *economic* consequences of our rapid decline, there is no urgent cry for "action" (the typical American answer to any problem) as yet. Mr. Carlson himself

sees a few signs of hope: perhaps we might again become a "child-friendly" society. But we suspect that the more closely you read his story, the more you may wonder whether it is not already too late for even the most drastic remedies. (Let us pray.)

Certainly there will be no reversal of decline until *Roe* v. *Wade* is reversed: that fateful decision costs the nation perhaps two million would-have-been citizens (and consumers, taxpayers, etc.) yearly—the "grand" total since 1973 may be at or about 20 million. (It would be a salutary thing, would it not, if some expert were to *include* those little ghosts in our post-*Roe* socio-economic statistics, so that everyone could see how high the cost has been?) Well, Mr. Carl Anderson begins with the proposition that *Roe* is such bad law that it *will* be reversed, and asks the crucial question: With what?

Not the *status quo ante*, he argues: *Roe* has not only destroyed the prior anti-abortion consensus, but also dramatically changed our "constitutional jurisprudence of human life"—for instance, *Roe* has become the basis for previously-unthinkable court decisions in such as "wrongful birth" and "right to die" cases. So it won't do merely to return the powers the High Court usurped from the several states; we must go back to the constitutional tradition that "steadily expanded the protection of the law to include all human beings" because *Roe* shattered that vital link "between the biological and the legal person." We'll forgive you if you conclude that Mr. Anderson's case ought to be closely reviewed by every judge and lawyer in the land.

As everybody knows, a prime argument for *Roe* was that women would procure abortions "anyway," so why not make abortion legal, and "safe"? But Mr. Ian Gentles shoots a great many holes in such arguments, with the twin weapons of statistics and common sense. Does anybody really believe that laws cannot affect conduct? Was it reasonable to expect that creating a booming "easy-money" abortion industry would improve medical practice? And just how bad *were* conditions pre-*Roe*? Mr. Gentles goes into all this and more; we think you will find it most interesting. It certainly complements Mr. Anderson's thesis, as well as Father Canavan's—*Roe* is social ideology, not sound law.

Next we have the Rev. Harold O. J. Brown, once an editor of this review, now on leave from teaching theology to serve as a pastor of an Evangelical church in Switzerland. While there, he's been doing research and a great deal of thinking on the question: Why did the German Christian churches "fail" during—and even before—Hitler's rule? Well, there were many reasons, not least darwinized theology; we found this one fascinating reading—having known little about the subject before—but we think the reader will find even

more interesting Brown's exposition of how it all relates to the American experience with euthanasia and certain other horrors legalized by the Nazis.

Our final article is, we think, a fitting summary argument to Rev. Brown's case, not to mention a chilling look at just how far we *have* come in legalizing the taking of "lives not worth living." The authors have expert knowledge of their subject: Mrs. Jacqueline Nolan-Haley of the laws involved, and Dr. Joseph Stanton of the actual cases (in some of which he has been a witness). They write with impressive dispassion until their conclusion which, you will hardly be surprised to learn, is quite like Mr. Anderson's: our laws are demonstrably going in the wrong direction; "death with dignity" is destroying the right to *live.*

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Our appendices for this issue might seem to be a disparate lot. But in fact they all relate—and add depth—to what precedes them. For instance, the unusual little item (*Appendix A*) by Mr. Djibril Diallo, a United Nations official; you might think he'd be a little more grateful for all the zillions our government has provided his native continent for "population control"—but he's not, he actually thinks that Americans should pay some attention to what *Africans* want. And of course the costly joke *is* on us: having embraced (fatally?) de-population ourselves, we can't imagine that others would be so ungrateful as to prefer survival. We're pleased to reprint his complaint here, because you are not likely to find anything similar in the Major Media.

Appendix B is a brief commentary on the recent Vatican document on "bio-technology" and related matters. In this case, the media certainly gave the document major coverage—but largely missed the *point.* For instance, the New York *Times* (March 16) headlined its commentary "Legal Issue Seen in Vatican Call For Laws to Bar Birth Technology"—as if it were just another socio/political question. But as Mr. Thomas Molnar explains, Rome has spoken on a much deeper level.

Nor is that fact news. We regularly read a little English journal called *Sceptre Bulletin,* published in London for, we gather, just a handful of appreciative people, which is a shame, because it is always good reading. For instance, it recently reprinted a talk given by the late Archbishop of Dublin, Dr. Kevin McNamara, which demonstrates that the Catholic Church's interest in medical ethics is hardly recent. You'll find it in *Appendix C.*

Sad to say, Archbishop McNamara died of cancer on April 8, at age 60. He was perhaps Ireland's most vigorous opponent of abortion and related evils. We had never met him, but he was a regular reader of this review for some years, during which we corresponded with some regularity. We heard from

him only recently; he said nothing about his illness. Now that we think of it, he rarely said anything about himself. His untimely demise thus came as a shock to many who admired him, as we did, for his unflinching faithfulness. We presume that his reward will be the promised one. *R. I. P.*

How much does the medical profession enjoy the scrutiny of "laymen"? Not very much, evidently. You have no doubt heard of RU 486, the "invention" of a French doctor, which in effect acts as a do-it-yourself abortion pill. Is there a *moral* issue involved in making this new "Superpill" generally available? Not if you agree with the author of *Appendix D*, who says it's a purely medical judgment.

Well, if abortion is purely medical, it is producing some bad medicine. We read in another medical journal the summary of the case against a New Jersey doctor whose license was revoked for, among much else, performing an "in-office abortion beyond the permissible stage of pregnancy on a 14-year-old, who died of complications." In another case "a fetal head was not removed." He also pleaded *nolo contendere* to "altering medical records." (But then, as Mr. Gentles' article explains, this kind of thing is not unusual in our age of "safe" abortions.)

Next our friend Joseph Sobran adds his own personal experience (*Appendix E*). Joe went to see for himself what the "products of conception" look like after abortion. It's ghastly stuff, but you're spared the photographs, which we've seen, but couldn't bring ourselves to print here. (Imagination is bad enough.)

Finally, *Appendix F* is a brief column by Mr. Murray Kempton, a belated Pulitzer Prize winner (we think his should be *pro forma*, annually). But here he is not demonstrating his famous style so much as his good-reporter trademark. He merely describes the "contract" in the now-famous "Baby M" case, and it's an amazing document. The question is, why did its contents *not* become a featured part of the "news" in the celebrated case (every *other* detail was)? Was it because other newsmen did not want to report the "abortion angle"? We hope to have more on this strange case in due course. But surely there is enough in this issue to hold you until the next one.

J. P. McFADDEN
Editor

The Deadliest Profession

John F. Matthews

THE LARGEST SINGLE CAUSE OF DEATH in the United States over the past 20 years has been the medical profession. Not through malpractice, nor through error or ignorance, but quite deliberately and with full conscious intention.

Consider some of the figures from 1985, which is the last full year for which records are available in the current *World Almanac.*

What most of us think of as the "big killers" (we give money in huge amounts to "foundations" in the hope that they will be "conquered" some day) were hard at work reducing the American population just the way they have been doing for decades. Heart ailments topped the published lists; various forms of cardio-vascular disease swept away some 980,160 people. Cancer did in another 462,240, hypertension accounted for 187,440, while cerebrovascular diseases (commonly called "stroke") killed about 153,840. Flu and pneumonia killed 59,280 people; pulmonary diseases such as emphysema, asthma and chronic bronchitis swept off another 75,120, and cirrhosis of the liver (which, like AIDS, is mostly a self-induced disease resulting from a chosen, heavy-drinking "lifestyle") eliminated another 27,120.

And way down near the bottom of this list one can find a smaller but none the less sorrowful figure: 18,960 deaths from what is loosely termed "infant mortality."

Save to accountants, numbers often tend to be boring. But these have a certain eerie fascination. They remind us of the rate at which we are being wiped out every year; part of the endless and inevitable translation of the living into the dead, our unwilling contribution to what Sophocles was the first, I think, to call the *truly* silent majority.

But they are only a part of the tally. Something is missing here; something so enormous that its omission is striking even in an age as prudish as ours is about mentioning anything so controversial as "moral" issues for fear of offending somebody's sacrosanct civil right to

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John F. Matthews, a former professor at Brandeis University, has contributed several previous articles to this review.

"pluralism." What is left out—here, and in nearly every other public list of "causes of death"—is the fact that there are annually over one and a half *million* abortions in America. And that in every single one of them, somebody gets killed. Not accidentally, not by mischance, but expertly and deliberately by one of that relatively-small fraction of the medical profession which makes its living out of that sort of thing.

More people were killed by abortion last year (and the year before that *and* the year before that) than by stroke, hypertension and all the rest of the "second-rank" medical disabilities put together. More fatalities than caused by motor accidents (46,080), suicide (28,320) and homicide (19,680) all added to one another and then multiplied by 15.

This is not a question of "definition," or a matter of faith or religious persuasion. It is simply a fact—that what you do when you abort a so-called "fetus" is to kill someone. Very young, of course, in the earliest stages of what we are lately told should be called "personhood"—but quite real, all the same. All it takes to prove it is to let that "somebody" alone to grow and flourish, give it a bit of food, care and education, and *voilà*, you have an *adult* on your hands who might live to be ninety! What has prevented this from happening, in more than 15 million cases over the last decade, is not cancer, heart disease, suicide or cirrhosis, but simply the medical profession acting out the legal "free choice" of unwilling mothers who for the most part (see below) didn't really have to get pregnant in the first place. One can argue that the whole business is mainly the women's fault, since they are the ones who ask for the abortions. But the hands that do the actual dirty work are those of "doctors."

Not *all* doctors, of course. Most of them, to this day, wouldn't touch an abortion with a forty-foot barge pole, any more than most of the women in America would actually *have* one. The vast majority of physicians remain in the business of healing, not hurting, people. Many of us are alive today because of doctors who save lives, treat diseases, ease pain, even replace damaged parts and tissues, with as much dedication to fighting agony and death as those old-time, underpaid "family practitioners" who did it less for money than for love.

But there is a minority of doctors now whose specialty is not only diagnosis and treatment but also the ungentle art of extermination. With the result that since the famous case of *Roe* v. *Wade*, they have

become, with full legal sanction, the largest single cause of human death on this entire continent.

One must be careful, of course, not to confuse them with people like the late Dr. Josef Mengele of "Nazi death-camp" infamy. What Dr. Mengele (and colleagues) did was to utilize so-called "inferior people" like Jews, Slavs, Gypsies, etc., to serve as material for horrifying "medical experiments" which were invariably fatal. Part of the motivation was ideological (Mengele, it seems, really *did* believe his victims deserved to be put to death for "sub-humanity"), and part of it was probably pure sadism. But some of the inhuman tortures actually were a kind of research, and its results (such as some of the data on "survival in freezing water-temperatures," for instance) are still quietly used as a basis for further investigation both in the U.S.A. and the Soviet Union.

What the American abortionists do, on the other hand, is merely a matter of money. Race, creed and color do not even remotely enter into it (as they clearly did for Mengele) and neither, apparently, do problems of "sadism." They are purely and simply killing because the price is right and because (one assumes?) the work rather appeals to them. It doesn't, as they say in South Boston, require much heavy lifting. So what on earth is there to get excited about?

For the doctors, not much, apparently. But for the self-proclaimed leaders of the "Women's Movement" and a good many of the women (no ladies, they) who follow them, abortion seems more or less the emotional keystone of the whole contemporary idea of "feminism."

It is easy to make fun of some aspects of feminist enthusiasm. Insistence that books be rewritten so as to change "hu*man*ity" into "personity," or the Fatherhood of God eliminated in favor of the "She-ness" of the Deity (or that *Little Women* be banned from libraries because it is "propaganda for 19th century sexism"), often make their proponents seem so frivolous as to seem harmless.

Which they are not, obviously; certainly not to unborn babies. Because when pregnancy occurs, these are the sorts of people who are the customers (or who help *provide* customers) for the more than 4,000 pre-natal infanticides that are purchased in America every day. What it takes to make the U.S. medical profession do its fatal little tricks with fetuses is that plenitude of paid-for "patients" whose pathway to the

clinics is expedited by the "activists" who claim to speak with somewhat more than papal infallibility on the whole subject of sex.

Abortionists themselves, mostly male, can be thought of merely as medical scavengers, cleaning up (physically and financially) on the aftermath of other people's thoughtless and "morally irrelevant" copulations. In the ancient Aryan caste system of Hindu India they would simply have been classified as Untouchables. But for the leaders of organized feminism, abortion is considerably more than just a way to make a living. Something more in line, actually, with the kind of ideological obsessions that animated people like Dr. Mengele. Being in favor of it is not only a career, it is a cause; an element of committment absolutely vital (as Eleanor Smeal of NOW keeps pointing out) to the whole grand triumph of ultimate female freedom.

There is a certain oddity in this. At just what point did abortion come to have such a singular priority over all the *other* important women's issues in the world?

Is it really more "significant" or more "crucial" than equal pay for equal work? Or than the various protections that law ought to provide, such as access to education, the elimination of rapists, proper safety in the home and street, maternity leaves from employment, etc.? Not that there isn't agitation and political pressure about these subjects, because there is (and should be). But when the Leaders want to get real crowds in the street; when they want chanting, singing and slogan-shouting and the working-up of the hard-core faithful into a fine old frenzy, the one sure-fire subject seems to be the threat that somebody (men) might succeed (again) in preventing abortionists from killing off any and all of the unborn children that women choose to ask them to kill.

Watching a "demonstration" of this sort on Boston Common, one could not help but wonder what makes them hate babies so? And why, if they *do* hate them, people like this go on producing them—to the point at which (as feminist Germaine Greer used to brag of herself) they wind up being "personally obliged" to have three or four abortions? Is it possible that they *like* having abortions?

If not (and it does seem improbable) then why do they still go around insisting that chastity and self-restraint are "unfairly inhibiting," and that sex is something every woman has a "right" to indulge in whenever she feels like it? As we pointed out in these pages over a

decade ago, it is quite unnecessary to *kill* children in order not to have them. All it takes is the wisdom and self-control to avoid the pleasures of fornication until one is ready (and able) to love, cherish and care for whatever might come along *afterward.*

The centrality of abortion to feminists seems, unfortunately, based on the notion that unconstrained and "unobligational" sexual license is in some ways the fundamental essence of that highly envied status called "malehood." What is being claimed is the right of women to "enjoy," nowadays, what it is believed *men* have always enjoyed: a universe of lust without commitment, in which material success and job satisfaction come first and after that the "girls just want to have fun."—and to have it, moreover, without accepting any more responsibility for the results of their behavior than their intellectual leadership thinks men do.

The truth, of course, is that save for the actual experience of pregnancy, men are not exempt from the "consequences of sex"—as any divorce court, child-support case, or venereal disease clinic attests by its very existence. Which is why until very recently most "decently brought up" young men were taught the "dangers and responsibilities" of sex even before they had any idea of the mechanics of it.

Indeed, it wasn't very long ago in America that if a man "got a girl into trouble," he was expected immediately to marry and then spend the rest of his life taking care of her and the children. People really *did* it, too. One of my own best friends felt obliged in this fashion, and a very long and happy marriage it (fortunately) turned out to be. But however successful the outcome of that case, it also served as a very salutary caution to the rest of the boys—because nobody else was at all ready, at that point, to drop out of school and take on the obligations of home and family the way Kenneth had done. So the result was that we were every bit as careful with our "masculine desires" as the girls we went out with generally tried to be with their "feminine" ones.

Millions of young Americans to this day still try to behave caringly and lovingly and with a respectful consideration for each other and their futures. But what must be kept in mind nowadays is that "lasting affection" and "the promise and possibility of parenthood" (other than as a tiresome burden) are just as alien to the spokespersons of the pro-abortion faction as are the notions of male/female loyalty. The unspoken model accepted for both men and women by the proponents

of "disposable pregnancy" is the promiscuous world of the slums and of the so-called "men's magazines"; a world of "studs" and insolently-available little "foxes"; a world that even the *poorest* of the poor were once taught to avoid and despise, but which middle-class children and adolescents are now quite publicly expected—and educated—to emulate.

What was once a comparative rarity—blatantly "invitational nubility"—is now advertised as a desirable norm in the press, on TV, and in nearly every foul-mouthed "teen-ager" movie made in America. With the result, not surprisingly, that the adolescent male who would once to a remarkable degree have been downright terrified of such women now often tends (after a good basic training in "the media") to think that perhaps *all* of them are like that.

And why should he (or the girls he goes out with) think otherwise? The widely-photographed females who exhibit themselves not only nude but also in "love-making" poses in the mass circulation public press are no more scorned, nowadays, than abortionists. To the contrary they are admired, well-paid and petted, and tend to turn up at important functions as persuasive commercial adjuncts to new cars or the latest stereo-phonograph promotion, mingling publicly with the same *éclat* as the young baseball players who nowadays display themselves half-naked in behalf of tight-fitting male underwear.

"This is the way to look, the way to live," they all keep urging us, while the copywriters who churn out their "personal stories" earnestly assure the pallid, panting readership of how very much the girls are "turned on" by the idea of millions of unknown men staring greedily at the intimate photographs of what used to be called their "private parts." And just there, of course, is where the abortions begin. With the curious dogma that "liberation" consists in having the same sort of sex-life as the kind of men whom the Western world has long thought of as heartless and immoral cheats.

What abortion is about, to put it bluntly, is a life with no meaning save sensuality, no content save the momentary, transitory "up side" of dalliance, in which nobody ages (or dares to), nobody cares, nobody suffers, nobody ever has to say "I'm sorry." And if there is no love in these dreary couplings, there is none, either, in what comes afterward.

Children are not only unthought of in these impermanent ruttings; if they should "happen" (not unnaturally), they are as unwanted as head lice or bad weather. All that is left of "desire" is to be rid of them. And in the strange, ugly life that is so oddly held up to both sexes as a paradigm of freedom, the babies *are* got rid of—by the millions. There is an ancient tradition (older than St. Paul, going all the way back to Genesis) which holds that women are unstable vessels of evil and impure passion, instruments of temptation and sin. They are the daughters of Eve, after all, and in every generation they are inescapably and by the weakness of their nature the enemies of holiness, the endlessly iterated authors of man's fatal Fall.

There is also *another* tradition—more modern and perhaps less "Hebraic"—in which women are thought of mainly as merciful, tender, loving and gentle; members of a sex which is even capable, as Mary was, of being the compassionate and all-forgiving Mother of God.

Both these views have been influential in our civilization, but a significant thing about the *Christian* part of our heritage was the notion that there was a choice between them. For women, just as for men.

Both sexes, equally and alike, had been made free by their Creator to choose what to be in this life. Whether to be Cain or to be Abel; whether to try for sanctity or merely settle for the easy and accomodating ways of sin; whether to opt for Christ and the grand and rather dazzling idea of Eternity, or for Satan and the prospect of damnation and eternal death.

This is not quite the "freedom of choice" offered by the pro-abortion demonstrators. They advocate "freedom" for women to embrace careers rather than children, and then—in their spare time—to enjoy the liberty of refreshing themselves with the kind of sociable "recreational" sex which would bring a smirk to the most senior Serpent in all of Eden. And after that, if there should be some sort of "accident" during playtime, to be able to find a helpful and consoling Doctor so that the two of them—for a price—can re-enact the role of Cain together. "Sexual experience has unlimited posssibilities," we are told, "just so long as we keep the damned moral issues out of it."

In the interim, however, something new has happened. Rather to everyone's surprise, we find ourselves living in a country in which AIDS last year killed perhaps 15,000 people (How many more went

"unreported"?). Some of them were drug addicts, but most were men who had been satisfying their lusts amid the romantic stench of public toilets and "bath houses." Both their numbers and the extreme ugliness of their fate has created a kind of universal moan of sympathy while the million and a half infants who were slaughtered by abortion last year are mostly unwept for.

Still, with the onset of AIDS it is again becoming fashionable for some of our clergy to remind us that "the wages of sin is Death." Which is scarcely very much in the way of a revelation, actually; sooner or later the wages of everything is death. The innocent and the guilty are both transient. What matters to Christians, presumably, is what comes afterward.

But even to those who expect no hereafter, for whom all there is of threat or promise is contained within the brief parentheses of birth and death, clearly there are some ways of living that are more visibly "deathful" than others; more so, even, than they used to be.

Consider, for example, that prior to the discovery of America, punishments for what has long been thought of as the "sin" of adultery were mainly stoning, immurement, or some form of penance, or (during the Middle Ages in England) a fine of sixpence or thereabouts—then roughly 1/40th the value of a bullock or 1/54th the value of a horse. All of these were conditional, of course, on the assumption that you were actually found out.

After the voyages of Columbus, however, there was also "the pox" which tended to "find people out" no matter if they were actually caught or not. Whether syphilis was actually a "punishment" (as Hogarth clearly thought in his famous "Rake's Progress"), still it was quite a horrible way to die, and for many people right up to the present century served as a powerful encouragement to "morality."

Today a wholly new set of horrifying and widely advertised social diseases has been added to the hazards of sexual license. With AIDS in particular, it is no longer merely a question of lust not bothering to *love*; it has become an obligation, we are told, even for the most normal partners in non-monogamous copulations, not really to dare to actually *touch* any more. Because when it comes to the possible exchange of body-fluids, "nobody you can't be absolutely sure of" is to be trusted.

So what they now propose to teach in our grade-schools and high-schools (along with supplying the equipment and advertising it on television) is that there must always be that safe micro-distance of something interposing. No longer so much to prevent the beginnning of a new life (which can easily be disposed of with abortion) but rather to prevent the most terrifying and peculiarly intimate of our new viruses from making a slow, savage, loathsome end to us. One would think all the publicity about this would put a stop to casual lechery even among the most adolescent. But it hasn't, so far. As Olav Henry Alvig, M.D., has observed (*Insight*, 29 Dec., 1986): "Unless there is a drastic change in the sexual behavior of Americans . . . 300,000 will die of AIDS in the next five years." Which is almost, we may notice, one-fifth as many as will die of abortions in the next *single* year.

Curiously enough, what we are invited to do at the moment is not to get rid of the kind of behavior that produces such calamities, but to get rid of our "intolerance" of it. The dying young man in a January, 1987, TV documentary (on Boston's WBZ) about AIDS points out to himself every morning *via* a note pinned to his bathroom window—*"I am perfect just the way I am, and I love you!"* Which is simply to say that he feels himself completely devoid of "sin," even though he went on "having sex" with various partners well after learning of his own illness, never bothering to warn them of their own very real danger.

Nothing such people do ever seems to them to be wrong; only *commenting* on it is wrong. Whether it be drug-abusers, homosexuals, or the users and practitioners of prostitution, "experts" tell us that the suggestion that people with filthy habits have a tendency to get filthy diseases shows a complete lack of sensitivity on the part of the "straight" community and we ought to be ashamed of ourselves.

Which is why, perhaps, the fatal defects in lives laced with chemical euphoria, perversion, and sexual promiscuity are things the leaders of NOW and the ACLU and other such organizations apparently have agreed not to talk about. After all, a public acknowledgement of death and disability puts in jeopardy some of their most widely promulgated notions about "privacy" and "freedom."

AIDS is incurable. But those who have it (and who have, by their behavior, introduced it into the main stream of *normal* human life by infecting wives, innocent children, blood-transfusion recipients, and so

on, still claim, as poor, doomed young Mr. Cronan said of himself on TV, to be "perfect" and blameless. All that's wrong with them is that science hasn't yet advanced fast enough to catch up with the rather horrible outcome of their "free choices" in the way of a lifestyle. And that is no more reason to expect them to *give up* their way of behaving than it would be to ask a woman to give up fornication just because she doesn't want to let her babies be born.

There are women in America ("sexually active," as they say) who appear to think of pregnancy as a sort of female heterosexual equivalent of AIDS. It is loathsome, it is "unjust"—but at least it has this enormous and quite "happy" difference in that it is curable!

By chemistry, suction, or surgery, the infants with which such women are "afflicted" can be exterminated. Which means that for *them*, at least, the wages of sin are still Death—not, as with AIDS, for the sinner, but for the innocent child who was the *product* of the deed.

Something like one in five pregnancies in the United States are said to end this way—just as they do in other countries.

Because it's not just in America: the pro-abortion Alan Guttmacher Institute proudly announced last October that there were some 30 to 45 *million* legal abortions all around the world last year. (*Total* abortions are estimated at 55 million or more.)

That's more deaths in 12 months than in any war in human history; more than resulted (in the same time span) from any known plague or natural disaster ever to ravage the human race. So when the National Institutes of Health asserted in January that AIDS was projected to "infect or kill" as many as 50 million people by the year 2000, it was probably talking about fewer humans than abortions now kill *annually*.

The former Saul of Tarsus to the contrary, the love of money is not really the root of all evil. Most of us who are not drug-smugglers, or addicts, or *Mafiosi* hit-men, would not even dream of killing for money. Abortionists do, and they can become rich—quite legally—doing it. But they don't seem to boast about it a lot. Too much publicity is said to be medically unethical.

From Tragedy to Farce

Francis Canavan

THE U.S. SUPREME COURT DECIDED on June 30, 1986, that the Constitution of the United States does not confer "a fundamental right upon homosexuals to engage in sodomy."[1] In a nation faced with an AIDS epidemic, that decision is hardly surprising. It may occasion some surprise, however, that four justices of the Supreme Court strongly dissented on the ground that there *is* a constitutional "right of privacy" which protects sodomy as well as contraception and abortion.

Since it is the function of the Court to apply the Constitution to the decision of cases, but not to make up the Constitution as it goes along, we may ask where in the Constitution these four justices found a right of privacy that encompasses sodomy. Explaining where they found this right and how they arrived at the conclusion that it includes the right to sodomy will require some exposition of the Court's interpretation of the Due Process Clause. This clause is the major source of "constitutional rights" today and, in particular, of the right of privacy.

A constitutional right in this country is a limit placed on the power of government. What the Supreme Court once said of the right to free speech may be said of all constitutional rights: "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state."[2] The right of privacy, which the Court claims to have discovered in the Due Process Clause, is said to be a constitutional guarantee, therefore a limit on the power of government. But what that limit may mean is no easy question. As Justice Byron R. White has observed concerning the application of privacy to abortion, "the task of policing this limitation on state police power is and will be a difficult and continuing venture in substantive due process."[3]

There are, of course, two due process clauses in the Constitution. The first of them is found in the Fifth Amendment, which was ratified in 1791. It declares: "No person shall . . . be deprived of life, liberty, or

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property, without due process of law." But since this clause limited only the power of the federal government, Congress after the Civil War framed the Fourteenth Amendment, which was ratified in 1868. Among other things, this amendment provides: "No state shall . . . deprive any person of life, liberty, or property without due process of law." This is the Due Process Clause which occupies so much of the Supreme Court's time (because by far the greater number of cases that raise due process issues arise at the State rather than the federal level) and whose meaning the Court is forced constantly to explore.

So, for example, in the sodomy case, the question before the Court was whether the State of Georgia's statute making sodomy a crime deprived one Michael Hardwick of his "liberty" to engage in that homosexual act and did so "without due process of law." In this case, as in an unending series of others, there are two closely interrelated questions: the meaning of "liberty" and the meaning of "due process of law."

Due process originally referred to the legal procedures by which the state could inflict criminal penalties or civil restrictions. It was accepted that the state could legitimately deprive a person of his life by execution, or his liberty by imprisonment, or his property by a fine. The state could also limit a person's liberty by a civil procedure such as issuing an injunction against him or deprive him of part of his property by taxation, or limit his liberty in a host of ways. However, the state could do none of these things in an arbitrary fashion but only through established legal procedures to which all persons were impartially subject.

In a pre-Civil War case, ten years before Congress framed the Fourteenth Amendment, the Supreme Court described the test which it would use to determine whether a legal procedure prescribed by Act of Congress qualified as due process of law under the Fifth Amendment:

> We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[4]

This was "procedural due process," a guarantee solely that certain procedures would be followed in legal action, and it was no doubt the

due process that Congress had in mind when it framed the Fourteenth Amendment in 1866. So the Supreme Court, too, generally understood due process until about the end of the nineteenth century.

In the present century, however, "substantive due process" has grown and spread itself like a green bay tree. As Justice White put it in the majority opinion in the Georgia sodomy case, "despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription."[5]

The Court now asks what is the substance or content of the rights to life, liberty, or property—but particularly of liberty—of which the state may not deprive one without due process of law. In answering this question, the Court has turned up a wide range of rights said to be implicit in the term "liberty," and has held that government may not deprive one of them by any process of law or may do so only by demonstrating a "compelling state interest" in regulating them—and then only by legal procedures designed to reduce the deprivation of the rights to the minimum. The meaning of "due process of law" thus tends to be collapsed into the meaning of "liberty." The nature of due process, that is to say, is determined by the nature and extent of the rights it is designed to protect.

The question, then, is what is the nature of the liberty enshrined in the Due Process Clause. The words of the clause itself do not answer the question, so various justices have offered a variety of answers to it.

The late Justice Hugo L. Black had a simple answer: the Due Process Clause of the Fourteenth Amendment was intended to "incorporate" the first eight amendments to the Constitution, which are usually referred to collectively as the Bill of Rights. In Black's view, all of the limits which those amendments place on the powers of the federal government, the Due Process Clause places on the powers of the State governments—but only those limits. If we ask the meaning of "liberty" in the Due Process Clause, we turn to the first eight amendments. Whatever liberties we find defined there are protected against State infringement by the Due Process Clause, but liberties which we do not find

there cannot be used by the Supreme Court as a basis for declaring State laws unconstitutional.

The majority of the Court in recent decades has gone both less far and much farther than Justice Black. While the Court has "incorporated" most of the first eight amendments as restraints on State power, it has not incorporated all of them. (What good end, for example, would be served by imposing on State courts every plaintiff's right, under the Seventh Amendment, to a trial by jury in any civil case "where the value in controversy shall exceed twenty dollars"?) On the other hand, the Court has vastly expanded the due process meaning of "liberty" and, as Justice White has said, has recognized "rights that have little or no textual support in the constitutional language."[6]

Of no constitutional right is this more true than of the "right of privacy." The court first announced this right in 1965 in *Griswold* v. *Connecticut*, where it declared a Connecticut law forbidding the use of contraceptives to be unconstitutional.[7] The question before the Court ostensibly was not (and in *all* right of privacy cases is not) whether the law was wise or good, for these are legislative and not judicial questions, and courts are not supposed to pass on them. The question before the Court was only whether the Due Process Clause denied the State of Connecticut the power to enact such a law. The majority of the justices said that it did deny that right; then they had to explain where in the Constitution they found a basis for this conclusion.

Justice William O. Douglas, who wrote the opinion for the Court, found a right of privacy, immune from State interference, to be inherent in the association of men and women in marriage. "The association of people," he admitted, "is not mentioned in the Constitution nor in the Bill of Rights."[8] But if we consider the Bill of Rights as a whole, we find that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[9] The First, Third, Fourth, Fifth, and Ninth Amendments collectively create a "zone of privacy"[10] and a "right of privacy"[11] which the Due Process Clause protects against invasion by a State. Connecticut therefore violated the Due Process Clause by its law on the use of contraceptives.

Justice White and Justice John Marshall Harlan concurred with the majority of the Court in finding the Connecticut law unconstitutional,

but not because it deprived people of anything implicit in the Bill of Rights. "The Due Process Clause of the Fourteenth Amendment," said Harlan, "stands, in my opinion on its own bottom," and the Connecticut law violates it by depriving people of the liberty which that clause protects, independently of the Bill of Rights.[12] Justice White agreed that "this Connecticut law as applied to married couples deprives them of 'liberty' as that concept is used in the Fourteenth Amendment,"[13] but not merely because it "invades a protected area of privacy or . . . demeans the marriage relationship."[14] Rather, he based his judgment on what he saw as Connecticut's failure to show an adequate connection between its statute and the justifying reason the State alleged for it, namely, "the State's policy against all forms of promiscuous or illicit relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal."[15]

Justice Black, joined by Justice Potter Stewart, vehemently dissented. "I like my privacy as well as the next one," he said, "but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."[16] The Fourth Amendment's guarantee against "unreasonable searches and seizures" would be an example of such a specific guarantee of privacy.[17] But to go beyond the enforcement of "the particular standards enumerated in the Bill of Rights and other parts of the Constitution,"[18] Black thought, is highly dangerous:

> My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country.[19]

Whatever one may think of Justice Black's "incorporation" theory—and it is questionable—one must admit that he proposed it for a valid reason. He wanted to prevent "a great unconstitutional shift of power to the courts" by restricting them to the interpretation and application of explicit and specific provisions of the Constitution. But the majority of justices in recent decades have felt no such qualms. Their function, as they see it, is to protect what they regard as fundamental rights against

infringement by government, especially by State governments. If the rights are fundamental, then they must be in the Constitution somewhere.

Thus in the landmark 1973 abortion case, *Roe* v. *Wade*, Justice Harry A. Blackmun said in the opinion of the Court:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment, . . . the Fourth and Fifth Amendments, . . . the penumbras of the Bill of Rights, . . . the Ninth Amendment, . . . ; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment . . . .[20]

But Justice Blackmun did not seem greatly to care where the right of privacy was found so long as he could use it to establish a constitutional right to abortion: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[21]

No Court, however, would want to make the right of privacy so broad as to encompass every immunity from governmental action that any individual might care to claim. Justice Blackmun therefore explained, borrowing words from the Court's 1937 opinion in *Palko* v. *Connecticut*[22], that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."[23] The control on the Court's interpretation of "liberty" in the Due Process Clause thus is not the text of the Bill of Rights, as Justice Black wanted it to be, but the Court's understanding of which rights are so fundamental as to be implicit in the concept of ordered liberty. Not all rights are fundamental in that sense, but a woman's right to decide on abortion is.

The Court thus placed itself in the enviable position of being able to strike down any State law which violates a fundamental right, while reserving to itself the power to determine not only which rights are fundamental even though they are nowhere defined in the Constitution, but also which countervailing "state interests" are so "dominant" as to

sustain State laws and regulations which limit those rights.[24] A Court thus self-empowered may well be tempted to be arbitrary in its decisions, as Justice White accused the majority of being in his dissent in *Roe* v. *Wade*: "As an exercise of raw judicial power, the Court perhaps has authority to do what it does today," but "I find nothing in the language or the history of the Constitution to support the Court's judgment."[25]

Roe v. *Wade* was followed by a long line of Court decisions striking down State laws and municipal ordinances which attempted to regulate and moderate the exercise of the right to decide on abortion which that case had established. Despite Justice Blackmun's assurance in *Roe* v. *Wade* "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation,"[26] the Court made the right progressively more absolute. No law or regulation was allowed to stand which had or could be interpreted as having the effect of discouraging abortion.

The last major decision in that line of cases was handed down in June, 1986, in the case of *Thornburgh* v. *American College of Obstetricians and Gynecologists*, in which the Court invalidated the Pennsylvania Abortion Control Act of 1982.[27] As Justice White remarked in his dissent in this case, "the ostensible objective of *Roe* v. *Wade* is not maximizing the number of abortions, but maximizing choice."[28] That is, in fact, the ground on which Justice Blackmun put the decision in the opinion of the Court:

> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. . . . Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe* [v.*Wade*]—whether to end her pregnancy. A woman's right to make that choice is fundamental.[29]

Whether the Constitution really makes the right to make that choice fundamental and therefore beyond the power of a State to prohibit, limit, regulate, or discourage is, of course, precisely the point at issue in the constitutional debate over abortion. The issue is not whether a State *should* prohibit, limit, regulate, or discourage abortion. That is a political and legislative question, to be answered by the people of the State

and their elected representatives (and one may suspect that when people answer questions on abortion laws in public opinion polls, it is to this legislative question that they address themselves). The constitutional question is only whether the State *can* legislate on this subject in the exercise of powers not denied to it by the Due Process Clause. We cannot resolve that issue by begging the question and assuming that the Due Process Clause deprives the State of the power to legislate on the subject of abortion.

Justice White wrote a dissenting opinion in this case in which he explained why he believed that *Roe* v. *Wade* was "fundamentally misguided"[30] at much greater length and in more detail than he had in his original dissent in 1973. (He was joined here, as he had been in his dissent in *Roe* v. *Wade*, by Justice William H. Rehnquist.) His whole opinion would repay analysis, but for the present purpose it is enough to state the norms by which he thought the Court should control its interpretation of the Due Process Clause.

The first is that the Constitution is the people's law, not the Court's to do with what it thinks best:

> Because the Constitution itself is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing. But decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.[31]

The second norm of interpretation concerns "fundamental" rights. While the Due Process Clause, White said, "has been read by the majority of the Court to be broad enough to provide substantive protection against State infringement of a broad range of individual interests," in most cases State legislation "need only be rational" for the Court to find it constitutional "and the determination of rationality is to be made with a heavy dose of deference to the policy choices of the legislature." It is only where "fundamental" rights are affected that the Court should employ "strict judicial scrutiny of legislation that impinges upon them."[32]

The crucial question, then, is how the Court should determine which rights are fundamental. The question is most easily answered when the

text of the Constitution itself recognizes the "existence and importance" of such rights. "Thus, the Court is on relatively firm ground when it deems certain of the liberties set forth in the Bill of Rights to be fundamental and therefore finds them incorporated in the Fourteenth Amendment's guarantee that no State may deprive any person of liberty without due process of law." But in going beyond the text of the Constitution, the Court skates on thinner ice:

> When the Court ventures further and defines as "fundamental" liberties that are nowhere mentioned in the Constitution (or that are present only in the so-called "penumbras" of specifically enumerated rights), it must, of necessity, act with more caution, lest it open itself to the accusation that, in the name of identifying constitutional principles to which the people have consented in framing their Constitution, the Court has done nothing more than impose its own controversial choices of value upon the people.[33]

There are two ways which members of the Court have advocated to identify constitutional principles to which the people may be taken to have consented in framing their Constitution. "One approach has been to limit the class of fundamental liberties to those interests that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed.'[34] Another, broader approach is to define fundamental liberties as those that are 'deeply rooted in this Nation's history and tradition.'"[35] Neither of these "approaches to the identification of unenumerated fundamental rights" mechanically yields answers, but they are useful as efforts "to identify some source of constitutional value that reflects, not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government."[36]

Justice White was doubtful "whether either of these approaches can, as Justice Harlan hoped, prevent 'judges from roaming at large in the constitutional field.'"[37] After all, he well knew what things some of his brethren on the Court were capable of finding in the concept of ordered liberty. He himself, however, was certain that neither of these "basic definitions of fundamental liberties" could sustain the abortion right as defined in *Roe* v. *Wade*.[38] That decision, he said, "implies that the people have already resolved the debate [over abortion] by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing."[39]

Later in the same month the Court returned to the same question, what is included in the right of privacy as a fundamental liberty, in the Georgia sodomy case, *Bowers* v. *Hardwick*. But in this case Justice White wrote the opinion of the Court for a 5-4 majority, while members of the 5-4 majority in *Thornburgh* v. *American College* found themselves reduced to a minority of four (Justices Blackmun, William J. Brennan, Thurgood Marshall, and John P. Stevens) because Justice Lewis F. Powell voted on the other side. But the issue remained the same in both cases: the scope of the right to privacy.

This issue, according to the dissenters in an opinion written by Justice Blackmun, should not be taken as being about sodomy but about liberty. "The Court," he said, "claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others."[40] That is the interest which the Due Process Clause deprives any State of the power to impinge upon. The Georgia statute, by making sodomy a crime, "denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual activity."[41]

An activity is put beyond the reach of the law precisely because it is private and engaged in by mutual consent; that it is homosexual is irrelevant. Michael Hardwick's claim that the Georgia law "involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation."[42]

This right is fundamental and therefore protected by the Due Process Clause for the same reason that "certain rights associated with the family" are protected.[43] "We protect these rights," Justice Blackmun explained, "not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life." So also "we protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition." The right of individuals to "define themselves in a significant way through their intimate sexual relationships" is, so to speak, a seamless garment that cannot be cut into pieces by distinguishing among different forms of sexual relations. The fundamental consideration is not what the individual does but his right to choose what he will

do, for "much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds."[44]

As Justice Blackmun and his fellow dissenters seem to understand human nature, a human being is essentially an individual and an individual is essentially a sovereign will that determines both the ends and means of human life. Hence, says Blackmun, "the issue raised by this case touches the heart of what makes individuals what they are,"[45] and "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."[46]

This radical individualism explains the meaning given to the Due Process Clause, not only by the four dissenters in this case, but also by them and their predecessors on the Court in a long line of cases going back at least to *Griswold* v. *Connecticut.* One can, no doubt, distinguish the Court's prior decisions on contraception and abortion laws from the case of sodomy, as Justice White felt obliged to do when he spoke here for the majority of the Court.[47] It remains true, nonetheless, that many justices, like the four dissenters in this case, have seen all of these cases as hanging on the single thread of the sovereignty of the individual and his right to choose.

Against that right, in their view, what the American people have historically believed to be the meaning of the Constitution, as shown by the long and widespread record of State laws regulating abortion or criminalizing sodomy, may not be allowed to determine the meaning of the Due Process Clause.[48] To which Justice White replied in his opinion for the Court, "Against this background [of the number of States that once did or still do criminalize sodomy] to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[49]

Justice White here spoke in the mild and measured language of a judge; he could have said that it was uproariously funny, as ideology usually ends up being. For the opinion of the minority in this case, as in previous cases where they were the majority, is ideology, the doctrinaire spinning out of the logical implications of "liberty" as they con-

ceive it. That it is their concept, with the content that they pour into it, and not that of the American people whose law the Constitution is, does not matter to them. In the eyes of libertarian ideologues, a people is only a collection of discrete individuals, all equally sovereign over themselves, whom the Court must protect against each other's private and subjective morals. A people is not a historical community with a moral tradition and a public morality which it is entitled to uphold by law.

And yet, as Justice White remarked, "the law is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." Not only that, the Supreme Court will destroy its own authority, which rests on the people's faith that the Court enforces the Constitution and not its own personal opinions. "The Court," he explained, "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." The Court should therefore resist the temptation "to expand the substantive reach" of the Due Process Clause. "Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority."[50]

The present writer remains of the opinion expressed in an earlier article,[51] that the Due Process Clause and its companion, the Equal Protection of the Laws Clause of the Fourteenth Amendment, should be repealed and replaced by an amendment that would only give to Congress the power to define and enforce civil rights. As I believe the present article has shown, there is no effective constitutional control on judicial interpretation of the Due Process Clause. It can mean too many things to too many justices and, if it can mean all the things that some justices say it means, it does not belong in a constitution that is supposed to limit courts as well as legislatures. So long as it is in the Constitution, the justices will use it as a Magna Carta of "rights" previously unknown and even unsuspected.

Of course, while the Due Process Clause remains in the Constitution—and that surely will be for any foreseeable future—the Supreme Court must interpret it and the most we can hope for is that the Court will follow Justice White's advice. As a member of the legal

laity, however, I do not presume to instruct the clergy in the law, certainly not with any expectation of being listened to. But I may venture a few words of advice to my fellow laymen.

First, we should kick the habit of thinking that any action of government which is unjust, unwise, or undesirable must therefore be unconstitutional. We should also moderate our eagerness to turn divisive issues of public policy into cases in constitutional law, and also stop thinking that such issues can be settled more wisely and justly by courts than by legislatures. Finally, we should not too readily take the word of justices of the Supreme Court when they tell us what the Constitution commands and forbids. Particularly if they refer to the Due Process Clause, they are quite possibly preaching an ideology and calling it constitutional law. It is one thing for them to hold up maximizing personal choice as a social ideal, but it is another thing altogether for them to make it the meaning of the Constitution.

Indeed, their attempt to meld these two distinct things into one leads them to ridiculous results. As Karl Marx, no mean ideologue himself, once wrote, history does everything twice, the first time as tragedy and the second time as farce. There are men sitting on the Court today whose constitutional judgment on abortion may be regarded as tragedy, but when they come to sodomy, it's farce.

NOTES

1. *Bowers* v. *Hardwick*, 1065 S.Ct. 2841, 2843.
2. *Hudgens* v. *NRLB*, 424 U.S. 507, 513 (1976).
3. Dissenting opinion, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 92 (1976).
4. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 Howard 272, 277 (1856).
5. *Bowers* v. *Hardwick*, at 2844.
6. *Ibid.*
7. 381 U.S. 479.
8. *Ibid.*, at 482.
9. *Ibid.*, at 484.
10. *Ibid.*, at 485.
11. *Ibid.*, at 486.
12. *Ibid.*, at 500.
13. *Ibid.*, at 502.
14. *Ibid.*, at 503.
15. *Ibid.*, at 505.
16. *Ibid.*, at 510.
17. *Ibid.*, at 508-509.
18. *Ibid.*, at 525.
19. *Ibid.*, at 520-521.
20. 410 U.S., 113, 152.
21. *Ibid.*, at 153.

22. 302 U.S. 319, 325.
23. *Roe* v. *Wade*, at 152.
24. *Ibid.*, at 154-155.
25. *Ibid.*, at 221-222.
26. *Ibid.*, at 154.
27. 1065 S.Ct. 2169.
28. *Ibid.*, at 2200.
29. *Ibid.*, at 2185.
30. *Ibid.*, at 2192.
31. *Ibid.*
32. *Ibid.*, at 2194.
33. *Ibid.*
34. The interior quotation is from *Palko* v. *Connecticut*, at 325, 326.
35. The interior quotation is from *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977).
36. *Thornburgh* v. *American College*, at 2194.
37. The interior quotation is from *Griswold* v. *Connecticut*, at 502.
38. *Thornburgh* v. *American College*, at 2195.
39. *Ibid.*, at 2198.
40. *Bowers* v. *Hardwick*, at 2852.
41. *Ibid.*, at 2848.
42. *Ibid.*, at 2849.
43. An interior quotation from *Moore* v. *City of East Cleveland*, at 501.
44. *Bowers* v. *Hardwick*, at 2851.
45. *Ibid.*, at 2854.
46. *Ibid.*, at 2856.
47. *Ibid.*, at 2844.
48. *Ibid.*, at 2854, 2857.
49. *Ibid.*, at 2846.
50. *Ibid.*
51. "A New Fourteenth Amendment," *The Human Life Review*, Vol. 12, No. 1 (Winter 1986): pp. 30-48.

The De-Population Problem

Allan C. Carlson

WHILE MOST LITERATE INHABITANTS of the Western world lay awake at night worrying about the specter of global over-population, an extraordinary development occurred, one barely noticed at the time. Between 1965 and 1985, fertility rates of the industrial democracies tumbled far below the Zero-Population-Growth (ZPG), or replacement, level. In several lands, actual population decline set in, with deaths exceeding births.

Demographers measure long-term reproductive behavior by translating the annual number of new babies into a weighted average of lifetime births per woman. A figure of 2.1 just insures the replacement of successive generations. As of 1983, West Germany and Denmark shared a total fertility rate of 1.3, the Netherlands and Italy of 1.5, Japan of 1.7, France and the United Kingdom of 1.8. In the United States, the fertility rate tumbled from 3.6 in 1955 and 2.9 in 1965 to 1.7 in 1976, and has hovered around 1.8 through 1983.

The geopolitical implications of this change are large. In 1950, as in 1900, the Western democracies accounted for roughly 30 percent of the world's population. Given the collapse of Western fertility, that figure has fallen to 15 percent. Even assuming a continued decline in the Marxist and "Third" worlds and a not-at-all-certain stability at current levels in the West, it will plunge to only 7 percent by 2025, and a mere 4.5 percent 50 years later.

While little reported in the American press, the depopulation issue has become a major domestic political question in France, Germany, and Sweden. In 1983, the French Minister for Social Affairs, Pierre Beregovoy, called for collective action by the member states of the European Economic Community to reverse falling birth rates. Sorbonne historian Pierre Chaunu talks of "a European cancer" and "a refusal of life itself." Demographer Alfred Sauvy warned that the West-

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ern world is signing its own death warrant. The debate now appears to be spreading to the United States. *U.S. News and World Report* has recently described the social impact of "the baby bust" in the United States and emergence of an intensifying "politics of fertility."[1] On a more academic level, the Washington-based American Enterprise Institute sponsored in early December a seminar on "The Consequences of Population Decline in the Western Democracies." In their joint presentation, AEI Senior Fellow Ben J. Wattenberg and Research Associate Karl Zinsmeister warned that "every major nation that is modern and free is also on a demographic track that, if not changed, will ultimately decimate it." They argued that a relatively large population, while no guarantee of great power status, appeared to be one necessary precondition. Population growth, they added, was a primary stimulus to economic expansion and innovation. Larger populations could more easily construct a modern infrastructure of industry, roads, and airlines and could also provide the tax base to support a modern defense system. Even in the realm of values and culture, they said, numbers mattered. Declining populations were also rapidly aging ones, facing loss of vigor and enormous social-welfare financing problems.[2] Such arguments actually represent the renewal of an older debate. Between 1900 and 1940, every Western nation except the United States witnessed political attention to the depopulation threat. This earlier "population crisis" set the context for the contemporary controversy. Significantly, it also cast the incentive structure of democratic capitalism into the very center of the debate. It is by returning to that focus, I suggest, that our options for the future can be clarified.

"Cradles or Coffins?" Europe's First Depopulation Scare

The roots of the original depopulation scare lay in 19th-century France, the first modern nation to see its "crude birthrate" fall from a preindustrial level of 30 or 40 births per thousand people to below 20 per thousand. France in 1800, with 28 million persons, was still the demographic equal of the Russian Empire. Yet fertility decline brought stagnation. Between 1870 and 1940, the French population remained stuck at the 40 million figure. In the latter year, shortly after Hitler's armies occupied Paris, Marshal Petain lamented: "Too few children, too few arms, and too few allies—those were the reasons for our defeat."

Political action had been tried in an effort to reverse the decline. The National Alliance Against Depopulation, founded in 1896, publicized the probable consequences of demographic decay. Hundreds of other French pro-natalist, pro-family organizations sprang up over the next four decades. The most successful of these was the French League of Large Families, an organization based in Roman Catholic parishes and reflecting the higher fertility found among France's religious population.

After 1900, as the fall in crude birthrates began to affect other European peoples, similar debates and pro-natalist organizations emerged. In each case, it was assumed that the decline in the birthrate would continue, and it was argued that dire geopolitical and economic consequences would result. Philosophers of the question linked the birth decline to a general spiritual and cultural crisis in the West.[3]

When shaping political responses to the fertility crisis, a majority of European pro-natalists agreed on the need to suppress neo-Malthusian propaganda advocating birth control, to prohibit the sale of contraceptives, and to strengthen prohibitions on abortion. Pro-natalist Social Democrats dissented, arguing that modern parents, having won some control over their fertility, would not relinquish it, and that any future recovery in the birthrate would have to be based on the voluntary parenthood principle. Similar differences emerged over the desirable shape of pro-natalist incentives: conservatives favored birth bonuses, child allowances, marriage loans, and maternal salaries; socialists encouraged day care and other state services for families. Pro-natalist unanimity was found on only one point: the primary cause of the birth decline lay in the transition to an industrial society and, more specifically, in the economic incentive structure created by a classically liberal, market-oriented economy.

Within that consensus, there were different emphases. Roman Catholic theorists such as Valere Fallon argued that a market-determined wage system discouraged children by taking no account of family size. In a competitive economy, the childless bachelor and the man with a wife and five children at home received the same income. The family with children, accordingly, was left with a lower standard of living, which discouraged others from family formation.[4]

Social Democrats, led by Swedish economist Gunnar Myrdal, made a similar argument. A capitalist wage system, they said, took no account of family size and responsibilities. In recessions, younger workers with small children were the first to be laid off. Larger families tended to live in the worst housing. In short, modern capitalism imposed on young couples a choice between relative poverty with children or a higher living standard without them. A growing number of potential parents were simply making the rational decision to have few or no children at all.[5]

Antimodernists with fascist leanings, including the German sociologist Roderich von Ungern-Sternberg, also heaped abuse on the spirit of capitalism. The free market, they charged, had given rise to a new human mentality—"the striving spirit"—which avoided matters of the heart and encouraged heightened individualism. In striving for success in a competitive environment, "bourgeois man" recognized that those who had few or no children had a better chance of winning the socioeconomic race. Similarly, industrial production loosened social arrangements that had once given women "sensible occupations" in household management. With women so thrown into the competitive scramble, there were no rational reasons why their rise to positions of economic power and influence should be precluded. Accordingly, women turned away from the housewife/mother role, even branding it with ridicule.[6]

In response, the defenders of market capitalism and liberal individualism argued that the crisis was only apparent, not real; that the fall in the birthrate represented an adjustment to an earlier and continuing decline in the infant mortality rate. Populations in relative equilibrium during the preindustrial era, with both high birth- and high death-rates, would soon find a new equilibrium or stability at lower, modern levels.

Nonetheless, during the late 1930s, governments in democratic France, Belgium, and Sweden, National Socialist Germany, and fascist Italy were frantically attempting to construct pro-natalist policies designed to encourage larger families. Yet the war intervened before results could be assessed, and attention was diverted elsewhere.

The Baby Boom

After World War II, the depopulation issue briefly resurfaced in Great Britain and France, only to disappear quickly from the political

stage. Unexpectedly, birthrates began climbing throughout the Western world in the mid-1940s. For most of Western and Central Europe, this recovery in fertility took the form of a "boomlet," peaking in 1949-50 and flattening out for a decade and a half on a stable plateau, with total fertility rates slightly above the replacement level. However, in the United States, Canada, and Australia, the fertility recovery continued to accelerate well into the 1950s, peaking in 1957-58 and remaining at a high level well into the 1960s.

The American "baby boom" derived from several mutually reinforcing factors. As 10 million servicemen were demobilized in 1945-46, they quickly caught up on long-delayed weddings and births. This period also saw significant decreases in the proportion of women remaining single or childless, in the average age of marriage, and in the time between marriage and the first and succeeding births. The unanticipated economic expansion of the 1940s and 50s provided abundant jobs for the relatively scarce young men born during the interwar period, which further encouraged couples to marry and begin childbearing early. Rapidly expanding suburbs proved conducive to larger families. Undergirding these developments were reinvigorated cultural attitudes that encouraged marriage, celebrated the housewife/mother role, and welcomed moderate-to-large families.

From our current perspective, the "baby boom" now appears to have been but the short-lived exception to the two-century-old trend of fertility decline. In the 1950s, though, it seemed to observers that a basic turning point had been reached. Pro-natalists such as Sauvy celebrated the existence of "a very new situation," symbolized by the rise in the number of Western births, by postwar documents such as the 1948 Universal Declaration of Human Rights (which labeled the family as "the natural and fundamental element in society and the state"), and by the return of educated, professional women to full-time childbearing.[7]

Refined demographic calculations also suggested that the classical liberal defenders of democratic capitalism had been correct: a natural balance at or above replacement was emerging throughout Europe and North America. The completed fertility for cohorts of German women born between the 1890s and 1930s, for example, proved to be surprisingly stable: approximately two children per woman. Similar levels over extended periods were discovered for France, Sweden, and Eng-

land and Wales. The cycles of decline and recovery after 1900, it turned out, were largely caused by changes in the *timing* of births: fertility declined in periods of war and economic depression and rose in periods of peace and prosperity. The sustained prosperity of the post-World War II era seemed to betoken stable or moderately expanding populations for the future.

Giving a variation to this theme, demographer Richard Easterlin of the University of Pennsylvania developed a thesis of fertility change that predicted cyclical baby booms well into the next century. In the new era, he argued, the material aspirations of young adults were largely shaped by the experiences in their parents' households during adolescence, and that fertility behavior (number of children) was determined by the degree to which a young man's earnings exceeded, met, or fell below his aspirations. When male incomes were high relative to their aspirations (as during the 1940s and 50s), marriage and childbearing were encouraged. When incomes failed to meet aspirations, though, wives sought employment and childbearing was deferred or avoided. Accordingly, he predicted that the huge cohort of youth born in the prosperity of the first baby boom would probably restrict their fertility to some degree; yet their children, in return, would have lower aspirations and, given their relatively slight numbers, would be in greater demand. Hence, these youths would produce a second "baby boom," starting in the 1990s.[8]

The Easterlin thesis emerged as the dominant interpretation of U.S. fertility trends in the post-World War II era. In the Western world generally, the received opinion of social scientists was that Western birthrates would hover at or somewhat above the replacement level. A steady state had been achieved.

On the Disappearance of Children

This held true until 1964. Then, everywhere at once, something went horribly wrong. With an uncanny coordination, birthrates throughout Europe, North America, and Australia began to fall again, and at accelerating rates. This happened in Marxist, socialist, and democratic capitalist countries alike. The downturn began in a period of unprecedented prosperity and economic growth and continued through the stagflation of the 1970s, into the 1980s.

Among Western nations, political reaction first came, predictably, from France. As the French birthrate plunged below the replacement level, strong pro-natalist voices reemerged. Former Prime Minister Michel Debre seized the issue in 1975, calling for a policy effort equivalent to war to restore the fertility rate. Historian Pierre Chaunu labeled the "new contraception and anti-birth arsenal" as "infinitely more dangerous" to the future of France than any atomic arms. The issue quickly transcended party lines. Then-president Valery Giscard d'Estaing, a Gaullist, argued in 1978 that "a society no longer able to assure the replacement of generations is a society condemned," and he argued for special policy incentives to encourage an increase in three-child families. More recently, Socialist President François Mitterand has argued that "the decline in the birthrate constitutes a grave menace for the West, and we must take action." Nationwide opinion polls showed a dramatic increase in popular pro-natalist sentiments after 1975 and even a jump in the "ideal family size" cited by women. In 1978-79, the French government raised the value of child allowances, particularly for third and subsequent children, and introduced a new supplemental benefit for the mothers of children age three or younger.[9]

The fertility collapse hit particularly hard in West Germany, where the number of births to the indigenous population fell from 1.06 million in 1964 to 576,468 in 1977. In the decade after 1966, the number of families with three or more children declined by two-thirds. Political reaction came in 1977, when the Christian Democratic Union tabled resolutions in the *Bundestag* that expressed "growing public concern" about the economic, social security, defense, and rural-policy implications of a declining population and urged study of the feasibility of a pro-natalist family policy. In March, 1980, the *Bundestag* conducted a major debate on depopulation, with the conservative Christian parties arguing for more financial support for families, including larger child allowances and a three-year benefit package for new mothers, including a maternal salary. The Social Democrats urged expanded day care and welfare services. The federal government did increase child allowances in 1979, particularly for third children, and extended paid maternity leaves to six months. On the *Länder* level, Bavaria, Baden-Wurtemburg, and other provinces introduced marriage loan programs providing newlyweds with low interest loans of 10,000 Marks, with the

principle to be forgiven through the successive birth of children.[10]

Sweden's population debate swelled during the same period. Nineteen seventy-six marked the first year that deaths actually exceeded native births. A year later, a book by Carl Aberg and Allan Nordin warned the nations of the perils of depopulation. Social Democrats grew uneasy over projections that below-replacement fertility would eventually gut the financial base of the welfare state. Conservatives hoped to restore the traditional family. Disagreements over cause were identical to those found in France and Germany: the right sought to reduce the incentives pushing women into the labor market and to secure recognition of home-based child care as socially useful work; the left wanted to expand day care and encourage men to carry a greater share of the child care burden. In the 1979-81 period, the government did raise child allowances to 3,000 Kronor per year for the first and second children, 3,750 for the third, and 4,500 for the fourth. They have since been raised again, particularly for third and fourth children. Day-care facilities have also been expanded and paid parental leaves from work extended.[11]

Lurking behind these developments, though, has been a common, usually unspoken fear: displacement by other peoples. The turn to pronatalist policies, in every case, has been accompanied or preceded by a shutting off of immigration. Germany ceased admitting new "guest workers" in 1974, followed shortly by Swedish and French immigration shutoffs. The reason is not hard to see. As late as 1965, the excess of births over deaths among the native German population was 334,000; among immigrant workers, 32,300. By 1975, though, the former figure had tumbled far below zero (-235,600), compared to growth in the latter to 99,000. Similarly in France, of a growth in total population between 1950 and 1975 of 11 million, seven million was due to immigration and four million to a higher birthrate. In contrast, expansion of the French population since 1975 is attributed almost exclusively to the high birthrate of immigrant North Africans. In both cases, the reaction against immigration set in *only after* the native population slipped into incipient decline.

In short, among naturally growing modern peoples, immigrants seemed to be perceived as a healthy addition to successful, expanding social systems. Among a declining people, though, immigrants become

perceived as a threat, and liberality gives way to xenophobia and suppression.[12]

A New Situation in America

In the United States, the dominant fixtures of the professional demographic establishment argue that the new population scare is overblown; that despite fertility rates well below replacement, equilibrium will return. Easterlin, for example, continues to argue that the U.S. fertility rate will rise in the 1990s as the small "baby bust" cohort of the late 1960s and 70s enters adulthood. Using the Easterlin model, Dennis Ahlburg of the University of Minnesota calculates a climb from 3.3 million American births in 1978 to 4.6 million in 1997.[13]

Yet there is strong evidence that the optimists are whistling in the dark: that we are in a new demographic era where the probable result is continued fertility decline. On a theoretical basis, it is clear that the demographers' assumption that Western societies would achieve stable populations at or near the ZPG level was never more than a pipe dream: a reflection of an understandable, if reactionary, neo-Malthusian quest for stability in a constantly changing world. As demographer Hilde Wander correctly notes, ZPG is not a development supported by some innate mechanism, as is long-term growth or long-term decline. It is rather a border case between growth and decline, liable to opposing forces, and inherently unstable.

The current status of Western populations represents something altogether novel. Never before in the long history of demographic change have populations stopped growing in normal times because of deficient fertility. From the 1970s on, the West has begun a "second" transition, entering an entirely new, wholly uncharted demographic terrain.[14]

Lying behind this radically different situation are three structural changes in the Western social order:

(1) *The new technologies of contraception and the legalization of abortion.* As population historians have long and correctly noted, the inhabitants of the West began to control their fertility well before modern contraceptive techniques were available. The decline in French, German, British, Swedish, and American birthrates set in during an era when *coitus interruptus* remained the primary contraceptive method for the large majority of the population. By the time the diaphragm and

relatively cheap condoms were available, Western fertility rates had already tumbled to half their preindustrial level. Nonetheless, fertility control remained haphazard and the number of "unwanted" births relatively high through the mid-1960s. However, the commercial introduction of the birth control pill in 1965 and the legalization of abortion in most Western countries in the 1968-80 period resulted in a sharp decline in the percentage of unwanted births. Among married women in the United States, for example, the percentage of unwanted births ("not wanted by mother at conception or any future time") fell from 20.5 percent in 1965 to 13 percent in 1973 and to 6.8 percent in 1982. According to one analysis, 42 percent of the fall in total fertility between 1973 and 1982 can be explained by this decline in unwanted children.[15]

(2) *The ongoing divorce of fertility from marriage.* Sweden and the United States offer two illuminating examples of societies that are consciously severing the ancient connection between wedlock and children. In the former land, marriage is slowly disappearing as an institution. In 1966, Sweden counted 61,000 marriages; by 1972, the number had fallen to 38,000, with a slowed, albeit continued, decline thereafter. In 1960, 43.7 percent of Swedish women aged 20-24 were married; by 1978, the number had fallen to 18.8 percent. Among those aged 25-29, the fall was from 77.7 to 52.0 percent. Taking the place of marriage is unmarried cohabitation. As late as 1960, only an estimated 1 percent of couples living together were unmarried. By 1970, the figure was 7 percent. A 1978 government report put the figure at 15 percent, and more recent estimates rise near 25 percent. Cohabitating couples, it is true, continue to have babies. Yet their completed fertility appears to be less than half of that found among married couples. Sweden's 1975 census, for example, showed married women, ages 30-34, with an average of 2.0 children; among cohabitating women in the same age bracket, the figure was 0.9. Reflecting the turn to cohabitation, illegitimacy is also skyrocketing in Sweden. As late as 1960, only one out of every 10 births was out of wedlock. By 1978 the figure had climbed to 36 percent.[16]

In the United States, it is true, wedlock remains popular, with the marriage rate still at a high level. Nonetheless, this country has also experienced a dramatic increase in the number of never-married young

adults. Among women ages 20-24, for example, the figure doubled from 28 percent in 1960 to 56 percent in 1983; for ages 25-29, from 11 to 25 percent. The number of reported cohabitating couples in the United States, while still proportionately small by Swedish standards, did climb from 523,000 in 1970 to 1,988,000 in 1984. Unmarried births are also enjoying a surge in popularity here, the illegitimacy ratio (illegitimate births as a percentage of live births) having quadrupled since 1957. Alice Rossi, in her 1983 presidential address to the American Sociological Association, notes that while voluntary childlessness has increased only slightly in recent decades, voluntary illegitimacy is enjoying growing popularity. She speculates that we may be moving through a time when parenting is being separated from marriage, as sex was separated from marriage in an earlier period.[17]

(3) *The creation of a new set of anti-natalist economic incentives through the transition from a one-income to a two-income family norm.* All commentators on the subject of contemporary fertility decline note the important effect of the massive movement of women into the labor market. Only a handful, though, fully explore the implications of that change.

Curiously, some of the most honest thinking on this subject comes from the pens of feminist theorists, who have focused on the revolutionary changes in male and female roles that have occurred over the last two decades.

In an article for *Feminist Studies*, sociologist Nancy Folbre lays out a comprehensive feminist theory of fertility decline. She argues that the "patriarchal family" (for nonfeminists, the traditional family), resting on the "domination" of women and the "exploitation" of female and child labor, was the historic Western family form. Such control, she says, allowed both parents to draw economic benefits from their children, whether young or grown; and it allowed men to shift a significant portion of the real cost of children (in terms of time and lost income) onto individual mothers. She argues, however, that capitalism subverted this family system. To begin with, the introduction of modern production methods led to a growing separation of home from work. In a competitive wage system, moreover, new opportunities for women to earn a wage raised the "opportunity cost" of children: the income or production foregone in order to provide maternal child care.

Folbre acknowledges that Karl Marx and Freiderich Engels had presented essentially the same argument. She adds, though, that the founders of Communism "clearly neglected the possibility that patriarchal interests might be reflected in policies set by employers, trade unions, and the state which would define the terms of women's participation in the labor force." Informal sanctions on women's labor, the division of jobs into "male" and "female" categories, special protective legislation, and the clear wage differential that men enjoyed over women were the mechanisms and institutions through which the traditional family protected itself against the logic of a competitive wage system. Folbre notes that the sexual wage differential, in particular, created a powerful economic incentive for women to assume the task of child care, "simply because they cannot replace the earnings that would be lost if fathers took time off from wage work." Such a system held through the 1950s.

Yet independent of this "coercive pronatalism," Folbre continues, other economic changes were undermining the material basis of the family unit. As child labor became illegal, as families shrank in size toward a norm of only two children, and as the expansion of commodity production provided a growing number of cheap substitutes for home-produced goods and services, the valuation of women's household labor fell. Even husbands began to see the benefit of sending their wives to work, she says. As women with fewer children began to spend more time in the marketplace and less time at home, they gained more experience and training which delegitimated the economic (although not the social) argument for the wage differential. Finally, many women—and some of their husbands—began demanding equal pay laws, affirmative action, and revaluation of male-female job categories on the basis of "comparable worth." At this critical point, the culturally set boundaries to industrial society, which had protected the family from the cancerous logic of radical individualism, were breached. Significantly, barely any defenders of the old order were to be found.

This collapse of a family-oriented economy, Folbre explains, is precisely what happened in Europe and the United States during the 1960s and 1970s. Childbearing became an activity conducted despite, rather than because of, economic self-interest. The decision to raise a child now imposes "truly phenomenal economic costs upon parents" and

provides no benefits. All existing economic incentives, she concludes, point toward accelerated fertility decline.[18]

Making a similar argument in an article entitled "Will U.S. Fertility Decline Toward Zero?" Joan Huber of the University of Illinois answers *yes*: "The most probable long-run fertility trend is continued decline, not just to ZPG but toward zero." Huber argues that it was the new demand for female labor during the prosperous 1950s that undermined prevailing cultural assumptions about a woman's responsibility to care for children at home. During that decade, the rapid expansion of business and government bureaucracies increased demand for clerical workers, traditionally a female job. Similarly, the baby boom increased demand for teachers and nurses, also female tasks. The diminished supply of young, unmarried women workers due to the low birthrate of the 1930s and the lowered age of marriage after 1945 also conspired to drive up demand for the labor of married women. In an era of weakened cultural institutions, the solitary decisions of employers to hire married women and of individual women or couples to send the wife/mother out to work coalesced into a revolutionary social transformation. So began the massive flow of married women into the labor force, a development which was politicized after 1960 and continues to our day.

Huber acknowledges that this trend originated "despite lack of normative support and in the face of a mass media propaganda barrage extolling the joys of family togetherness." Yet as more women began to spend more time in the labor force for more of their adult lives, powerful challenges were mounted against male and female job categories and the sexual wage differential that set the earnings of women employed full-time at about three-fifths the wages of male counterparts. Such developments, Huber says, "not only triggered a new women's movement but also set the stage for continued fertility decline." Indeed, she adds, feminist ideology in collision with the facts of biological replacement have "made the U.S. profoundly anti-natalist."

She anticipates no improvement in the future, for a variety of factors weigh against any revival of pro-natalism. First, the direct costs of child-rearing continue to rise, exceeding $175,000 for the first child. Second, the psychic costs of having children increase as parents face the awful challenges of peer groups, professional advice, and government

scrutiny. Huber points to studies consistently showing mothers at home with preschoolers to be the most unhappy group in the population. Third, the economic rewards of childbearing decline as Social Security wipes out the economic bonds of parents to children. Fourth, as women's educational level and job opportunities rise, the "opportunity cost" of staying home also increases. Fifth, husbands have become primary advocates of working wives, having learned (as did husbands in the Soviet Union) that the added income, in practice, costs them almost nothing in terms of extra housework. And sixth, the dramatic rise in the divorce rate since 1965 has suppressed the desire for children, by increasing women's risks of being saddled with the children alone.

Huber concludes that the primary long-term effect of women's rising employment has been "to increase the perception that parenting couples are disadvantaged in comparison to non-parenting ones." The emerging "zero-sum squabble" over jobs and income is not between men and women; rather, it is a zero-sum contest between parents and nonparents. Barring dramatic changes, she says, children will simply and slowly disappear.[19]

The New Home Economics

Support of an econometric sort for this pessimistic view comes from the school of research known as "the new home economics." Its proponents in both Europe and the United States argue that the determining factor in fertility changes since 1950 has been the rise in the earnings capacity of women, along with other developments that have induced greater labor force participation by young married women. Children are time-intensive, they argue, and any change which increases the "opportunity cost" of children will reduce "demand" for them.

From this perspective, the key change of the last four decades relative to fertility was the transition from a society in which most families had only one income-earner to a society in which most have two. In the traditional one-income family, where the wife specializes in child care and home activities, an increase in her husband's wage indirectly raises the cost of her home-based time (by raising the cost of her husband's potential child-care time), thereby raising the "cost" of children

and also reducing the probability of her joining the labor force. Under these circumstances, an increase in real family income tends to *encourage* additional births. In contrast, the new home economics theorists argue, a system in which both spouses work tends to *reduce* fertility by raising the value of leisure and working hours. These changes raise the cost of time and children in a manner that more than offsets the positive stimulus to fertility created by economic growth. Indeed, it appears that in a two-earner normative milieu, the more rapid the rate of economic growth, the more costly two-earner families find it to have children, making fertility negatively correlated to real wages. In consequence, the Western world now finds itself in a new era where *economic growth depresses fertility.*

The new home economics offers explanations of other recent changes in reproductive behavior. The rise in the average age of marriage since 1960 and the greater compression of the period during which a woman has her children (on average, starting a family later and finishing childbearing sooner) are rational acts in a society which has increased the "opportunity cost" to women leaving the workforce and has enhanced the expected degree of women's lifetime labor force attachment.

Declining marriage rates (in Europe), a high level of divorce, and rapidly growing levels of cohabitation are also predicted by this model. Marriage brings the most economic gain to a couple when the uses of the spouses' time are complementary: *e.g.,* when the husband devotes his time to paid employment and the wife to home activities. In this example, the mate with the higher earnings capacity tends to allocate more time to paid employment and less to nonmarket work. Because of this division of labor, the couple is *better off* than if they operated as individuals, since household time is cheaper (in foregone earnings) when supplied by the lower-wage spouse and the time devoted to paid labor has a greater payoff when supplied by the spouse with a higher wage. This gain from marriage *increases* with growth in disparity between the spouses' potential wages. However, as the earning potentials of the average man and woman move toward equality (through a cultural-political turn toward equal pay laws, affirmative action, and "comparable worth"), the gain from marriage diminishes and the incentive either to marry or save a marriage declines. Similarly, as the gain from marriage shrinks, risk-adverse individuals rationally seek to

acquire more information about potential spouses before entering into wedlock: hence, the rising propensity to cohabit.[20]

In short, the new home economics shows that in a system where the differential between men's and women's wages is shrinking, one should expect a growing number of two-earner households, a declining number of marriages, rising levels of divorce and cohabitation, and diminished fertility. Indeed, once the initial change in normative order has occurred, the momentum of transformation grows. As University of Chicago economist Gary Becker sums up: "The increase in labor force participation and the decline of fertility eventually accelerate even when the growth in female earning power does not. Moreover, these two factors accelerate the increase in the divorce rate because the decline in the gain from marriage also accelerates."[21]

Without explaining why, John Ermisch does retain faith that "there is undoubtedly a floor to fertility above zero," perhaps one child per family. Yet above that floor, he insists, economic growth will tend to push fertility downward.[22]

Most available evidence supports this interpretation of the fertility decline. The correlation between fertility decline and the rise in women's wages relative to men's is very close for West Germany, Britain, and the United States. Other studies show that career-oriented women reduce their expected family size by at least one child and that higher levels of education for women even translate into higher labor force participation during and immediately after pregnancy. According to recent calculations, the "opportunity cost," or lost wages, of a woman with a Master's degree choosing to care for a child up to age 14 is roughly $300,000. Without adopting the whole materialistic argument, one can acknowledge fundamental change in the economic incentive structure: modern Western economics based on the two-earner norm structurally discourage the birth of children.[23]

If the United States stood splendidly apart from the rest of the world, this economic fact of life might be acceptable: our numbers would decline, slowly at first, then with accelerated speed; our society would rapidly age, yet there would probably be sufficient reserve wealth in the nation to see us all comfortably through to our graves; last one turn out the lights, please.

Yet we do not stand apart from the world. Over the long run, our

ability to maintain the industrial base essential to our national security depends on relatively large numbers. Nations of 225 million people can afford to build Triton submarines and aircraft carriers. Nations of 25 million cannot.

More immediately, we are confronted by an altogether new situation relative to immigration. During the first great wave of non-British immigration to the United States (1840-1924), most arrivals came from distant lands across wide oceans and landed in a country with a native-born population that was still experiencing natural growth through relatively high fertility. The new immigration (1965-present), though, has different characteristics: (1) the largest share of new arrivals, legal and illegal, come from the contiguous Mexico/Central America region, a demographic hothouse with an extremely high fertility rate and some residual irredentist sentiments; and (2) they are settling in a country where the native-born population has been in long-term decline since 1973. If these two changes continue over the next several decades, it is folly to assume that there will not be major political and cultural consequences.

Indeed, it is possible that the American reaction to these trends of fertility decline and foreign immigration could turn populist and xenophobic. Nativism is a not-infrequent theme in American history, and the conditions are ripe for a new wave of passionate, possibly ugly, reaction. The survival of the United States as a pluralistic democracy may depend on how we choose to handle the fertility question.

Redressing the Economic and Cultural Balance

So what's to be done?

We can begin by recognizing that the "first" demographic transition, marked by the turn from uncontrolled to controlled fertility, is probably irreversible. The change occurred even at a time when the use of contraceptives was illegal and virtually every culture-shaping institution, from the churches to the universities, condemned the practice. The experience of the last century suggests that people, once having gained control over their reproduction, do not willingly give up that control. (To the degree that it is a matter of fertility control, the abortion question is the exception here. Recent pro-life gains lead to the conclusion that on this issue reversal may occur.) For the future, we need to

assume that the large majority of births will be planned and/or wanted.

Moreover, we need to recognize that governmental policies can have a powerful influence on some fertility decisions. Alfred Sauvy, looking at late-19th-century France, notes that while all politicians praised the virtues of home and family, taxation on housing hit large families the hardest. Demographer David Eversley argues that Britain's tottering welfare state has become a punitive system, where families with children increasingly cannot compete with childless households. One study of the impact of the U.S. selective service law since 1940 concludes that policies between 1940 and 1943 offering deferments to husbands and fathers stimulated one million early or extra marriages and raised the birthrate by 30 percent above what it would otherwise have been.[24] In short, governmental action does affect fertility—albeit usually unintentionally, indirectly, and/or adversely.

Finally, we need to be aware that the modern negative economics of child-rearing does have a depressive effect on fertility. One West German researcher found 53 percent of women citing "financial constraints" as their chief reason for not having another child, followed by "inadequate housing" (12 percent) and "children are a burden" (12 percent). One recent American study discovered three out of five parents citing "general financial burden" as their reason for not wanting more children.[25] Many other factors enter into the decision to bear a child—emotional, ideological, cultural, and personal. So does a clearly evident unwillingness on the part of many young people to make financial and temporal sacrifices in order to rear children. The point, though, is that finances and economic disincentives do make some difference.

In considering responses to the "second" demographic transition, during which the restructuring of the labor market and gender roles has turned economic growth into a force hostile to fertility, there appear to be four possible ways to counter this change:

(1) *We could adopt the feminist agenda* for resolving the fertility problem, seeking both to restructure the home so that men take equal responsibility for child care and domestic duties and to reconstruct the work-place so that it is "child friendly." The latter task would include on-site day-care centers, after-school-care centers, flexible hours, job-sharing, parents' insurance (paid leaves of absence after birth), and so on. There are some undoubted benefits in this approach, yet the expe-

rience of Sweden and Denmark, which have been pursuing these policies for several decades, strongly suggests that recovery of the fertility rate is not among them. These two nations remain at the very bottom of the demographic pile.

(2) *We could construct a strong pro-natalist policy system.* This has recently been attempted in several Eastern Bloc countries. The German Democratic Republic, for example, strengthened its incentives in 1976. A birth grant of 1,000 Marks (roughly one month's average salary in East Germany) is paid for each child. Monthly allowances are worth 30 percent of the average wage for a family with six children. Marriage loans are completely canceled out on the birth of a third child. Paid maternity leave is also available for one year after the birth of a baby. In Czechoslovakia, similar policies are supplemented by a mother's wage, paying a woman with at least one child below the age of two from $86 to $210 a month to provide full-time care for her children. However, the results of such policies have been, at best, meager, serving primarily to change the timing of births rather than lifetime fertility.[26] Moreover, such a policy model, with its heavy emphasis on socialized income redistribution, would seem strangely alien to the American setting.

(3) *We could create an alternative means of reweighting economic incentives in a more pro-child, pro-family direction.* Instead of taxing everyone and creating government payments for families, we could instead turn to the tried-and-true American method of social policy: use tax credits and exemptions to allow families to keep more of their earned income. Tax deductions for dependent children could be dramatically increased, from the current $1,080 to $4,000 or even $5,000 per child. The maximum child-care tax credit, now available only to working parents using day care, could be granted to couples who arrange to care for their own children at home. A new refundable income tax credit of $500 per child could be granted to taxpayers, up to the maximum value of their FICA or Social Security tax for the year.

These changes would also assist America's ace-in-the-hole on the fertility question: its pervasive religiosity. One consistent finding in studies of differential fertility—whether France in the 1920s or the United States in the 1980s—is that strong religious faith translates into larger

families. This appears to have relatively little to do with strictures against birth control and a great deal to do with reverence towards creation and life and obedience to God's perceived will.[27] Indeed, America's existing pockets of high marital fertility are found exclusively among religious groups: Mormons in Utah, Idaho, and other states; the Amish and Hutterite farm communities; fundamentalists heavily concentrated in the South; Hassidic Jews; and traditional Catholics.

It is clear that changes in the tax code will not stimulate fertility. Yet they would remove some of the disincentives to family *caused* by government and reduce the penalty falling on those who are deeply committed to family life and children. It is the least (and, in another sense, perhaps the most) that the government of a free people can do.

(4) *Continue the cultural tasks of restoring a viable family norm.* The major shift in economic incentives outlined above, particularly the creation of a strong disincentive to the mother at home, has had an undoubted negative effect on family formation and fertility. The immediate cause of the change, as noted, was disintegration of the cultural, political, and legal structures that had set the family unit off as a protected unit in the competitive sea. The weakness of those structures, though, clearly derived from older developments: the decline of pietism and ethical judgment among the once-dominant mainline Protestant churches; the disappearance in the schools of training in principles of obligation, fidelity, and responsibility to one's lineage; a modern art and literature which portrayed marriage and procreation as backward, hopelessly archaic acts while extolling the merits of unencumbered sex and self-absorption. It is important to remember that the economic principles undergirding family life could crumble only after decades of such cultural softening: when challenged, they found that they had few defenders. Their restoration in a mode adapted to the late 20th century can occur only after these cultural foundations of family life are recovered.

This latter task is large, yet the 1980s are delivering promising signs that it is possible. America's churches are in turmoil and seem ready for renewal. The disastrous decline of American education has apparently ceased and shows hints of reversal. There are even glimmerings of a revival of traditional themes in literature and art.

Over the long run, only the nurturing of these trends will restore the United States as a nation friendly to children and family.

NOTES

1."Measuring Impact of the 'Baby Bust' on U.S. Future," *U.S. News and World Report*, December 16, 1985, pp. 66-67.

2. Ben J. Wattenberg and Karl Zinsmeister, "A Speculation on the Geopolitical Implications of Below-Replacement Fertility in the Western Democracies." A presentation during AEI Public Policy Week, Washington, D.C., December 2, 1985.

3. Perhaps the best survey of the first depopulation scare is: D. V. Glass, *Population Policies and Movements in Europe* (Oxford: Clarendon Press, 1940).

4. Valere Fallon, S.J., *Les allocations familiales pour les classes moyennes* (Brussels: Ligue des familles nombreuses de Belgique, 1938).

5. See: Gunnar Myrdal, *Population: A Problem for Democracy* (Cambridge: Harvard University Press, 1940).

6. Roderich von Ungern-Sternberg, "Die Ursachen des Geburtenrückgangs im welteuropäischen Kultkurkris wahrend des 19. und 20. Jahrhunderts," *Archiv für Bevolkerungswissenschaft und Bevolkerungspolitik* 8 (1938), pp. 1-19; and *Biologie und Okonomie* (Berlin: Richard Schoetz, 1936), pp. 94-98.

7. Alfred Sauvy, "The Family," in *General Theory of Population*, (New York: Basic Books, 1969), pp. 404-06.

8. See: Richard A. Easterlin, *The American Baby Boom in Historical Perspective*, (New York: National Bureau of Economic Research, 1962), and subsequent works.

9. Marie-Monique Huss, *Demography, Public Opinion, and Politics in France, 1974-80*, Occasional Paper No. 16, (London: Department of Geography, Queen Mary College, University of London, 1980), pp. 23-62; and Richard Tomlinson, "The French Population Debate," *The Public Interest* 76 (Summer 1984), pp. 111-20.

10. C. Alison McIntosh, *Population Policy in Western Europe* (Armonk, NY: M. E. Sharpe, 1983), pp. 177-220; and Adelhard Grafin zu Castell Rudenhausen and Wolfgang Köllmann, "Past and Present Policy Reactions to Fertility Decline in Germany," in David Eversley and Wolfgang Köllman, editors, *Population Change and Social Planning* (London: Edward Arnold, 1982), pp. 414-25.

11. McIntosh, *Population Policy in Western Europe*, pp. 147-73.

12. See: Julian Crandell Hollick, "Demographic Change in Europe," *The World Today* 36 (September 1980), pp. 361-68.

13. Jean van der Tek, editor, "U.S. Population: Where We Are; Where We're Going," *Population Bulletin* 37 (June 1982), p. 8; and Dennis Ahlburg, "Good Times, Bad Times: A Study of the Future Path of U.S. Fertility," *Social Biology* 30 (Spring 1983) pp. 17-23.

14. Hilde Wander, "Zero Population Growth Now: The Lessons From Europe," in Thomas J. Espenshade and William J. Serow, editors, *The Economic Consequences of Slowing Population Growth* (New York: Academic Press, 1978), pp. 41-42, 67-68.

15. William F. Pratt, *et al.*, "Understanding U.S. Fertility: Findings From the National Survey of Family Growth, Cycle III," *Population Bulletin* 39 (December 1984), pp. 8-9, 31.

16. Murray Gendell, "Sweden Faces Zero Population Growth," *Population Bulletin* 35 (June 1980), pp. 11-14; and McIntosh, *Population Policy in Western Europe*, pp. 140-42.

17. Alice S. Rossi, "Gender and Parenthood: American Sociological Association, 1983 Presidential Address," *American Sociological Review* 49 (February 1984), pp. 1-19; Larry L. Bumpass, *The Changing Linkage of Nuptiality and Fertility in the United States*, CDE Working Paper 79-6 (Madison, WI: Center for Demography and Ecology, University of Wisconsin, 1979), pp. 18-19; and Wendy H. Baldwin and Christine Winquist Nord, "Delayed Childbearing in the U.S.: Facts and Fictions," *Population Bulletin* 39 (November 1984), pp. 15-17.

18. Nancy Folbre, "Of Patriarchy Born: The Political Economy of Fertility Decisions," *Feminist Studies* 9 (Summer 1983), pp. 261-84.

19. Joan Huber, "Will U.S. Fertility Decline Toward Zero?" *The Sociological Quarterly* 21 (Autumn 1980), pp.481-92.

20. John Ermisch, "Investigation Into the Causes of the Postwar Fertility Swings," in Eversley and Köllman, *Population Change and Social Planning*, pp. 141-55.

21. Gary S. Becker, *A Treatise on the Family* (Cambridge, MA: Harvard University Press, 1981), p. 251.

22. Ermisch, "Investigation Into the Causes of the Postwar Fertility Swings," p. 154.

23. *Ibid.*, p. 147; Linda J. Waite, "U.S. Women at Work," *Population Bulletin* 36 (May 1981), pp. 13-14; Steven D. McLaughlin, "Differential Patterns of Female Labor-force Participation Surrounding the First Birth," *Journal of Marriage and the Family* (May 1982), pp. 414-15; and Thomas J. Espenshade, "The Value and Cost of Children," *Population Bulletin* 32 (1977), pp. 25-27.

24. Sauvy, *General Theory of Population*, p. 384; David Eversley, "Prospects for a Population Policy in the U.K.," in Eversley and Köllman, *Population Change and Social Planning*, p. 432; and Edwin Driver, *Essays on Population Policy*, (Lexington, MA: Lexington Books, 1972), pp. 166-81.

25. McIntosh, *Population Policy in Western Europe*, p. 209; and Espenshade, "The Value and Cost of Children," pp. 20-21.

26. See: Henry P. David, "Eastern Europe: Pro-natalist Policies and Private Behavior," *Population Policy* 36 (February 1982), pp. 3-39.

27. See: Nan E. Johnson, "Religious Differences in Reproduction: The Effects of Sectarian Education," *Demography* 19 (November 1982), pp. 495-99; Julia Ericksen and Gary Klein, "Women's Roles and Family Reproduction Among the Old Order Amish," *Rural Sociology* 46 (Spring 1981), pp. 282-96; and Moshe Hartman, "Pronatalistic Tendencies and Religiosity in Israel," *Sociology and Social Research* 68 (January 1984), pp. 247-58.

After *Roe*: You Can't Go Home Again

Carl A. Anderson

THE SEVERITY AND INTENSITY OF THE LEGAL CRITICISMS of *Roe* v. *Wade* suggest that the decision will eventually be overturned.[1] But it seems that there has been too little thought given to the most important question: What kind of constitutional jurisprudence of human life should we have after *Roe*?

Most discussions of the post-*Roe* era have focused on political questions, such as how state legislatures would react in the wake of the decision's demise and what type of abortion statutes they might enact,[2] without asking how the Supreme Court can reverse *Roe* in a way consistent with the historical treatment of abortion in the United States. To do *that*, the Court will have to go beyond a simple grant of legislative discretion to the States, and instead act to afford legal protection to human life before birth.

Certainly *Roe* v. *Wade* has failed to gain widespread acceptance as a legitimate exercise of judicial power. Judge John T. Noonan, Jr., of the 9th Circuit Court of Appeals, neatly summed up this attitude towards *Roe* when (as a professor of constitutional law at the University of California at Berkeley) he wrote:

> The liberty established by *The Abortion Cases* has no foundation in the Constitution of the United States. It was established by an act of raw judicial power. Its establishment was illegitimate and unprincipled, the imposition of the personal beliefs of seven justices on the women and men of fifty states. The continuation of the liberty is a continuing affront to constitutional government in this country.[3]

The conclusion that the demise of *Roe* is inevitable stems also from a sense that the continued survival of the decision rests not on its reasoning but upon its authors' dependence on it for their own judicial identity. Indeed, this is all the more evident as medical technology renders obsolete the legal approach to abortion mandated in *Roe*. As Justice Sandra Day O'Connor observed in her dissenting opinion in *Akron* v. *Akron Center for Reproductive Health*:

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> The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception . . . . Even assuming that there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic for the trimester framework adopted in *Roe* . . . . For the reasons stated above, that framework is clearly an unworkable means of balancing the fundamental right and the compelling state interests that are indisputably implicated.[4]

The only national policy sustainable over time in American society is one that can be defended and accepted within our democratic institutions. The policy determinations in *Roe* are no closer to obtaining that acceptance today than when the decision was handed down in 1973. Indeed, even then, it was apparent that the effort to widen legal acceptance of abortion had come to a stop and was beginning to recede.

Beginning with Colorado in 1967 and continuing through the popular referendum in Washington State in 1970, a number of states enacted liberalized abortion laws. However, during 1971, not one state repealed or amended its law although 30 legislatures considered legislation to do so. The next year, Connecticut adopted restrictive provisions, and the New York legislature repealed the liberal law it had enacted in 1970. Also in 1972, North Dakota and Michigan voters rejected proposals to liberalize state statutes by wide margins in popular referenda. Since 1973, state legislatures and local communities have sought in a variety of ways to limit the reach of *Roe* v. *Wade*.[5]

At the Federal level, Congress has moved to restrict government funding of abortion through Medicaid and other health programs to only those cases where the life of the mother is endangered. It has prohibited abortion as a method of family planning under both the national and international population control programs, banned Federal involvement in experimentation on aborted or about-to-be aborted children, prohibited Legal Services Corporation attorneys from abortion litigation, and amended the Hill-Burton Act to provide that hospitals may not be required to perform abortions as a condition for Federal assistance under the Act.[6] Committees in both the Senate and the House have conducted extensive hearings on legislation to overturn *Roe* in 1975,[7] 1976,[8] and 1981.[9] Since those hearings, the Senate has easily

confirmed the nominations of two new justices to the Supreme Court committed to the reversal of *Roe*. Clearly, not only has *Roe* failed to obtain acceptance, but it has also been the focus of a constant drumbeat of legal criticism and political controversy.

In *Roe* v. *Wade*,[10] the Supreme Court struck down a Texas statute which protected the unborn child from the moment of conception and restricted abortion except when necessary to save the life of the mother. In doing so, the Court held that the right of privacy found in the Fourteenth Amendment's term "liberty" included the abortion decision and that the State's interest in protecting "potential" human life before birth became compelling only after viability.

Some have argued that the most appropriate response to the *Roe* decision is to simply return to the legislatures of the fifty states the power to restrict and regulate abortion. Such a resolution has a great deal of appeal. It recognizes the wisdom of Justice Holmes when he reminded us that the state legislatures "are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[11] It recognizes too that legislatures possess a superior fact-finding capability which does not depend upon the resources or talents of the advocates before it and is not limited by evidenciary rules. Moreover, legislatures are more likely to find ways to compromise competing policy views and are better suited to the review and correction of policy choices over time.

While this federalist approach to reversing *Roe* has merit, it nonetheless has a serious drawback. It leaves undisturbed the premise of the Court's decision: Justice Blackmun's contention that "We need not resolve the difficult question of when life begins."[12] After all, the debate over *Roe* has never been simply or even principally a debate over whether the proper locus of decision-making was the individual, the legislature or the court, but whether the decision should be made at all. As President Reagan has often said, "When we talk about abortion, we are talking about two lives—the life of the mother and the life of the unborn child."[13] Because this debate will not be concluded without recognizing the biological humanity of the unborn child and restoring the nexus between biological humanity and legal personhood, it seems unlikely that the Supreme Court can withdraw from the abortion controversy by a simple reversal of *Roe*. Prior to 1973, the humanity of the

unborn child was at the center of state action regarding abortion. Although a comprehensive review of the common law treatment of abortion is not possible here, it is worth noting that significant change in the law's treatment of the question occurred as a result of the discovery in 1827 of the nature of conception.

The first criminal statute prohibiting abortion in the United States was enacted by the Connecticut legislature in 1821.[14] Prior to that time abortion was considered a serious criminal offense under Anglo-American case law. Under the laws of England, according to Lord Coke[15] and Matthew Hale,[16] abortion, while not murder, amounted to "a great misprison" and "a great crime," if the woman "be quick or great with child." Some have argued that the term "quickening," that is, the point during pregnancy when the mother is able to feel the movement of her unborn child, was at common law the point at which criminal liability for abortion took effect. The better view is that "quickening" was utilized at common law as a practical test to determine whether there had been an assault upon a live human being in the womb and whether that act had caused the child's death.[17] "At all times, the common law disapproved of abortion as *malum in se* (evil in itself) and sought to protect the child in the womb from the moment his living biological existence could be proved."[18]

Thus in England, when the common law crime of abortion was codified by statute in 1803, the term "quickening" remained the dividing line, not as the threshold of whether an offense had been committed, but of the severity of the offense. When the woman was "quick with child," the offense was punishable by death; otherwise it was a felony punishable by imprisonment, fine, whipping, pillory, or transportation to a penal colony for up to 14 years.[19]

Unquestionably, the 1803 English law was consistent with the accepted medical knowledge of the time. Thomas Percival, who in the same year published his work on medical ethics, strongly condemned abortion and argued for protection of the unborn child from "the first spark of life."[20] When in 1827, the nature of conception was discovered, the law soon followed the advance of science. Parliament enacted a new law on abortion which deleted the "quickening" distinction and provided for uniform penalties for abortion regardless of the stage of pregnancy. By 1838, an English court reinterpreted the common law

rule prohibiting the execution of a woman "quick with child" to apply to a time prior to when the woman would actually feel the child's movements. The court stated: "'Quick with child' is having conceived."[21]

American courts also readily abandoned the "quickening" distinction in their attempt to remain abreast of scientific progress. The basic American text on medical jurisprudence during the 19th century stated:

> . . . the fact is certain, that the fetus enjoys life long before the sensation of quickening is felt by the mother. Indeed, no other doctrine appears to be consonant with reason or physiology, but that which admits the embryo to possess vitality from the very moment of conception.[22]

The 1859 report of the Committee on Criminal Abortion of the American Medical Association (AMA) described abortion as "the wanton and murderous destruction" of the unborn child.[23] The AMA's unanimous acceptance of the committee's resolution calling for the revision of abortion laws was unquestionably the single most important cause of the transformation of abortion law in 19th century America. Nearly a decade later, the chairman of that AMA committee, Dr. Horatio Storer, summarized the rationale of these new statutes:

> Physicians have now arrived at the unanimous opinion, that the foetus is alive from the very moment of conception. . . . The willful killing of a human being, at any state of its existence, is murder. . . . Abortion is, in reality, a crime against the infant, its mother, the family circle, and society.[24]

The action of the AMA produced quick results from state legislatures. For example, one year after the Committee on Criminal Abortion rendered its report, the legislature of Connecticut amended that state's abortion law to delete the "quickening" limitation.[25] The AMA action also affected the activity of state medical societies as well. For example, in 1867, the New York Medical Society condemned abortion at whatever gestational age performed as "murder."[26] By that year a number of states, including Connecticut and Pennsylvania, had adopted legislation making abortion a crime from conception. By the end of the century, virtually every state had enacted legislation substantially restricting the performance of abortion.[27]

An especially significant development was the enactment of criminal abortion statutes in the Federal Territories of Arizona, Colorado, Idaho, Montana, and Nevada, because territorial legislation was subject to the approval of the Congress. The nineteenth-century reform of abortion

law—particularly in the Federal territories—is constitutionally significant in that it took place contemporaneously with the drafting and ratification of the 13th and 14th Amendments to the Constitution. These state abortion laws were part of a broader development in American jurisprudence to afford legal protection to those who were recognized as biologically a human being. Professor Joseph Witherspoon explains that the drafters of the 14th Amendment

> . . . intended to establish a definition or concept of human beings based upon biological reality and common sense or scientific truth. In their view, whoever is a human being in fact is a human being or person in law. . . . It was their purpose by this definition to take away the power that had been exercised by legislatures, courts, chief executives, and administrative agencies in the past of treating or defining as a nonhuman being one who is a human being in fact or reality.[28]

There is no evidence that the framers of the 14th Amendment disagreed with the anti-abortion statutes that were being enacted in the 19th century. On the contrary, as Justice Rehnquist observed in his dissent in *Roe*, "By the time of the adoption of the 14th Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. [The] only conclusion possible from this history is that the drafters did not intend to have the 14th Amendment withdraw from the States the power to legislate with respect to this matter."[29]

If the law's obligation to treat as a human being that which science demonstrates to be a human being was a central concern during enactment of restrictive abortion laws in the nineteenth century, it remained an issue in the mid-twentieth century when states began to relax those restrictions. Perhaps the clearest example can be found in litigation following the revision of New York's law in 1970. In *Byrn* v. *New York City Health and Hospital Corp.*,[30] Robert Byrn, Fordham University law professor, obtained appointment as a guardian *ad litem* for unborn children in New York State. He sued for a declaratory judgment that the 1970 statute which permitted abortion within the first 24 weeks of pregnancy amounted to an unconstitutional deprivation of life of the unborn child.

Professor Byrn presented extensive expert testimony regarding the development of the child before birth "in order to present to the court a composite picture of the unborn child as, in all factual respects, a live human being, no different qualitatively from his post-natal sibling."[31]

The evidence proved convincing. The New York Court of Appeals held that "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' . . . . It is human . . . and it is unquestionably alive."[32]

The court held, however, that the resolution of that question was not determinative. It posed a further question, "whether a human entity, conceived but not yet born, is and must be recognized as a person in the law."[33] The court then held that "it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence."[34] Citing the German legal philosopher Hans Kelsen, the court observed:

> What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person.[35]

The implications of the majority's positivist rationale for its decision in *Byrn* were not lost on Judge Burke, who specifically rejected the notion that "it is a policy determination whether legal personality should attach." Judge Burke wrote:

> This argument was not only made by Nazi lawyers and Judges at Nuremberg, but also is advanced today by the Soviets in Eastern Europe. It was and is rejected by most western world lawyers and Judges because it conflicts with natural justice and is, in essence, irrational. To equate the judicial deference to the wiseness of a Legislature in a local zoning case with the case of the destruction of a child in embryo which is conceded to be 'human' and is 'unquestionably alive' is an acceptance of the thesis that the 'State is supreme,' and that 'live human beings' have no inalienable rights in this country. . . . Human beings are not merely creatures of the State.[36]

Apparently the *Byrn* case (or perhaps its dissent) presented the question of the humanity of the unborn child and its claim to legal personhood too directly for the U.S. Supreme Court,[37] which refused to hear the case on appeal.

However, another national high court did hear an abortion case centering on the humanity of the unborn child and the responsibility of the State to recognize and protect it. In 1974, the Federal Constitutional Court of West Germany heard a challenge to the country's newly-revised abortion law, which, like the New York statute, decriminalized abortion when performed within the first 12 weeks of pregnancy.[38] The

West German court addressed the issue in a fundamentally different way from its U.S. counterpart. Overturning the 12-week provision, the court held that "The life which is developing itself in the womb of the mother is an independent legal value which enjoys the protection of the constitution."[39]

While acknowledging that abortion is a subject which has been publicly debated for decades from various points of view, the West German court concluded it was precisely because of this debate that it was the responsibility of the legislature to "evaluate the many sided and often opposing arguments which develop from these various ways of viewing the question."[40] Yet, the court also stated that because abortion involved "the protection of human life, one of the central values of every legal order," there were "limits" to "legislative freedom of decision" and that these limits were to be found in the "total view" of the Constitution and "the hierarchy of values contained therein."[41]

Article 2 of the West German Constitution provides that "Everyone shall have the right to life . . ."[42] In reviewing the history of this provision the court noted that its inclusion in the German constitution was new. It was not to be found in the previous Weimar Constitution. The court observed that its inclusion was to "be explained principally as a reaction to the 'destruction of unworthy life,' to the 'final solution' and to 'liquidations,' which were carried out by the National Socialist Regime."[43] The West German court held that the protection of the right to life provided by Article 2 had to be interpreted broadly as part of the national response to the treatment of certain classes of persons under Hitler's National Socialism. The court further explained:

> . . . the Basic Law has erected a value oriented order which places the individual human being and his dignity at the center of all its determinations. . . . Fundamental to this is the idea that the human being has its own independent value . . . which demands unconditional respect for the life of every human being.[44]

In holding the German statute which permitted unrestricted abortion during the first trimester unconstitutional, the court observed that "The state may not abdicate its responsibility even through the recognition of a 'legally free area,' by which the state abstains from the value judgment and abandons this judgment to the decision of the individual."[45]

Although it established this minimum floor of constitutional protection for the unborn child, the court did *not* go further and circumscribe

legislative discretion in balancing the competing interests in the abortion decision. Consequently, in 1976, the Bundestag enacted a new criminal abortion statute which, while it restricted the performance of abortion throughout pregnancy, provided for abortion to advert "a risk of serious damage" to the woman's physical or mental health, when the unborn child may be handicapped or when "reasons exist for presuming that the pregnancy is the consequence" of sexual abuse or assault.[46]

The 1976 statute has not been challenged in court and therefore the German high court has not had occasion to review whether the action of the Bundestag complies with the standard the court laid down regarding the obligation of the State to protect human life before birth. But whether the legislative response to the German court's decision was constitutionally adequate, the fact remains that the Court, with a much more limited tradition of judicial review than our own Supreme Court, felt compelled to respond to its national experience with National Socialism by adopting an expansive reading of the right to life.

In the U.S., the Supreme Court has, after an admittedly slow beginning, moved to implement an expansive standard of equal protection in the aftermath of our national experience with slavery. Similarly, in its response to our national experience of *Roe* v. *Wade* and its aftermath of some 18 million abortions, the Supreme Court—perhaps only gradually—will also move to adopt an expansive protection of life for human beings before birth.

As Professor Richard Epstein observes, until the early 1970s American law generally treated the child before birth as a legal entity with protectable interests whenever doing so would be in the child's interest.[47] It was perhaps inevitable that a reversal of that trend would directly raise the question of the obligation of the law to treat as a person that which is recognized biologically as a human being. To answer as did the New York Court of Appeals in *Byrn* that this is simply a policy determination remains profoundly unconvincing in a society committed to a legal order grounded in the recognition of fundamental human rights. Indeed, the 13th and 14th Amendments testify that the rejection of this positivist approach to legal personhood is deeply rooted in our country's history and tradition.

In his dissent in *Thornburgh* v. *American College of Obstetricians*, Justice White wrote:

> . . . the termination of a pregnancy typically involves the destruction of another entity: the fetus. However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. Given that the continued existence and development—that is to say, the *life*—of such an entity are so directly at stake in the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*.[48]

The difficulty posed by Justice White in this passage is virtually identical to that raised in the *Byrn* case: if we say that "there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being," then how may we draw an arbitrary line at birth in regard to the law's obligation to protect this life?

In *Thornburgh*, Justice White objected that "*Roe* v. *Wade* implies that the people have already resolved the [abortion] debate by weaving into the Constitution the values and principles that answer the issue. As I have argued," he concluded, "I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing. I would return the issue to the people by overruling *Roe* v. *Wade*."[49]

It is easy to agree with Justice White if by this he means that in drafting and ratifying the 14th Amendment the American people did not intend to set forth the detailed abortion statute the Court produced in *Roe*. But this does not foreclose the possibility that in 1868 the people did indeed weave into the Constitution the "values and principles" that should guide the outcome in *Roe*. By adding the 14th Amendment to the Constitution, the people did think that they were doing something to protect the nation from a future tragedy similar to that which they had just experienced—a tragedy resulting from a decision of government to arbitrarily deny a class of human beings the fundamental protection of the law. That action by the people has everything to do with why *Roe* was wrongly decided and how *Roe* should be reversed.

The drafters of the 14th Amendment used both the terms "person" and "citizen." It is only the latter term which is clearly conditioned on birth in order to automatically claim the privileges and immunities of

American citizenship. By use of the broader term "person," the drafters intended to offer a broad protection, including the protection of life, to those individuals who did not meet the requirements of citizenship.[50] There is nothing in the language or history of the 14th Amendment which demands that one be born to be afforded the right to life guaranteed by its provisions.

Indeed, one would expect that the drafters of this language not only chose the term "person" with care but were also deliberate in their choice of the word "life." Certainly, they were aware of the discovery by science earlier in the century that the life of each human being begins at conception and continues throughout pregnancy. There is no reason to believe that in employing the term "life" they somehow intended an abbreviated meaning of it—a meaning which had already been discredited by the scientific discoveries of their time.

The text of the Constitution itself does not define the term "person." And the Court, of course, has interpreted the word to include corporations.[51] But to say that the Court may expand the term "person" to include inanimate objects within the protections of the Constitution as a matter of policy is not to say that it may narrow that term to *exclude* certain human beings from those protections.

Justice White continues to see a role, even if a limited one, for substantive due process as his dissenting opinion in *Thornburgh* and more recent majority opinion in *Bowers* v. *Hardwick*[52] make clear. According to White, substantive due process "includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed."[53] It is difficult to see how such a role can be preserved if the right to life, upon which all other liberties depend, can be dismissed so easily.

But if broad discretion is returned to the legislative branch while preserving a limited role for substantive due process, at a minimum substantive due process should mean that there exists a constitutional floor of protection of the right to life of all human beings. While the legislature may resolve the competing life interests in the difficult abortion cases, it should be made clear that no branch of government may place an entire class of human beings at whatever stage of development outside the protection of the law.

Perhaps some will argue it is too much to expect the Court in one decision to move from denying the unborn child any realistic protection to affording the complete protection of personhood. If so, the Court should not expect the personhood issue to go away. One can expect the biological humanity of the unborn child to be raised in litigation before the Court. One can also expect that the judicial reversal of *Roe* will be the occasion for the enactment of numerous state laws regulating and restricting abortion, many of which will be explicitly premised on the recognition and protection of the unborn child. Some states may even go further and resolve the personhood issue by amending their own constitutions to afford the right to life to the unborn. During 1986, the people of Rhode Island considered just such an amendment to their state constitution. It read in part as follows:

> All human beings, including their unborn offspring at every stage of their biological development beginning with fertilization, are persons who are protected in their inalienable and paramount right to life, without regard to age, health, function, or condition of dependency.[54]

It was unlikely that such language would be adopted while *Roe* v. *Wade* is still standing, but upon the decision's reversal one may expect that such an amendment would be enacted not only in one, but in several states. That development would almost certainly spur litigation that would reach the Supreme Court.

There is an additional reason why, try as it may, the Court will not be able to step backward to the pre-*Roe status quo.* That might have been possible if the Court had acted to reverse *Roe* soon after it had been decided. But during the 14 years that the decision has been in effect, it has substantially altered the legal environment in regard to the protection of human life.[55] *Roe* has been cited as justification for establishing a cause of action in wrongful birth cases,[56] for the denial of lifesaving treatment to handicapped newborn infants,[57] for the denial of heart surgery for a mentally handicapped child,[58] for the denial of cancer treatment of an elderly institutionalized patient,[59] and for the termination of a respirator for a comatose teenager.[60]

It is not at all certain whether the outcome of cases such as these will change with the simple reversal of *Roe.* Each presents a different variation on the underlying issue of *Roe* in regard to legal recognition and protection of the biological person. As the technological manipulation

of the human person at both his beginning and ending stages of development increases, so too will the underlying debate increase between the competing views of the law involved in the abortion cases. In the future, technology will increasingly define the parameters of human life. We must ask ourselves whether the inviolability and the dignity of the human person can be made secure without repairing the vital link, broken by *Roe*, between the biological person and the legal person.

An editorial in the 1941 Yearbook of Obstetrics and Gynecology suggests an answer:

> 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 live 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 and that we may ultimately attain salvation.[61]

The law's affirmation of the dignity of the human person is not static. To the contrary, the American experience of constitutional government has steadily expanded the protection of the law to include all human beings. The authors of the 13th and 14th Amendments witnessed years of national tragedy due in large measure to the failure of the law to correspond to biological reality. Clearly, those lawmakers intended that their efforts would protect their posterity from a future failure. Within this context, the abortion statute struck down in *Roe* was not at odds with the 14th Amendment. To the contrary, both statute and Amendment were part of a consistent approach to law and a commitment to human rights and dignity. It is the rationale of *Roe* which marks a retreat from this commitment. As the opinions in *Byrn* made clear, this retreat cannot be corrected by overturning *Roe* in a way which simply grants to state legislatures discretion regarding the protection of human life. In *Byrn*, Judge Burke reminded us that, for the law to refuse to recognize human beings as such is "in essence, irrational." When that refusal negates the fundamental obligation of the law to protect human life, the events of the last two centuries make abundantly clear where such irrationality leads.

CARL A. ANDERSON

NOTES

1. *Roe* v. *Wade*, 410 U.S 113 (1973). See, for example, A. Bickel, *The Morality of Consent* (1975), p. 28; A. Cox, *The Role of the Supreme Court in American Government* (1976), pp. 113-114; G. Grant, *English-Speaking Justice* (1985), pp. 69-89; C. Rice, *The Vanishing Right to Live* (1969); Byrn, "An American Tragedy: The Supreme Court on Abortion," 41 *Fordham Law Review* (1973), p. 807; Dellapenna, "Nor Piety nor Wit: The Supreme Court on Abortion," 6 *Columbia Human Rights Law Review* (1974), p. 379; Destro, "Abortion and the Constitution: The Need for a Life Protective Amendment," 63 *California Law Review* (1975), p. 1250; Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*," 82 *Yale Law Journal* (1973), p. 920; Epstein, "Substantive Due Process by Any Other Name: The Abortion Cases," *1973 Supreme Court Review*, p. 159.

2. Collins, "Is There 'Life' (Or 'Choice') After *Roe*?", 3 *Constitutional Commentary* (1986), p. 91.

3. J. Noonan, *A Private Choice: Abortion in America in the Seventies* (1979), p. 189.

4. 462 U.S. 416, 458-59 (1983).

5. For example, *Planned Parenthood* v. *Danforth*, 482 U.S. 52 (1976); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Poelker* v. *Doe*, 432 U.S. 519 (1977); *Bellotti* v. *Baird*, 433 U.S. 622 (1979); *H.L.* v. *Matheson*, 450 U.S. 398 (1981); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood* v. *Ashcroft*, 462 U.S. 476 (1983); *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983); *Thornburgh* v. *American College of Obstetricians*, 106 Sup. Ct. 2169 (1986).

6. *Supra* note 1 at 96-119; J. Agresto, *The Supreme Court and Constitutional Democracy* (1984), p. 130.

7. Hearings on S. J. Res. 6 before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 94th Congress, 1st Session (1976).

8. Hearings on Proposed Constitutional Amendments on Abortion before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Congress, 2nd Session (1976).

9. Hearings on the Human Life Bill before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 97th Congress, 1st Session (1981) and Hearings on Constitutional Amendments Relating to Abortion before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Congress, 1st Session (1981).

10. 410 U.S. 113 (1973).

11. *Missouri, Kansas & Texas Railway* v. *May*, 194 U.S. 267, 270 (1904) (Holmes, J., dissenting).

12. *Supra* note 10 at 159.

13. R. Reagan, *Abortion and the Conscience of the Nation* (1984), p. 21. President Reagan has consistently supported legislation and proposed amendments to the Constitution which would recognize the unborn child as a person in regard to the right to life protected by the Fifth and Fourteenth Amendments; see, for example, *idem* at 30-31.

14. Conn. Stat., Title 22, sections 14, 16 (1821).

15. E. Coke, *The Third Part of the Institutions of the Laws of England*, section 50 (1797).

16. M. Hale, *The History of the Pleas of the Crown*, (1847), p. 432.

17. Byrn, "An American Tragedy: The Supreme Court on Abortion," 41 *Fordham Law Review* (1973), pp. 807, 815-16.

18. *Idem* at 816.

19. 43 Geo. III, Ch. 58.

20. T. Percival, *Medical Ethics*, (Leake ed., 1927) pp. 134-35.

21. *R.* v. *Wycherley*, 173 Eng. Rep. 486, 487 (N.P. 1838).

22. Cited in G. Grisez, *Abortion, The Myths, The Realities and The Arguments* (1970), p. 191.

23 10 *American Medical Gazette* (1859), p. 409, reprinted at *Human Life Review*, vol. 8, (1982), p. 93.

24. H. Storer and F. Heard, *Criminal Abortion: Its Nature, Its Evidence and Its Law* (1868), pp. 28-29.

25. Conn. Pub. Acts, Ch. 71 section 1 (1860).

26. Byrn, *supra* note 17 at 835-36.

27. *Idem* at 828.

28. *Supra* note 8 at vol. 4, p. 526.

29. 410 U.S. 174-75.

30. 286 N.E.2d 887 (1972), Appeal dismissed 410 U.S. 940 (1973).

31. Byrn, "The Abortion Amendments: Policy in the Light of Precedent," 18 *St. Louis Law Review* (1974), pp. 380, 384.

32. 286 N.E.2d at 888.

33. *Idem* at 889.

34. *Idem.*

35. *Idem.*

36. *Idem* at 892.

37. See *supra* note 1 at 17; C. Rice, *Beyond Abortion: The Theory and Practice of the Secular State* (1979), pp. 9-15.

38. West German Abortion Decision, 9 J. Mar. J. Prac. & Proc. 551 (1976); see also, Kommers, "Abortion and Constitution: United States and West Germany," 25 Am. J. Comp. L. (1977), p. 255.

39. West German Abortion Decision, *supra* note 37 at 605.

40. *Idem* at 637.

41. *Idem.*

42. *Idem.*

43. *Idem*; see also, F. Wertham, *A Sign for Cain: An Exploration of Human Violence (1966);* Alexander, *Medical Science Under Dictatorship*, 241 *New England Journal of Medicine* (1949), p. 39.

44. Cited in Sealy, "Abortion Law Reform in Europe: The European Commission on Human Rights Upholds German Restrictions on Abortion," 15 *Texas International Law Journal* (1980), pp. 162, 169; see also, Von Hippel, "The Role of Natural Law in the Legal Decisions of the Federal German Republic," 4 *Natural L. F.* (1959), p. 106.

45. *Supra* note 37 at 644.

46. See Horton, "Abortion Law Reform in the German Federal Republic," 28 *International Law Quarterly* (1979), p. 288.

47. Epstein, *supra* note 4 at 174.

48. 106 Sup. Ct. 2169, 2195 (1986).

49. *Idem* at 2198.

50. Destro, *supra* note 4 at 1290-91.

51. *Santa Clara Co.* v. *So. Pacific Railroad Co.*, 118 U.S. 394 (1886).

52. 106 Sup. Ct. 2841 (1986).

53. *Idem* at 2844.

54. N.Y. *Times*, Nov. 11, 1986 at A-33, col. 1.

55. See Destro, "Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent," 2 *Journal of Contemporary Health Law and Policy* (1986), p. 71; Kimmil and Foley, "Abortion: An Inspection Into the Nature of Human Life and the Potential Consequences of Legalizing Its Destruction," 46 *University of Cincinnati Law Review* (1977), p. 725; Robertson, "Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth," 69 *Virginia Law Review* (1983), p. 405.

56. *Berman* v. *Allan*, 80 N.J. 421, 404 A.2d 8 (1979); see also, Horan and Valentine, "The Doctor's Dilemma: Euthanasia, Wrongful Life, and the Handicapped Newborn in Infanticide," 33 (D. Horan and M. Delahoyde eds. 1982).

57. *American Academy of Pediatrics* v. *Heckler*, 561 F. Supp. 395 (D.D.C. 1983); see also, Koop, "The Slide to Auschwitz," *Human Life Review*, vol. 3, pp. 101, 102-103 (1977).

58. *In re* Phillip B., 92 Cal.App.3d 796, 156 Cal.Rptr. 48 (1979), cert. denied sub nom. *Bothman* v. *Warren B.*, 445 U.S. 949 (1980).

59. *Superintendent of Belchertown* v. *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); see also, 1 Hearings of Death With Dignity Before the Special Committee on Aging of the Senate, 92nd Congress, 1st session (1974) (Testimony of Walter Sackett).

60. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); see also, P. Ramsey, *Ethics at the Edges of Life* (1978).

61. Quoted in 122nd Congressional Record S.14563 (Aug. 25, 1976).

Abortion, Law, and Human Behavior

Ian Gentles

ABORTION IS NOT A WORD that comes tripping lightly off the tongue. Using it at a cocktail party will not promote the smooth flow of chatter. Most people would prefer not to hear the word. Doctors refer delicately to "terminations." Advocates of abortion on demand talk about "reproductive choice." After all, they say, we wouldn't compel anyone to undergo the "procedure."[1] Even many anti-abortionists prefer the label "pro-life" because of its agreeable connotations and positive ring.

Major social struggles are also struggles over language. The difficulties with the vocabulary of abortion are symptoms of a painful conflict that reaches to the heart of our society. Should the unborn child have legal and civil rights? Or is its continued existence nobody's business but its own mother's? It will be a long time before the struggle is over. Meanwhile, let us examine one of the chief practical arguments used to justify abortion on demand.[2]

It is often said, and widely believed, that before the laws were changed the number of illegal abortions was very high; that because they were usually carried out by unqualified people they resulted in a tragically high death rate among women; that legalization has merely converted a hazardous, large-scale criminal practice into a safe one. It is also said that no law can stop women from having abortions; better therefore that they should have them in the safe sterile environment of a hospital or clinic than be subjected to the botched efforts of back-room butchers, or even worse, attempt their own abortions with coat-hangers and knitting needles.

Stripped of its overheated rhetoric, this argument is a compelling one. Much as we may want to uphold respect for human life, what is the point of having laws against abortion if they are demonstrably ineffective, and result only in a large number of deaths among women?

But what are the assumptions upon which this apparently compelling argument rests? Do we really know that the criminal abortion rate used

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to be very high, and that many women died as a result? Has the adoption of permissive laws merely transferred previously-illegal abortions to the legal column, with no significant increase in their numbers? Has legalization contributed to a fall in the maternal death rate? Has it rid us of unqualified and unethical practicioners? Do we know for sure that no law will stop women from having abortions?

The Frequency of Criminal Abortion

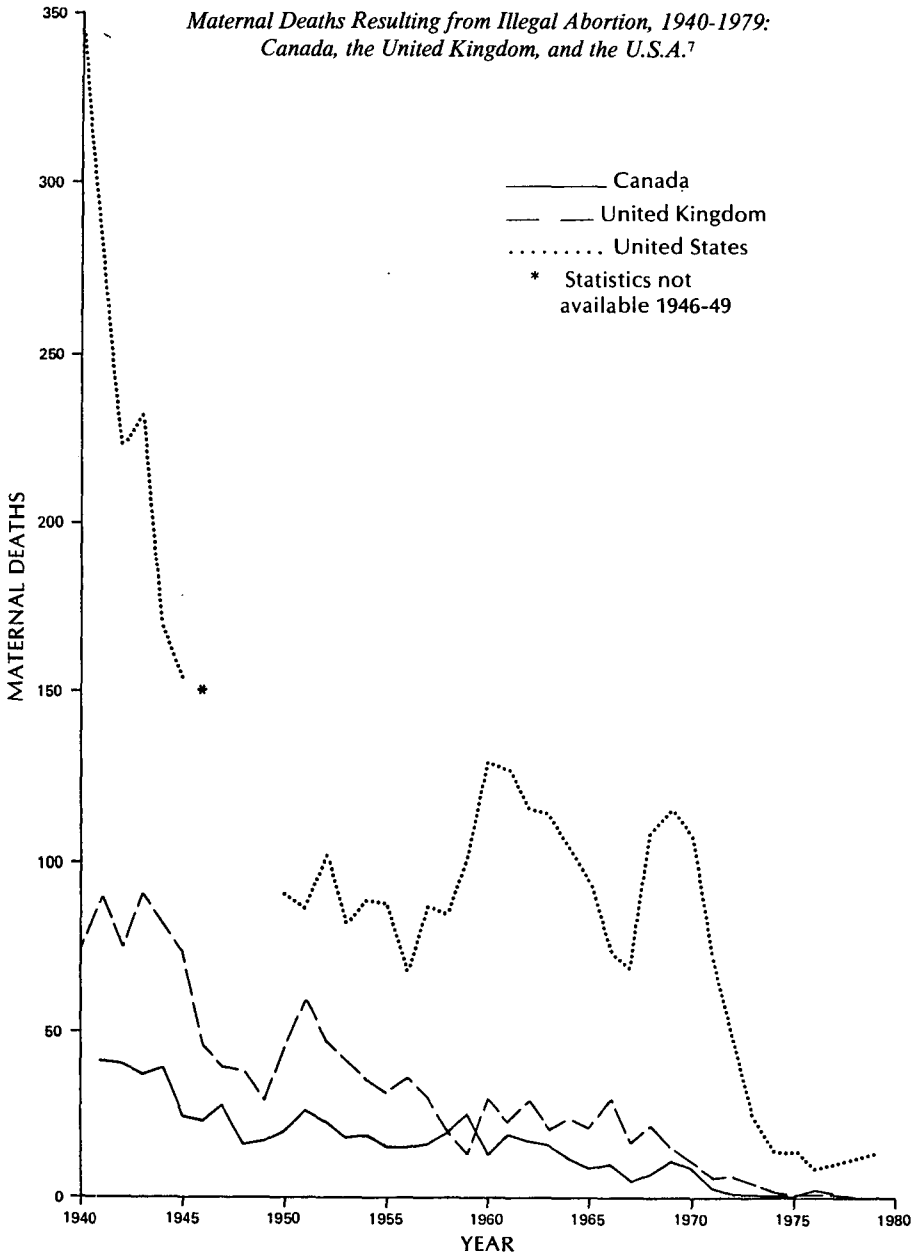
To arrive at an accurate measure of the frequency of a criminal activity is obviously difficult. Nevertheless, there is enough evidence, from a variety of countries, to make the attempt worthwhile. Strikingly, the evidence, while it is doubtless incomplete, all points in the same direction. Proponents of permissive abortion laws regularly used to state that there were a million illegal abortions annually in the U.S., a quarter of a million in Britain, and 100,000 in Canada. Criminal abortions were said to result in as many as 10,000 deaths yearly in the United States, and between 300 and 2,000 in Canada.[3] What is remarkable is that most of these estimates are derived from a study done on New York women during the late 1920s by the Margaret Sanger Birth Clinic, supplemented by a later, Kinsey-initiated study.[4] Both studies were flawed by the unrepresentative nature of their samples.[5] Nevertheless, during the campaign for legalization in the 1960s, figures were extrapolated from these old studies to produce claims of "a million abortions a year" and thousands of deaths in the U.S. Dr. Bernard Nathanson, one of the most militant pro-abortion campaigners of that era—he has since changed his mind—has shown how seriously we ought to regard these figures.

> How many deaths were we talking about when abortion was illegal? In the N.A.R.A.L. (National Abortion Rights Action League) we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always "5,000 to 10,000 deaths a year." I confess that I knew that the figures were totally false and I suppose the others did too if they stopped to think of it. But in the "morality" of our revolution it was a *useful* figure, widely accepted, so why go out of our way to correct it with honest statistics?[6]

If the high American estimates cannot be trusted, neither can the Canadian figure of 100,000 illegal abortions a year, for as Eleanor Pelrine has acknowledged, the Canadian figure was concocted by the charmingly simple device of dividing the U.S. figure by ten.

In fact we know, within a reasonable margin of error, what the death rate was from illegal abortions, and from these figures, as well as other evidence, it is possible to infer what the total number of illegal abortions was in a given year. The graph below shows the officially

Maternal Deaths Resulting from Illegal Abortion, 1940-1979: Canada, the United Kingdom, and the U.S.A.[7]



recorded death rate from illegal abortion in the U.S., Canada, and Britain. There is no doubt that the statistics underestimate the number of deaths, but it is unlikely that they do so by much. A body is hard to hide, and most physicians, particularly if they are not the ones who performed the illegal abortion, are disinclined to falsify a death certificate.

Each country's experience shares two salient features: 1) maternal deaths from illegal abortion were much fewer than proponents of permissive abortion have alleged; and 2) the numbers of deaths had begun an almost uninterrupted, sharp decline up to thirty years before abortion became legal. Legalization may have slightly accelerated, but did not alter, an already well-established trend. Why did deaths from abortion, both legal and illegal, decline? It cannot have been because the numbers of abortions shrank. Illegal abortion was surely more prevalent by 1965 than it had been 15 or 25 years earlier. A higher standard of living, with its consequent improvement in physical health, was probably a factor in the declining death rate. Criminal abortionists, many of whom were in fact qualified physicians, may have become more skilled at their work. But the leading factor was the discovery of sulphanimides, penicillin and antibiotics, whose use became widespread during the 1940s and 50s. Antibiotics have been the greatest single factor in reducing infection-related mortality during the past 40 years, and they undoubtedly contributed to the steep decline in abortion deaths before abortion became legal.

The Badgley Commission on the Operation of the Abortion Law estimated in 1975 that there were 46,096 Canadian women who had had an illegal abortion during their lifetime.[8] While they acknowledged that this estimate may have been on the low side, it is nonetheless many times lower than Pelrine's estimate of 100,000 abortions *annually*. Badgley also estimated that 55,061 women may have tried to induce an abortion upon themselves at some point during their lifetime. The combined total estimate of illegally-induced and self-induced abortions (101,157) represents approximately 2% of the female population of childbearing age. Since attempts at self-induced abortions often fail, the actual total number of abortions may be considerably less. Badgley's findings point to an annual figure well under 10,000 as the actual combined number of illegal and self-induced abortions in Canada during

the years before the law was changed in 1969. By contrast, the number of legally-induced abortions reached a peak of 66,254 in 1982.[9]

It has been estimated that in Britain there were between 15,000 and 20,000 illegal abortions a year before the permissive law took effect in 1968.[10] Even if this estimate is on the low side, there can be no doubt that the numbers of abortions rose sharply after legalization. In 1982, the peak year to date, the number of legal abortions in England and Wales was recorded as 128,553.[11]

There seem to be no reliable estimates of illegal abortions in the U.S. prior to legalization. However, the number of deaths from illegal abortions from the mid-1950s to the mid-1960s ranged between 70 and 135, or roughly four to five times the numbers recorded in Britain. This suggests that illegal abortions did not number over 100,000, assuming a relationship between deaths and total abortions similar to that in Britain. No official statistics have been kept in the U.S. since abortion was legalized. However, the Alan Guttmacher Institute, a research agency for the Planned Parenthood Federation of America, estimates that the number of induced abortions was 1,553,890 for 1980, or more than 15 times higher than it had been prior to legalization.[12]

Maternal Abortion Deaths from All Causes

Unlike the shadowy records of illegal abortion, the statistics of maternal mortality have long been bathed in the full glare of official attention. For many decades we have had a reasonably accurate idea of how many woman perished each year from all types of abortion—spontaneous, legally induced, and illegally induced. A certain coyness of terminology, together with quirks and changes in classification, make it occasionally difficult to separate illegal abortion deaths from other types of maternal mortality. We must also allow for the probability that mortality from illegal abortion is underestimated in official figures. Fortunately, a British Columbia study of abortion mortality over the 14 years immediately before legalization (1955-1968) provides reassurance on this score. While official statistics recorded 41 maternal deaths in the province, W. D. S. Thomas established from doctors' reports a figure of 44. The official figure was lower than the doctors' reports in four years, but *higher* than the doctors' reports in four other years. Combin-

ing the maximum annual figures from both sources yields a total of 49 deaths over 14 years, which is almost 20% higher than the official total. The fact that official statistics were as often higher than the doctors' reports as they were lower, suggests a random error rather than any systematic attempt to conceal abortion deaths.[13]

Doctors and coroners are, after all, normally loath to perjure themselves by falsifying a death certificate. Official figures thus appear to be not all that far from the truth, and at least give us a handle on the magnitude of the phenomenon. That independently-collected figures from Canada, the United Kingdom and the United States show strikingly similar trends over a forty-year period buttresses one's confidence that the statisticians came close to getting it right. In each of these countries the maternal mortality rate was around 400 per million women per year. By the 1970s it had shrunk to less than 30 per million women per year.[14] Yet at the same time, the numbers of induced abortions almost certainly rose.

Women Denied Abortion

What happens to women who seek legal abortions but are refused permission? If it is true, as alleged, that the law itself has little effect on whether or not women have abortions, one would expect almost all those who are denied a legal abortion to resort to an illegal procedure. The results of several studies do not support this inference.

In both Sweden and Czechoslovakia, prior to the introduction of abortion on request, there were abortion boards which refused some applications. In a major Swedish study it was found that two thirds of 196 women who were refused completed their pregnancies.[15] Another Swedish study followed up 249 Swedish women denied abortion. At first, 74 (30%) planned to secure an illegal abortion. But in the event, only 28 (11%) went through with it. (Often the male partner, or parents of the woman, initiated the search for a criminal abortion.) Most of the women—213 (86%)—gave birth to their child.[16]

In the Czech study, of 555 rejected applicants followed up, a minimum of 316 (56.9%) were found to have completed the pregnancy. In both the first Swedish study and the Czech one, normal conditions for the development of the child were found to exist in the great majority of the families, although some children were slightly more maladapted

than children whose mothers had not been refused abortions. The Czech investigators concluded: "No single test, no individual item and no indicator in the case history is alone capable of distinguishing 'Unplanned Pregnancy' children from 'Accepted Pregnancy' children in such a way as to enable a clinician to identify an 'unwanted' child easily and reliably."[17]

In Canada, 203 pregnant women living in maternity homes or served by child-welfare agencies were interviewed by the Badgley Commission. More than one out of four (27.4%) said they had considered having an induced abortion but had abandoned the idea for lack of accessible facilities or because their applications to hospitable therapeutic-abortion committees had been held up.[18] This finding provides indirect evidence which points in the same direction as the Swedish and Czech studies: women who find it difficult to obtain a legal abortion rarely turn to an illegal one.

In a study combining findings from Sweden, the U.S., and New Zealand, it was concluded that of a total of 6,298 women refused legal abortions between the 1940s and 1960s, only 13.2% sought an illegal one. Most of them were refused because the reasons they gave were deemed insufficient by the authorities. Evidently there was then no overwhelming social pressure to seek an abortion elsewhere, but even with this qualification, it remains striking that such a small percentage actually sought out a clandestine abortionist. Interestingly, a majority, ranging from 58% to 80%, were satisfied to have borne their baby.[19] The fact that all the studies agree that a significant proportion of women were deterred by the legal constraints placed on them indicates that the true induced-abortion rate is substantially lower under restrictive laws than under permissive ones.

The Criminal Abortionist

One of the usual arguments for permissive abortion laws is to reduce maternal deaths and morbidity caused by unskilled and unqualified abortionists. Evaluation of the success of permissive laws in this regard is complicated by the fact that maternal deaths from almost all causes relating to pregnancy have declined steeply for almost 50 years. There is evidence that this decline, which began well before permissive laws, would have continued regardless of changes in abortion legislation. As

we noted, antibiotics and improved medical care of complications were leading factors in the decline.

The U.S. Experience

Abortion morbidity in the United States is difficult to investigate. As a result of the U.S. Supreme Court's invalidating state abortion laws in 1973, and then striking down most state or local control regulations, there is now no mandatory reporting of abortions and their sequelae in many states. And the abortionist need not know of later complications, since the patient often goes to a hospital emergency room or another doctor.

But despite the absence of official statistics, newspapers have carried numerous stories which rival those that used to run before abortion was legalized. For instance, an investigation by the Chicago *Sun-Times* of four abortion clinics accounting for one third of all abortions in the Chicago area found that some doctors "aborted" non-pregnant women and subjected their patients to high-pressure tactics and false information. Inexperienced or unqualified practitioners, including moonlighting medical residents and a physician who had lost his license, worked in unsanitary conditions, with haphazard procedures, leading to morbidity. One doctor operated after drinking champagne at a clinic party. Rapid assembly-line procedures were used without waiting for anesthetics to take effect. There was shoddy record-keeping, falsification of vital signs, failure to order pathology reports, and the ignoring, scrambling or losing of lab test results. The licensing authorities were unaware that since 1973 twelve women had died in clinic abortions. One reporter concluded: "In 1973 the Supreme Court legalized abortion. As it turns out, what they legalized in some clinics in Chicago is the highly profitable and very dangerous backroom abortion."[20]

This phenomenon is not confined to Chicago. What follows is a sample of incidents reported by newspapers in nine American cities. The newspapers have not been surveyed exhaustively, nor can the practices they describe be quantified. It may well be that some of the worst practices have not come to public attention, because no systematic attempt has been made to uncover them. But what has been disclosed shows that the phenomenon of "dangerous backroom abortions" continues to exist throughout the U.S.

A Detroit *Free Press* article on a Dr. Joseph Rucker, Sr., revealed that he had on two occasions in 1974 left the skull of the fetus in the womb after the abortion, causing both mothers to become sterile. In 1977, he attempted to abort the seven-month baby of a fourteen-year-old girl by suction, a procedure normally used only up to about twelve weeks gestation. The child was born later with a two-inch square piece of scalp ripped from the back of her head. In 1978 a young Joliet woman signed an affidavit stating that while she was resting after an abortion in Rucker's clinic, a dog wandered in, sniffed her and began to lap blood off the floor. From 1976 to 1978 charges were brought against Rucker in these matters, but four years later he was still practicing.

Another Detroit *Free Press* article in 1974 found that only one of twelve area clinics "appeared to be meeting most commonly-held medical standards as well as providing adequate counselling and a comfortable atmosphere."[21] In August 1982 another exposé, this time by the Detroit *News*, revealed illegal or unethical kickback schemes, in which abortion clinics participated.[22]

The *News* also reported in June 1983 that a local gynecologist had been ordered to pay $75,000 to a woman who had come to him to abort a thirteen-week fetus. Seven weeks afterwards she discovered that she was still pregnant and aborted the child elsewhere by hysterotomy. If she is to have children in the future she will require a Caesarean delivery. Evidence showed that Dr. Enrique Gerbi aborted 23 mothers in a six-hour period, providing what was considered to be substandard care. Two years later Gerbi was taken to court on assault and battery changes after the saline abortion of a 29-week-old fetus resulted in a live birth. It was reported that the baby had been left in a bucket inside a utility closet until Gerbi decided to give her treatment.[23]

A report in the Miami *Herald* in early 1983 revealed that since the Women's Care Center opened in 1978, there were four deaths of aborting mothers. Many others nearly bled to death. In January 1983 state officials moved against the clinic. The *Herald*'s investigations disclosed that one of the clinic personnel practiced medicine without a license, one was under the influence of a narcotic, and there were also six malpractice suits for serious damage.[24] Similarly, the Orlando *Sentinel* reported in August 1982 that Dr. Orlando Gonzalez attempted to abort

the seven-month baby of a twelve-year-old mother, nearly killing the mother, who required a hysterectomy and colostomy. The infant, who was described as "missing" various pieces when delivered later, did not survive.[25]

According to the Philadelphia *Enquirer* (Aug. 6, 1974), half the board of directors and the entire staff walked out of what was considered by many feminists to be a "model clinic," complaining of poor medical care and massive profit-making by doctors. There were at that time ninety complaints and three malpractice suits against the clinic. In the Toronto *Star* (July 3, 1974), a reporter described the experience of a Toronto mother at Dr. Jesse Ketchum's abortion clinic in Buffalo. Virtually all glowing claims in the clinic's promotional pamphlet were falsified by the dirty and degrading atmosphere in a facility totally lacking pre- or post-operative care. On July 22, 1976, the Toronto *Sun* reported that "a [Los Angeles] clinic that diagnosed men as pregnant has been ordered to improve its procedures." Seven students and an instructor at the California State University were diagnosed as pregnant although none was. Eight female undercover agents then submitted samples, four of them from men and two from women who had had hysterectomies. Two of the men and both of the sterile women were diagnosed as pregnant and offered abortions.

On October 12, 1980, a San Diego *Union* story said that the biggest chain of abortion clinics in California was under investigation for misuse of state funds and substandard medical care. More than two years had passed since the report was filed but state health officials had taken no action, saying they lacked the personnel for speedy follow-up work.

In Texas in 1983 a jury sentenced Dr. Raymond Showery of El Paso to fifteen years in prison for the murder of a female infant born alive after an abortion. Such heavy sentences are in fact rare, although according to Dr. Willard Cates of the Centers for Disease Control in Atlanta, there may be about 400 to 500 live births from abortions every year in the U.S.[26] The Washington *Post* (Sept. 29, 1983) reported the testimony of employees that the child weighed about five pounds and was breathing when Dr. Showery dropped her into a bucket of water. A previous series in the El Paso *Times* in April 1981 detailed repeated abuses at Family Hospital (Showery's Clinic): incomplete late-term abortions—including one in which the infant's head was delivered

by the mother in her home several days after the abortion—falsified pregnancy tests, unqualified personnel, and disrespectful attitudes toward clients.

Why would any self-respecting individual involve himself in such activities? (I use the masculine pronoun advisedly, since almost all abortionists are men.) Doubtless some actually believe that they are offering a needed service to women in distress. For others the financial incentive may be paramount. For a gynecologist who is not very good at his job the temptation to multiply his income several times by practicing abortion can be very strong. How often do gynecologists receive communications like the circular letter of April 10th, 1978 from the Water Tower Reproductive Center in Chicago? Soliciting a gynecologist for a new clinic in Indianapolis, it read: "Salary and fringe benefits will be extremely attractive. Imagine the opportunity to make at least $80,000 a year for no more than ten hours work each week."[27]

From this small sample of press reports, it appears that there are serious and continuing problems in the U.S. with unethical and unqualified practitioners.[28] How extensive is the problem? No one knows, but it certainly continues to exist. Furthermore, the legalization of abortion appears to have made unqualified practitioners more difficult to control or prosecute. While no statistics exist, a recent development in malpractice insurance provides a hint of the magnitude of the problem. In 1983 the Professional Insurance Management Company, one of the major malpractice insurance brokers in Florida, began requiring that all doctors doing abortions, whether or not they are obstetrician-gynecologists, must pay annual premiums of $41,000; a general practitioner who began doing abortions would jump from the low-risk Code I classification, paying $6,000 yearly, to the highest risk classification of Code VII, with a nearly sevenfold leap in premiums.[29] If the malpractice insurance ratings are based on the company's knowledge of the true state of abortion practice in Florida, it would be difficult to conclude that legalization has dealt effectively with the "dangerous" abortionist.

The British Experience

In contrast with the American situation, National Health Service statistics are fairly easily available in Britain. When the Abortion Act came into force in 1967 (legalizing abortion for a broad variety of

indications), there was a small increase in maternal deaths associated with abortions, but thereafter the long decline associated with improved gynecological care has continued.[30]

Except for the initial increase, it would be difficult to isolate any influence that the Abortion Act had on maternal deaths. Did it have any influence on clandestine or unqualified abortionists? Figures compiled up to 1975 indicate that it did not. Indeed, what appears to have happened is this: in every year between 1967 and 1975, the numbers of women treated in hospitals for complications after illegal abortion was *higher* than in 1966, the year before the permissive law was enacted. Yet the number of police actions and convictions dropped off very steeply.

This would seem to bear out the concerns of the Royal College of Obstetricians and Gynecologists in 1966 that "legislation of abortion alters the climate of opinion among the public and even the Courts of Law. The result is that criminal abortion becomes less abhorrent, and those guilty of the offence receive punishments so light as not to discourage others in their activities."[32]

Eight years after the passage of the Abortion Act, a writer who studied figures from the National Hospital In-Patient Inquiry concluded in the *British Journal of Criminology* that "there is no evidence of a significant decline in illegal abortions since the Abortion Act."[33]

It is possible that there have been changes since these statistics became available. But as we have already seen, a decline in police prosecutions, which are a direct source of evidence, does not necessarily mean a decline in the practice of illegal abortion. Moreover, the Lane Committee reported in 1974 that illegal abortionists were making greater use of antibiotics.[34] Given this fact, decreasing hospital admissions caused by post-abortion infections would not necessarily signal a decline either. In conclusion, we cannot establish from the evidence reviewed that a decline in illegal abortion took place during the first decade after the Abortion Act in Britain, though mortality from all forms of abortion continued its decline.

What Happened in Canada

In Canada, the 1969 amendments to Section 251 of the Criminal Code legalized abortion when the life or health of the mother was in

danger. Abortions were to be performed only in accredited hospitals, after approval by a duly-constituted Therapeutic Abortion Committee, from which the abortionist must be excluded. But many hospital committees have chosen to interpret the word "health" according to the World Health Organization definition: "a state of complete physical, mental, emotional, and social well-being and not merely the absence of disease or infirmity."[35] The result has been virtual abortion-on-demand in major cities like Vancouver, Calgary and Toronto.

"Free-standing" abortion clinics have also been set up, in defiance of the Criminal Code. In the province of Quebec the government has refused to prosecute such clinics on the ground that the law is unenforceable. In Ontario and Manitoba, by contrast, the provincial governments prosecuted abortionist Henry Morgentaler when he opened clinics in Toronto and Winnipeg. In November 1984 Morgentaler and a colleague were acquitted by a jury, but the crown successfully appealed the acquittal, alleging that the trial judge failed to rule as inadmissible various types of evidence submitted by the defence, and failed to instruct the jury properly. The jury verdict also provoked controversy because of the American jury-selection experts employed by Morgentaler before the trial began. These experts later boasted that they had excluded from the jury those segments of the population most likely to be anti-abortion: "churchgoers, housewives, young people and older professionals."[36] The final outcome of the Morgentaler cases, presently before the Supreme Court of Canada, will determine whether Section 251 is enforceable in any province.

What can be discovered about the quality of service provided by illegal or unqualified practitioners? Although Henry Morgentaler is an M.D., his clinic in Montreal came under professional attack because his attitude was said by his colleagues to be "primarily directed to protecting his fees." In January 1976 his license to practice was suspended for one year by the Disciplinary Committee of the Professional Corporation of the Physicians of Quebec.[37]

The Committee established that Morgentaler conducted no valid interview with the patient before an abortion; that there was an almost complete lack of case history; that pregnancy or blood tests were not taken, nor pathological examinations performed, and that there was no follow-up care. Morgentaler himself states that his post-abortion care

consists of keeping the patient "under observation for an average of thirty minutes, and having her leave when ambulatory."[38]

It has also been established that Morgentaler re-used polyethylene "vacurettes" on patients even though the manufacturer warns against this practice, since diseases such as viral hepatitis, tetanus, venereal disease, gaseous gangrene, and Herpes II could be transmitted.[39] An instance of the dramas that are sometimes played out behind the walls of the Morgentaler clinic in Toronto was supplied by the testimony of a Honduran woman who was ambivalent about having an abortion and had the misfortune of changing her mind as the operation was beginning. According to her report, the abortionist gave her no painkiller before the abortion, and would not respond to her pleas to stop the operation. When she began screaming, an assistant shut her mouth and another forced a sanitary napkin into it.[40] In view of the fact that Morgentaler is considered by many to be a "model" abortionist, it is possible that a proliferation of free-standing abortion clinics in Canada would eventually duplicate American experience, as discussed above. (This is not to charge that all free-standing clinics violate health or ethical standards, but simply that American experience has shown that legalization does not eliminate unqualified and unethical operators: on the contrary, it may make it harder for the authorities to deal with them.)

Canada's partially-restrictive law has so far prevented the worst excesses of brutal exploitation that are reported in the U.S. Incidents of the kind culled from the American press are much rarer and more sporadic north of the border.

There is another drawback to free-standing abortion clinics that was not foreseen when they first opened their doors. It is the painful divisions that they flash onto the screen of our social consciousness. In the U.S. and Canada, clinics have been continually besieged by angry picketers. They have been the target of bombings, burnings, and sit-ins. In Toronto a local resident attacked Morgentaler when his clinic opened and there have been repeated arrests for civil disobedience. In July 1985, as tempers became frazzled under the summer sun, a clinic supporter pointed a shotgun at demonstrators, shouting "I'll blow your heads off." Local merchants complained of a drastic decline in business and beseeched both picketers and clinic to leave the neighborhood.[41]

Such intense social antagonisms are now recognized as one of the inevitable costs of free-standng abortion clinics.

From this survey of three countries it is evident that permissive laws have not eliminated abortions carried out by unqualified or unethical practitioners. Illegal abortion is infrequently prosecuted, but that does not mean that the problems previously associated with it have disappeared. Even in the Soviet Union, where early abortion has been available on demand since 1955, a leading medical journal has accused doctors of accepting bribes to carry out illegal abortions after twenty weeks of pregnancy. A major cause of illegal abortions is apparently the desire for more confidentiality than can be obtained under the state system.[42]

Restrictive Laws: The Experience of Scandinavia, Eastern Europe, New Zealand, and Canada

Protection of the unborn is the primary goal of most advocates of restrictive abortion laws. What effect do restrictive laws have on women? Do they lower the abortion rate? Do they promote an increased use of contraceptives? Do they affect social attitudes to pregnancy, child-bearing, and the unborn child? It is beyond the scope of this article to deal with these questions at length, but the experience of some countries may suggest provisional answers.

In general, claims that women who seek abortion under permissive laws would be equally likely to try to obtain them under restrictive ones are not supported by the evidence from several studies. We noted earlier a survey by Carlos Del Campo of women who had been denied abortion by medical boards in Sweden and New Zealand, or whose abortions were not funded by the government in the United States. Only 13.2% of the women studied sought abortion elsewhere. The rates varied widely from 46.6% in New Zealand in 1977 to 10% in Sweden in 1959, but the proportion was usually between a tenth and a fifth. (Also, the laws in the countries studied differed greatly from one another and some have changed since.)[43]

The current trend in the Western World has been toward permissive laws. But in Eastern Europe, where permissive laws were in force from the 1950s, the trend has been the other way. What has been the experience there with contraception, births and clandestine abortion?

A recent study of the Eastern European experience (by Tomas

Frejka) shows that laws which permit abortion on broad grounds, or on request, lead to an increase in induced abortions because some mothers abort when they would otherwise have carried to term, and others fail to use contraceptives.[44]

In each country which placed restrictions on abortion (including Romania which prohibited it altogether), an increased number of births followed. Pronatalist social policy must also have been a factor in increasing births. Frejka states that in subsequent years the fertility level may have remained higher than it would otherwise have been.

As a result of new policies, abortions declined at varying rates ranging from only a temporary decline in Czechoslovakia and Bulgaria to an on-going decline in Hungary (where the decline had started earlier, apparently because of increased contraceptive use). There was a slight rise in the numbers of abortions listed as "spontaneous" in some countries, such as Bulgaria, Czechoslovakia and Hungary, and it is safe to assume that some of these were illegal or unregistered induced abortions.[45]

Romania registered a significant increase in maternal deaths following induced criminal abortion. That country was unusual in other ways as well, having previously recorded a rate of 7.0 induced abortions per woman per lifetime under permissive laws.[46] Moreover, the government discouraged contraception as well as abortion. While the hoped-for result—a dramatic turnaround in the birth rate—was achieved, it was only at the price of sharply-increasing the maternal death rate.[47] This result did not occur in countries where contraception was permitted or encouraged.

The Eastern European experience suggests that restrictions on abortion result in an immediate sharp increase in the birth rate which thereafter tends to decline almost to its former level. Restrictions may also encourage contraceptive use if contraception is made available.

Among non-Communist countries, New Zealand is the first to attempt to change from permissive to restrictive legislation. Until 1976, New Zealand had a law similar to Canada's, allowing for abortion if there was danger to the life or health of the mother. However, in that year a Royal Commission on Contraception, Sterilization and Abortion found that an "abortion on request" service was operating at the Auckland Medical Aid Centre, contrary to the intent of the law. In 1976 there was one abortion nationally for every 11 live births. The follow-

ing year the rate rose to one abortion for every nine live births. In 1978 the new Contraception, Sterilization and Abortion Bill came into effect, with its stipulation that the danger to the mother's life or health must be "serious." The immediate result was a steep plunge in the abortion rate to one for every 14 live births in 1978 and 1979. However, after intense pressure from the medical profession the law was again broadened, and by 1981-2 the abortion rate had risen to an all-time high of one for every 7.5 live births.[48]

While the restrictive law was in force, there was no evidence of widespread resort to unqualified practitioners, although a small, undetermined number of women went to Australia where permissive laws exist in most states. The rapidly-rising abortion rate in New Zealand may be attributed to the fact that abortion consultants have interpreted the law in an increasingly broad way, and the regulatory committees are reluctant to intervene.[49] There have recently been fresh efforts in the New Zealand Parliament to make the laws more restrictive again.[50]

While the 1978 legislation had only a short-term impact, New Zealand still has a lower rate than most comparable Western countries—14.5 abortions per hundred live births, compared with Canada's 17.5 and Britain's 20.3.[51]

A recent study of Canada's 10-year abortion experience, from 1975 to 1984, shows that provinces which administer the law strictly do not drive large numbers of women to seek abortions in other provinces. Prince Edward Island, for example, has had *no* legal abortions since 1983, and Newfoundland has had fewer than 400 a year. Provinces like Ontario and British Columbia by contrast have tens of thousands of abortions a year, and abortion rates six or seven times that of Newfoundland. Yet the astonishing finding is that the number of women from the provinces where the law is strictly applied who seek legal abortions outside their home province is negligible.[52]

My investigation of the relationship between the abortion law and human behavior leads to four conclusions:

1) Maternal deaths from abortion declined steadily from 1940 or earlier. The legalization of abortion in the late 1960s had little effect upon a trend that had already been established for over a quarter-century. It was not legalization but improved treatment of infection that virtually eliminated abortion deaths between 1940 and 1980.

2) Permissive laws do not simply "replace" illegal abortions with legal ones. They produce instead a significant increase in the numbers of induced abortions. The brutalizing and exploitive activities of "back-alley" abortionists also stubbornly persist.

3) Restrictive laws do not necessarily lead to a large-scale, illegal resort to unqualified or unethical practitioners. Indeed, in the overwhelming majority of cases, women denied legal abortions go on to bear their children and most report that they are satisfied to have done so. The amount of illegal abortion in a given country appears to be the product of numerous factors, including the availability of means of preventing pregnancy, the attitude of the medical profession, and whether or not social and cultural policy is favorable toward the bearing of children. It is simply not true that "No law will stop women from having abortions."

4) The prevalence of unqualified practitioners seems to be less related to the degree of permissiveness of the law than to the strict enforcement of hospital standards and the willingness of the authorities to prosecute in cases of non-compliance.

As the abortion debate continues, those on either side should thus discard two erroneous assumptions: 1) that it was legalization which reduced the maternal mortality rate from abortion; and 2) that the overall abortion rate will remain the same, regardless of what law is on the books. If these prejudices were put aside, the way might be cleared for a debate about abortion laws on their merits.

NOTES

1. By the same reasoning the southern plantation owners of the nineteenth century who denied that they wanted to compel anyone to own slaves cannot be considered pro-slavery.

2. In writing this article I was benefited by the help of Carol Randall of the Cartographic Department, York University, who prepared the graph; Drs. L.L. de Veber of the Department of Pediatrics, University of Western Ontario and James G. Rankin of the Department of Preventive Medicine and Biostatistics, University of Toronto, who read and commented on earlier drafts, and Denyse O'Leary, who carried out much of the research. I alone am responsible for any errors which may remain.

3. Eleanor Pelrine, *Abortion in Canada* (Toronto: New Press, 1971), p. 56; Bernard M. Dickens, *Abortion and the Law* (London: MacGibbon and Kee, 1966), p. 83; Bernard Nathanson, *Aborting America* (New York: Doubleday, 1979), p. 193.

4. Dorothy G. Wiehl, "A Summary of Data on Reported Incidence of Abortion," *Millbank Memorial Fund Quarterly*, vol. 16 (1938), pp. 80-88; Paul H. Gebhard, Wardell B. Pomeroy, Clyde E. Martin and Cornelia V. Christenson, *Pregnancy, Birth and Abortion* (New York: Harper, 1958), p. 14.

5. See Germain Grisez, *Abortion: The Myths, The Realities and The Arguments* (New York: Corpus Books, 1970), pp. 14, 41.

6. Nathanson, p. 193.

7. Statistics Canada (Dominion Bureau of Statistics before 1970), *Causes of Death, Canada*, catalogue no. 84-203 (Ottawa, various years); *The Registrar General's Statistical Review for England and Wales*, Tables: Medical (Her Majesty's Stationery Office, London, various years); U.S. Dept. of Health, Education and Welfare, *Vital Statistics of the United States* (Rockville, Maryland, various years).

8. Robin F. Badgley, *et al.*, *Report of the Committee on the Operation of the Abortion Law* (Ottawa, Queen's Printer, 1977), p. 71.

9. Statistics Canada, *Basic Facts on Therapeutic Abortions, Canada* (1983), p. 14.

10. C. B. Goodhart, "On the Incidence of Illegal Abortion," *Population Studies* 27 (1973), p. 213. Goodhart's estimate is corroborated by the "Report of the Council of the Royal College of Obstetricians and Gynaecologists, Legalised Abortion" (*British Medical Journal*, April 2, 1966).

11. Office of Population Censuses and Surveys, Monitor AB84/1 (London, Her Majesty's Stationery Office, 1984).

12. *Family Planning Perspectives* 14:1 (Jan./Feb. 1982), p. 5.

13. Dept. of Health Services and Hospital Insurance, *Vital Statistics of the Province of British Columbia*, Maternal Mortality Tables, 1955-68 (Victoria, B.C., various years); W. D. S. Thomas, "Abortion Deaths in British Columbia, 1955-68," *British Columbia Medical Journal*, vol. 12 (May, 1970), p. 112. In a recent article A. and A. T. McLaren make selective use of these figures, confining themselves to the 5-year period 1955-59 when the official figures did not exceed those of doctor's reports, in an effort to show that government statistics drastically underestimated mortality from illegal abortion. Their argument is weakened in several other ways. At no point for example do they distinguish between spontaneous, legally-induced, and illegally-induced abortion. While they establish convincingly that the extent of illegal abortion was underreported in British Columbia from the 1920s to the 1950s, they then confuse the (rare) failure of doctors to record correctly the cause of death, with their (fairly common) failure to report the practice of criminal abortion. They weaken their argument further by accepting as self-evident the assumption that women denied a legal abortion will invariably obtain one illegally. "Discoveries and Dissimulations: the impact of abortion deaths on maternal mortality in British Columbia," *BC Studies*, no. 64 (winter 1984-5), pp. 3-26.

14. Michael Alderson, *International Mortality Statistics* (Facts on File, NY, 1981), p. 392.

15. H. Forssman and I. Thuwe, "One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused," *Acta Psychiatrica Scandinavica*, 42 (1966), 71-88.

16. K. Hook, "Refused Abortion." A follow-up study of 249 women whose applications were refused by the National Board of Health in Sweden, *Acta Psychiatrica Scandinavica* (Supplement 168, 1963), 58, 61.

17. V. Schuller, *et al.*, "The Unwanted Child in the Family," *Mental Health Research Newsletter*, 14, no. 3 (Fall, 1972), 2, 6; Z. Dytrych *et al.*, "Children Born to Women Denied Abortion," *Family Planning Perspectives*, 7 (1975), 165-71; Z. Matejcek *et al.*, "Children from Unwanted Pregnancies," *Acta Psychiatrica Scandinavica*, 57 (1978), 70, 76-86.

18. Badgley, *Report*, p. 167.

19. Carlos Del Campo, "Abortion Denied—outcome of mothers and babies," *Canadian Medical Association Journal*, 130 (Feb. 15, 1984), 361.

20. Cited in *Time*, November 27, 1978.

21. Detroit *Free Press*, Nov. 14, 1982; Sept. 10, 1974.

22. Detroit *News*, Aug. 16, 17, 1982.

23. *Ibid.*, June 25, 1983; Detroit *Free Press*, July 3, 1985. The child survived, but suffered severe internal injuries.

24. Miami *Herald*, Jan. 7, 1983.

25. Orlando *Sentinel*, Aug. 4, 1982.

26. Philadelphia *Enquirer*, Aug. 2, 1981.

27. One copy of this letter was addressed to Dr. Paul F. Muller of St. Vincent's Hospital in Indianapolis, who kindly made it available to me, *via* Denyse O'Leary.

28. Other articles and series containing relevant material include a two-part article in the Montreal *Gazette*, Oct. 14, 15, 1975, which details problems connected with referral agencies operating in Quebec. In the Pittsburgh *Press*, June 30, 1980, a reporter recounts a visit to a clinic regarded as exceptionally "caring," which she found to be "degrading." See also the Washington *Times*, Aug. 16, 18, 1983, for legal settlements in maternal abortion deaths where no qualified anesthesiologist was present.

29. The Professional Insurance Management Company is based in Jacksonville, Florida. This information was supplied by Dr. Matthew Bulfin, an obstetrician-gynecologist practicing in Fort-Lauderdale-by-the-Sea.

30. Office of Population Censuses and Surveys, *Mortality Statistics, Childhood and Maternity, 1978* (Series DH3 no. 5, London: H.M.S.O., 1980). Note Table 18—"Maternal Deaths"—was discontinued after 1978.

31. *Criminal Statistics for England and Wales 1977* (London: H.M.S.O., 1978). In 1978 a new category was created: "unspecified abortion," which included all those not classified as spontaneous, legally induced or illegally induced. It is likely that this category concealed a considerable number of illegal abortions.

Year	Hospital Patients admitted for "unspecified abortion"
1979	37,160
1980	35,470
1981	35,660
1982	34,490

Source: Department of Health and Social Security, *Hospital In-Patient Enquiry, Summary Tables 1979-1982* (London: H.M.S.O., 1980-4).

32. "Report of the Council of the Royal College of Obstetricians and Gynecologists, Legalised Abortion," *British Medical Journal* (April 2, 1966).

33. Paul Cavadino, "Illegal Abortions and the Abortion Act 1967," *British Journal of Criminology* (January, 1976). See also A. Howard John and Brian Hackman, "Effects of Legal Abortion on Gynaecology," *British Medical Journal* (July 8, 1972), 99-102, which shows a rise in criminal abortions in Bristol since the passage of the Act.

34. *Report of the (Lane) Committee on the Workings of the Abortion Act* (London: H.M.S.O., 1974), vol. 1, section Q, para. 509. The observation that illegal abortionists displayed this skill in increasing measure was there given as a reason for difficulty in establishing figures for illegal abortions.

35. World Health Organization: *Basic Documents* (32nd edition, Geneva, 1983), p. 1.

36. Toronto *Star*, Nov. 9, 1984, p. A4; *Globe and Mail*, April 11, Oct. 4, 1985.

37. In their decision, no. 24-75-0001.

38. H. Morgentaler, "Report on 5641 Outpatient Abortions by Vacuum Suction Curettage," *Canadian Medical Association Journal*, 109:12 (Dec. 15, 1973), 202-5.

39. Montreal *Gazette* (Dec. 24, 1974).

40. Toronto *Globe and Mail* (Jan. 14, 1985).

41. *Ibid.* (July 24, 30, 31, 1985).

42. *Ibid.* (August 24, 1986).

43. See note 19.

44. Tomas Frejka, "Induced Abortion and Fertility: A Quarter Century of Experience in Eastern Europe," *Population and Development Review*, 9:3 (1983), 517. Specifically, he writes, "More people came to use induced abortion as a method of birth control more frequently than they would have otherwise. A relaxation in contraceptive practice seems to have occurred, and greater reliance was placed on induced abortion either as a backup to contraception or possibly as the only birth control practice."

45. However, if pregnancies increase and induced abortions decrease, there would normally be an increase in reported spontaneous abortions in any case. Frejka, 511, 517.

46. *Ibid.*, 500.

47. B. Berelson, "Romania's 1966 Anti-Abortion Decree: The Demographic Experience of the First Decade," *Population Studies*, 33:2 (1979), 219. Berelson lists a sixfold increase. Using a slightly different timespan, Frejka shows a sevenfold increase, *op. cit.*, 511.

48. New Zealand's abortion figures are published annually by the Abortion Supervisory Committee. Birth figures are published by the Department of Statistics at Wellington, which publishes an Official Yearbook with a separate Population Extract.

49. For instance, on a New Zealand TV One program on March 11, 1983, abortion consultants opined that a mother was entitled to an abortion if "distressed" by pregnancy. This is not according to New Zealand law.

50. *Humanity*, 7:6 (Auckland, October 1983), p. 1; M. Pryor, "The Status of the Unborn Child Bill—New Zealand," *Genesis Review*, 3 (June 1985), 37-49.

51. Statistics Canada, *Basic Facts on Therapeutic Abortions* (Ottawa, Minister of Supply and Services, 1983), p. 6.

52. Statistics Canada, Catalogue 82-211 Annual. *Therapeutic Abortions 1983 and 1984*. Minister of Supply and Services: Ottawa, 1986, pp. 21, 33. (Despite is title, this report deals with the whole decade, 1975-84.) In 1984 12 Prince Edward Island and 39 Newfoundland women obtained out-of-province abortions.

Euthanasia: Lessons from Nazism

Harold O. J. Brown

DURING THE CIVIL RIGHTS STRUGGLE of the 1960s in the United States, religious people in the North, Midwest, and Far West generally supported the rights movement and gave religious reasons for doing so. In the South, although they professed beliefs identical to those of Christians in the rest of the country, religious whites at first tended to defend the *status quo* of segregation. This even applied to Roman Catholic Southerners, at least at the outset, although the official position of their church did not endorse segregation. Roman Catholics and liberal Protestants, under pressure from their church leadership centered outside the South, turned against segregation sooner and more easily than independent Southern evangelicals and fundamentalists, who remained opposed, although their evangelical and fundamentalist brethren in the North generally endorsed the rights movement.

Although segregation is not an issue addressed in the Bible or traditional Christian ethics, it is clearly questionable from a Christian perspective. Eventually most conservative Protestants in the South joined the rest of the country and ceased to defend segregation. Certainly new legislation and pressure from outside the community played a role. One major factor was the swing of the conservative Protestant leadership to support integration, symbolically inaugurated by Billy Graham himself, whose authentically Southern credentials are impeccable.

Where there is no clearly stated religious mandate on a particular topic, religious people will tend to go along with the sentiments of the rest of their class or social group, and will give religious reasons for doing so. Peter Berger discusses this in *The House of Solemn Assemblies* (Doubleday, 1965). Where there *is* a substantial religious mandate or tradition, the rank-and-file of religious people may well take a stand on their own, but they will achieve little without leadership. It is the leaders, official or symbolic, who more easily succumb to conformist social and cultural pressure, perhaps because they have status to risk.

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In contrast to what happened with the segregation issue, where Christians in general eventually followed their leaders to accept the implications of Christian morality, in the areas of abortion and euthanasia, the Christian rank-and-file has largely been abandoned by its real or symbolic leaders and left to drift ineffectively, muttering complaints and grumbling, but not able to make its numbers or its moral influence felt. This is particularly clearly seen in the reaction of the German church leadership to the Nazi euthanasia program during the 1930s and early 1940s. It offers a dramatic illustration of the failure of church leaders to speak out and to intervene when they could have done so, possibly with effectiveness and probably without much danger to themselves. Why did they fail?

In Germany there have always been close ties between the church (the churches, since the Reformation) and the state. The various German governments have all supported the churches to some extent, and church institutions and leaders have frequently enjoyed official or quasi-official status with the government. Theology is taught in state universities, just like law, medicine, science and philosophy. Inevitably, this meant that the standards of worldly society, and especially of intellectual society, took on importance in the eyes of church leaders. In the second third of the twentieth century, first science and then nationalism (or race) became supreme values.

Christianity has traditionally been suspicious of secular science whenever it fails to consider religious truths and values ("Professing to be wise, they became fools," says St. Paul in Romans 1:22). Christianity cannot tolerate a selective doctrine of human worth based on nationality or race. However, when Nazi racism pretended to be based on the most up-to-date science, and when traditional Christian values were being battered by military defeat, and economic depression, many Christian leaders seemed to lose their sense of direction. A number of Protestant theologians who are otherwise respected for their theological sharpness were infatuated with the Nazi movement: Karl Heim (briefly) and Paul Althaus (much longer) are two examples. (The lack of discernment of such theologians with respect to Nazism is paralleled in our own day by that of many modern Christians with respect to Marxism.) Ordinary Christians who take their moral responsibilities seriously find it hard to understand how so many of their leaders, while

professing a deep concern for Christian values, nevertheless in effect support a policy that denies them, as it were "praising by faint damns."

In the United States, prominent Christian leaders, such as Cardinal Joseph Bernardin, evangelist Billy Graham, and evangelical theologian Carl F. H. Henry, oppose abortion but do so in so cautious a way that they often seem to be apologists for the *status quo*: rather than do something drastic, and go beyond their perceived mandate, certain leaders, although personally outraged by what is going on, call for so much caution that they damp the anti-abortion convictions of the rank-and-file. This happened with euthanasia in Nazi Germany; it has largely happened with abortion in the United States. Will it happen again with euthanasia as "Death with dignity" (or mercy killing) establishes itself as the "treatment of choice" for more and more "hard cases" in American medicine? A closer look at the German churches' experience with euthanasia may help us to avoid the same mistake in the United States. In Germany, the leaders vacillated, the rank and file grumbled but took little action, and the killing went ahead on schedule. Why did this happen? How could a philosophy as patently anti-Christian as Nazism ever seduce intelligent Christian leaders to accept its criminal programs?

In retrospect, Nazism does not look like the kind of movement that could impress serious thinkers—it is intellectually disreputable and spiritually and morally odious. Nevertheless, there were very few secular intellectuals other than Jews who took a stand against the Nazis. Even the Christian leaders, those who should have been the guardians of the traditional values of the church and of civilization failed to take a real stand against the dogmatic neo-paganism of the Nazis. A few did so, but they were isolated, and it proved easy for the Nazis to neutralize them, often without recourse to any violence at all. From a conservative Protestant perspective, it would be wonderful to be able to say that Protestants were better than Catholics, and that conservatives were better than liberals, but unfortunately that would not be true. With a few honorable exceptions, neither Catholics nor Protestants did much, and neither conservatives nor liberals distinguished themselves. What is most surprising and—from an evangelical Christian perspective, disgraceful and disheartening—is the fact that Germany's conservative Protestants, or Pietists, as they are often called, who are supposed to be

uncompromising on religious and moral issues, hardly did any more to oppose Nazi atrocities than did the religious liberals who regularly try to "go with the flow."

Why was there so little resistance from conservative Christians? Two factors disarmed them: the prestige of modern science (including Nazi pseudo-science) and the Lutheran "two swords" doctrine, a kind of German version of the "separation of church and state." (Of course Germany had a close *collaboration* between church and state, not separation as in the United States. The "two swords" doctrine held that secular authority was to be kept entirely in the hands of the secular government, and that the church should keep silent except when the state began to interfere in specific church affairs. Thus Lutheran authorities, although troubled by the persecution of the Jews, said little until the government began to prevent converted Christian Jews who had become Lutheran ministers from exercising their ministerial functions. By then it was too late.) Faced with the double argument that such euthanasia was both "scientific" and "legal," i.e. within the competence of the secular government, many Christians and Christian organizations simply submitted. Some even cooperated. Most did so reluctantly, but some even appear to have done it with enthusiasm, pleased at the chance to be in step with the state and with "modern science."

The Nazi euthanasia program immediately affected Christian institutions, both Protestant and Catholic, for two reasons: first, in Germany it was the nation's conservative Christians—Protestants and Catholics—who provided most of the care for the mentally and physically handicapped, based on Christ's words about "the least of these my brethren" (Matthew 25:31-46). Second, the Nazis chose Christian institutions by preference for their euthanasia projects in order not to undermine the people's confidence in their public institutions!

How could so many dedicated Christians, committed to giving loving care to physically and mentally handicapped people as their calling from God, acquiesce in the liquidation of the very people who had been trustfully placed in that hitherto loving care? The fact that so many of these selfless workers went along with the *Zeitgeist*, the "spirit of the age," not only without protesting, but apparently without even understanding the implications of their collaboration, should stand as a sinister warning to Americans from the same Christian traditions as we

observe a like moral impotence in our own midst. Will our experience parallel that of the Germans under Nazism, despite the fact that the Germans succumbed to pressures to which we are not yet subjected?

The Background of the German Euthanasia Movement

Two major intellectual developments in the nineteenth century combined to prepare the way for selective, socially-engineered euthanasia in Nazi Germany: 1) the Darwinian philosophy of "the survival of the fittest," which was extolled by Nietzsche and adopted with religious zeal by most German intellectuals; 2) liberal biblical scholarship: so-called "higher criticism." The concept of the survival of the fittest as the law of nature could easily be extrapolated to imply the non-survival of the less fit, i.e. their elimination, as equally "natural." But what about the commandment, "Thou shall not kill"? Liberal biblical "higher criticism" downgraded the Ten Commandments from divine commands to the folklore of a small Near Eastern nation and deprived them of their binding authority. The spread of these two ideas—social Darwinism and liberal biblical criticism—helped to popularize euthanasia in intellectual and media circles in inter-war Germany. The same ideas have become virtual sacred cows in the United States as well. Conservative Christians in Germany—like conservative Christians in America today—opposed both social Darwinism and atheistic evolution—not, however, with enough vigor and success to resist the twin seductions of science and state authority where euthanasia was concerned.

In North America too we are familiar with these attitudes—the kind of anti-theistic evolutionary ideology that would treat humans like animals and vegetables, and the kind of biblical criticism that undermines the authority of God's commandments. Consequently, we may expect these ideas to undermine Christian resistance to mercy killing in North America, as they did in Germany, unless our spiritual leaders are better at opposing them than the Germans were. Unfortunately, the early signs are not encouraging. In North America, neither Christian nor Hippocratic standards have been able to impede abortion on demand. Those entrusted with the care and safe delivery of the unborn child have become its executioners. The unborn, defined as a mere "product of conception," may simply be disposed of. Will euthanasia also be easily accepted?

In Germany, it was but a short step from extolling the survival of the fittest as nature's mechanism for the advancement of the race to endorsing the elimination of the least fit as man's contribution to nature's program. In his extremely thorough study, *Euthanasia in the National Socialist State* (*Euthanasie im NS-Staat*, Frankfurt: S. Fischer, 1985), Ernst Klee cites Darwin's *Origin of Species* as a profound factor in creating the mentality of euthanasia. Germany's most influential philosopher, Friedrich Nietzsche, extolled the heroic elite on the one hand and on the other denounced Christianity as a "slave morality" imposed by the weak and cowardly to protect them from the strong and courageous. Christians love the weak and handicapped because they themselves are weak, cowardly, and handicapped. Both Darwinism and the philosophy of Nietzsche deny the belief that God exists, has made man in His image, and will hold him accountable for his actions. This belief is the basic foundation of human rights; without it, rights fade into oblivion.

The Loss of the Idea of the Image of God

Darwin did not explicitly deny God, but he more or less ruled out the idea that God had much to do with making man, and Nietzsche ruled God out entirely. With his explanation of the evolutionary origins of present-day man Darwin undermined the biblical doctrine of the image of God without explicitly denying it. Man was no longer seen as the bearer of God's image, but only as the highest ranking primate yet to have climbed the evolutionary ladder. Indeed, it is inherent in the theory of man's evolutionary origin that we who are alive today are superior to those who came before us, but inferior to those who will succeed us. Therefore we have a kind of moral duty to make way for them, even if it means our own elimination. This is naturally even truer with respect to those who are chronically ill, injured, or handicapped. It is a small thing and eminently logical to sacrifice the weak and sickly among us in order to facilitate the further "ascent" of our whole species. Darwin's successors were quick to seize on the concept that if the survival of the fittest is natural and good, it is wise to promote it by eliminating the unfit.

Darwin's influence downgraded humanity as it presently exists and made the weeding out of the "unfit" plausible and even a kind of moral

obligation. The restraints that traditional biblical morality (the Commandment, "Thou shalt not kill") placed on such weeding out were undermined by the simple expedient of explaining the commandments away as mere Hebrew folklore. This was the "assured result" of so-called "higher criticism," which in effect denied the divine inspiration of the Old Testament and reduced it to nothing more than the work of Jewish priests, scribes, and editors over the course of several centuries. The loss of these two fundamental ideas, namely, that man is made in God's image, and that the Creator has bound us by certain divinely inspired Commandments, was devastating to traditional morality, both Christian and Hippocratic.

Since Darwin, increasing numbers of people have scoffed at Adam and Eve, at the idea that all humanity originated with a single human pair, specially created by God. As Léon Poliakov points out in *The Aryan Myth*, the concept that a pair of humans were the progenitors of all of us makes racism theoretically unsound. Modern racist attitudes arose only when the fundamental conviction of the unity of mankind in Adam and Eve had been undermined by evolutionary theory and abandoned by liberal theology. Indeed, anti-Semitism based on *race* rather than on religion could rise only as people lost the idea that Aryans and Jews have common ancestors in Adam and Eve. Rejection of the authority of the Old Testament also facilitated anti-Semitism.

If one accepts naturalistic evolution (no God), it is logical to suppose that some races and strains of humans will be more advanced than others. Racism and apartheid are compatible with naturalistic evolution, although not with creation in the image of God. Curiously, modern liberals reject creation and accept evolution but oppose every concept of racial superiority and inferiority. Evolutionary theory provides a "scientific" basis for both Nazi racism and South African apartheid (although in actual fact, the Afrikaners, being predominantly Bible-oriented Christians, derive their justification for apartheid not from evolution but from their own interpretation of the Bible). Nietzsche's contemptuous rejection of Christian moral laws as "slave morality" fit only for the weak completes the picture.

As evolutionary theory and liberal biblical criticism undermined the Ten Commandments, the predictable results occurred. For example, when a Protestant church councillor protested against Nazi euthanasia

in 1940, Ministerialrat Eugen Stähle (a kind of department undersecretary) replied: "The Commandment, 'Thou shalt not kill,' is by no means a commandment from God, but rather a Jewish invention." Indeed, if Jewish scribes and not God's Holy Spirit were responsible for the text of Scripture, Stähle's statement would be true. If we assume that man is nothing more than a highly evolved animal, and deny that the Ten Commandments come from the Creator and are vested with his authority, it is only a short step to Nietzsche's view that Christianity is the self-serving religion of the weak and sickly, and from there to his call for "holy cruelty": "Let there be preachers of quick death!" There is a macabre irony in the fact that Nietzsche is often quoted to justify the elimination of the unfit; he himself suffered from progressive paralysis (general paresis) and spent his last years in mental darkness: if Nietzschean morality had been in force in his day, Nietzsche would have been one of the first to qualify as unfit to live, fit to be eliminated.

The connection between Darwin, Nietzsche, and the call for the liquidation of the weak is not a mere literary supposition: it can be fully documented from a number of sources. In 1893 the German agricultural expert Alexander Tille published *From Darwin to Nietzsche*, which contained a serious proposal to put evolutionary ethics into practice. Tille called for feeding people less "the less useful they are, so that the useless will inevitably perish." Tille's proposal anticipates Hitler's euthanasia programs as well as the 1986 resolution of the American Medical Association calling for the withholding of food and water from irreversibly comatose patients. Nietzsche was not only interested in eliminating the least fit, but also in preventing defective births. In *The Joyful Science*, he recommends that a father who has a handicapped infant should not merely kill it, but also carry its body in his arms for three days, so that he will not be tempted to beget another such defective. (Perhaps the population control enthusiasts of Planned Parenthood could add this to the list of Nietzschean recommendations they have already adopted.)

In 1895, two years after Tille, the German legal scholar Alfred Jost published *The Right to Die,* which argued not only for assistance in dying for the terminally ill, but also for killing the insane. His reasons: a maximum of pain could be avoided, compared with a minimun usefulness that would be sacrificed. In 1900 Alfred Krupp, the famous indus-

trialist and munitions-maker, offered a prize for the best essay on the question: "What do the principles of evolution (literally: the doctrine of the descent of species) teach us about the internal political development and legislation of nations?" The Swiss psychiatrist Auguste Forel published *Crime and Constitutional Mental Abnormality* in 1907, calling for "preventive measures" against the degeneration of the human race. Prior to World War I, such thoughts were limited to a small but elite circle: the "German Society for Racial Hygiene," founded in 1904, had only 350 members in 1914—but the majority belonged to one of the most exclusive circles in Germany, that of university professors.

World War I

It was under the influence of the terrible carnage of the First World War that the "manifesto" of the modern euthanasia movement was written: Alfred Hoche (1865-1943), a professor of psychiatry, and Karl Binding (1841-1920), a professor of law and at one time chief justice of the Imperial German Supreme Court, jointly published *The Authorization of the Destruction of Life Not Worth Living* (*Die Freigabe der Vernichtung lebensunwerten Lebens*). Binding, who died before the book appeared, was a prominent representative of legal positivism, the doctrine that holds that the only criterion for justice is the will of the State, without regard for whether a government is constitutional. Binding argued that killing a fatally ill person is not "homicide in the legal sense," because all that has been done is that one cause of death, incurable illness, has been replaced by another, equally fatal but less painful. "It is, in fact, a purely therapeutic [literally, healing!] act." In a footnote Binding proposes killing grossly deformed individuals to protect them from "running the gauntlet" of stares and ridicule. Binding created the concept of "lives not worth living," while Hoche, the psychiatrist, spoke of "human ballast" (*Ballastexistenzen*). The same year, 1920, Berlin law professor Karl Klee advocated the killing of "parasitic" and "worthless" individuals. Heidelberg University theologian Ludwig Lemme observed that individual Christians were forbidden to kill, but that government agencies have the right, as for them it is no longer killing, but merely "carrying out a regulation." Americans have become familiar with such language shifts in the abortion question (the "unborn child" becomes a mere "fetus," the "product of conception," to be elim-

inated by "retrospective fertility control"), and of course the terms "euthanasia" and "mercy killing" have been dropped from current English in favor of "death with dignity."

During the period before the Nazi take-over, the conservative Protestant (Pietist) Inner Mission, one of the major providers of care for the mentally and physically handicapped, formally rejected the idea of the destruction of "unworthy" life, but it did so on the questionable grounds that society harbors "much greater" parasites than the physically and mentally handicapped, such as brothel-keepers—in effect conceding the point that the handicapped are parasites, although less obnoxious parasites than brothel-keepers. In 1933, less than two years later, Adolph Hitler became Chancellor of the German Reich.

Readers of Hitler's opus *Mein Kampf* should not have been in doubt as to his intentions: "A stronger race," he wrote, "will drive out the weak, because the thirst for life in its final form will always smash all the ludicrous fetters of a so-called humanitarianism, in order to replace humanitarianism with nature, which destroys weakness in order to make room for strength." Although they should have been forewarned, the charitable institutions of the Inner Mission were quick to hail Hitler, "not out of tactical political considerations, but out of innermost conviction." Hitler wasted little time. By mid-1933 he had promulgated the "Law for the Prevention of Hereditarily Diseased Offspring," requiring the mandatory sterilization of several categories of social undesirables, from habitual criminals through alcoholics to the mentally retarded. Among these "parasites," only the alcoholics escaped this drastic measure. As the racial hygienist Lenz put it, "The German man needs freedom [to booze it up?] as the breath of life. Individual freedom must only be limited by the welfare of the nation." Lenz contended that alcohol did not severely damage one's offspring and thus did not threaten the nation; hence alcoholics did not have to be sterilized as mental defectives did.

As early as 1933 Nazi propaganda began to prepare the public for euthanasia: severely retarded women were shown comfortably established in the country-club atmosphere of a fine institution, while the healthy wives of laboring men had to live in dark tenements. The (Nazi) Prussian Minister of Justice Kerll wrote: "If the state should order official agencies to remove incurable mental patients from life in

accordance with the law, the execution of such measures will be nothing more than carrying out a public regulation." Sterilization preceded euthanasia, and the conservative Protestant Inner Mission as well as Christian publications found it amazingly easy to swallow. *Aufwärts* ("Upwards"), a Christian daily published in Bethel, the great hospital complex founded by Friedrich von Bodelschwingh, went along with Hitler's eugenic theories, calling for "ancestral research" to establish one's pedigree. The Bethel chief of staff, Dr. Hans Wilmers, "reluctantly" confessed that the "precious work" of the Inner Mission at Bethel was only a "halfway job" as long as more radical measures to prevent the transmission of hereditary problems were not followed (i.e., sterilization of the unfit). Two years later the government authorized abortion for women afflicted with hereditary defects. Although the Inner Mission had always vigorously protested against such a procedure in principle, in 1935 its Central Committee took a more accommodating stand in practice: "We have the duty faithfully and carefully to carry out all government regulations and instructions without alteration." It went on to say that the institutions of the Inner Mission should "distinguish themselves by conscientious performance. Inasmuch as all life lives through sacrifice, sterilization cannot be considered un-Christian. We should expect genetically damaged patients to make a heroic decision for sacrifice." Roman Catholics resisted sterilization, but eventually the bishops decided that Catholic health care personnel could *report* candidates for sterilization, although not actually sterilize them, because merely reporting did not harm the candidate, and failure to report would injure the government official responsible for seeing that the sterilization was carried out! Emphasis on sterilization forced a number of alcohol rehabilitation centers to close their doors, not because they opposed sterilization, but because so many patients were kept away by their fear of it.

Although traditional Christian moral teaching, both Protestant and Catholic, has condemned sterilization, and particularly involuntary sterilization, the institutions of both major churches rather quickly came to terms with it. The early twentieth-century veneration for science, particularly strong in Germany, extended even to the pseudo-science of racial hygiene, and led otherwise serious Christians to acquiesce in almost anything done in its name. If sterilization is necessary for the

good of the race in peacetime, when the nation's existence is not threatened, it is easy to see how harsher measures could be accepted in wartime, when the national danger is so much greater.

Examples could be multiplied at will. The sad fact is that Christians in Germany allowed themselves to be swept along with the euthanasia movement—which proved to be a forerunner of the "eugenic" genocide of the Jews. Those who were in a position to speak out almost never did, overwhelmed by the double assault of science and legality. The sad consequence is that a nation with a strong and relatively intact Christian tradition plunged into the most horrible crimes in human history, while Christians at most wrung their hands. For each of the German religious, medical, and legal opinions cited, it would be possible to name a close American parallel—frequently a painfully close one. The economic pressure on modern Americans is far less than that on Germany as it emerged from defeat into Nazism. However, the self-confidence of the church in late twentieth-century America may be more eroded by modernism than was the case in Germany in the 1930s. Large elements of American Christianity, while certainly vigorous, are preoccupied with their own spiritual temperature, with revival, renewal, evangelism, and missions, to the exclusion of trying to change the deadly drift of secular society—which will ultimately drag the churches with it.

Consideration of the facts presented here ought to make us less smug as we look at the collapse of the German churches in the face of Nazism; it also ought to motivate those of us who are involved in any way with the churches in America to take care lest a similar or worse fate befall us. Church people on the whole may have sound instincts, but where their leaders are swayed by the desire to be up to date and acceptable to the "right" people, the Christian influence on society can be reduced to nothing more than a few hand-wringing footnotes.

On Rationalizing Death

Jacqueline M. Nolan-Haley
Joseph R. Stanton

RAPID ADVANCES IN MEDICAL TECHNOLOGY over the last twenty-five years permit human life to be sustained for indefinite periods of time. Lives which once might have ended quickly forty years ago can be prolonged through the application of assorted medical technologies and apparatus. For a variety of reasons including economics and the "quality of life" ethic, current medical and ethical thinking no longer wishes to sustain life. Since it is not prepared to actively "kill," it advocates withdrawal of nutrition and water from patients, a notion which would have been considered outrageous as recently as five years ago. The appealing rhetoric of the "death with dignity" movement, which began as an attempt to ameliorate the depersonalization of the dying patient inherent in modern technology (which, paradoxically, has produced medical miracles), is now used to justify death by cessation of fluids and nourishment.

While some medical articles oppose this trend,[1] the emerging stream flows in the other direction.[2] The starting point for rationalizing starvation and dehydration deaths was in 1983 when the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research stated that nutrition and hydration were not "universally warranted" for dying patients.[3] The American Medical Association went further. In 1986 its seven member Judicial Council determined that it would be ethical for physicians to withhold "all means of life prolonging medical treatment" including food and water from patients in irreversible comas *even if death were not imminent.*[4] A report in the New York *Times* said that at least 10,000 Americans in irreversible comas could be affected by the AMA opinion.[5]

It is not surprising then that the reported appellate-court decisions which have ruled on the legality of death by dehydration and starvation have all sanctioned it as a "right" possessed by the person for whose

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alleged benefit it is sought. The terminology used by the courts rarely describes what is in fact being sanctioned: certain death from starvation and dehydration. Rather, the courts speak of "withdrawal of nutrition and fluids," and "termination of treatment." The process of rationalizing death by dehydration and starvation involves semantic juggling: the courts deny that it is suicide, euthanasia, or homocide; it is simply letting "nature take its course." But surely the rationalizations can be used to justify death for ever-widening segments of the population?

Doctrinal Framework for the Starvation Cases

Court decisions on the withholding or withdrawing of medical treatment begin with a recognition of the common-law rule that a competent adult has the right to determine what will be done with his or her body.[6] Thirty-five states and the District of Columbia have enacted statutes which codify this common-law right.[7] These statutes, known as "living will" or "natural death" laws, typically provide that a competent adult may decline life-prolonging treatment. Eighteen of these state statutes expressly exclude nutrition and hydration from the life-prolonging procedures which may be withdrawn under a "living will."[8]

The right to refuse medical treatment has never been considered absolute. It is usually balanced against the state's interest in preserving human life, preventing suicide, protecting third persons such as minor children, and protecting the integrity of the medical profession.[9] A well-known example of the courts limiting the exercise of the common-law right of patient autonomy is in the case of a pregnant woman who refuses blood transfusions for reasons of religious conviction.[10]

Incompetent persons obviously pose difficulty for the courts because someone else has to decide for them. In these cases the courts use two doctrines to support withdrawal of medical treatment. Under the doctrine of "substituted judgment," if the incompetent person expressed wishes regarding his or her future course of medical treatment while competent, then the court will honor those wishes. If the incompetent person made no such express wishes while competent, a surrogate decision-maker is empowered to determine what the patient would want.[11] The doctrine of substituted judgment was applied in the New York case of Brother Joseph Fox[12] who suffered cardiac arrest during

surgery and entered into what doctors refer to as a "vegetative state." His superior, Father Philip Eichner, requested that Brother Fox be removed from the respirator in accordance with Brother Fox's wishes that he not be kept alive by any "extraordinary business"[13] if his condition were hopeless. Brother Fox died before the court acknowledged his right to be removed from the respirator.

An alternative approach with incompetent persons, known as the "best interests" doctrine, would make treatment or non-treatment decisions based upon a surrogate decision-maker's perception of the patient's best interests.[14] What the patient wants is not necessarily determinative. In the New York case of *In re Storar*[15] the New York Court of Appeals refused to allow blood transfusions to be discontinued for a fifty-two year old retarded man with bladder cancer. Staff physicians testified that without the transfusions, he would eventually bleed to death. Despite his mother's request that they be discontinued the court stated that ". . . a court should not in the circumstances of this case allow an incompetent patient to bleed to death because someone, even someone as close as a parent or sibling, feels that this is best for one with an incurable disease."[16]

Within the contours of these two doctrines the courts have grappled with deciding what kinds of treatment could be stopped: chemotherapy?[17] dialysis?[18] respirators?[19] The decisions often turned on the distinction between ordinary and extraordinary care or between proportionate and disproportionate care with the courts weighing the benefits and burdens of treatment to the patient.

The Starvation Cases

In 1983 the courts confronted for the first time the question of whether feeding a person through a tube constitutes "medical treatment." The question was a critical one because of the already-existing legal doctrine which permits competent adults to reject medical treatment, and allows surrogate decision-makers to do the same for incompetent persons. All of the cases—most of which frequently cited the President's Commission Report—held that feeding a person through a tube was "medical treatment" and thus not required.

The first case to consider the food-and-water issue involved Clarence Herbert, a 55-year-old security guard who suffered cardiorespiratory

arrest and became comatose following surgery. He was immediately placed on life-support equipment. But his wife decided to allow withdrawal of medical treatment *and* nutrition and hydration when informed that her husband had suffered "brain death."[20] In fact, he had not. Clarence Herbert continued to breathe spontaneously long after the respirator was discontinued.[21] The two physicians who ordered the removal of the respirator and intravenous tubes which provided nourishment and water were eventually charged with murder.

In *Barber* v. *Superior Court*[22] the California Court of Appeals held that the physicians who acted knowingly and with full knowledge that Clarence Herbert would die, were not criminally responsible for his death since they had breached no legal duty. Relying on the President's Commission Report, the court decided that intravenous feedings of nourishment and fluid are equivalent to respirators and other forms of life support. They are essentially treatment decisions and should be evaluated on a benefit/burden scale. If treatment resulted in a "complete cure or significant improvement in the patient's condition," it is beneficial.[23] On the other hand, "if the prognosis is virtually hopeless for any significant improvement in condition,"[24] treatment is disproportionate in terms of benefits and not warranted. Since no one could say with certainty whether Clarence Herbert would ever recover from a persistent vegetative state to full recovery, the court held that there was no legal obligation to "treat" him by feeding.

Relying on the precedent established in *Barber* and on the President's Commission Report, the Massachusetts Appeals Court decided in 1984 that surgery to provide nutrition to a 92-year-old woman was substantially more burdensome than it would be for a "younger, healthier" person, and thus inappropriate. The case, *In re Hier,*[25] involved a woman who had suffered from mental and physical illness for many years. Since 1974 she had received nourishment through a gastronomy feeding tube. After she pulled the gastronomy tube from her abdomen several times the nursing home brought a legal action to obtain permission for surgery to re-insert the gastronomy tube. Applying a "substituted judgment" analysis, the court determined that Mary Hier would not want to undergo the surgery necessary for tube feeding and refused to order surgery.

The Mary Hier story which is *not* frequently told in legal circles is

that Mary Hier had never expressed a preference not to eat. Indeed, she would steal food from other patients' trays.[26] Her guardian *ad litem* returned to court with seven additional medical witnesses and persuaded the original judge to authorize the performance of surgery to re-insert the gastronomy tube.[27] Mary Hier still lives.

In 1985 the New Jersey Supreme Court issued a lengthy opinion on the "rights" of incompetent, seriously ill nursing home patients to have feeding discontinued. The case, *In re Conroy*,[28] arose when the nephew of 84-year-old Claire Conroy sought legal permission to have his aunt's feeding tube removed. Before the court decided upon his request, Claire Conroy died with the feeding tube in place.

The court offered three ways which life-sustaining feeding treatment including feeding tubes could be withheld or withdrawn from patients: first, if it were clear that the patient would have refused "treatment" if competent; second, if there were no evidence of a patient's wishes, a substitute decision-maker could have "treatment" withdrawn if there were some trustworthy evidence that the patient would have refused treatment and the decision-maker was satisfied that the burdens of the patient's life with the treatment outweighed the benefits of that life; third, even if there were *no* evidence that a patient would have declined "treatment," it may still be withdrawn if the burden of life with "treatment" outweighs the benefit the patient derives from life.[29]

Conroy is limited to nursing home patients with less than one year to live who never expressed "unequivocal" wishes to receive life-sustaining treatment while they were competent.[30] (This principle may be extended in three cases now pending before the New Jersey Supreme Court.[31])

In Florida, Helen Corbett, 75, had been in a vegetative state since March 1982 receiving nutrition through a nasogastric feeding tube. Her husband requested a court order to permit withdrawal of the tube. Helen Corbett died before the court decided in *Corbett* v. *D'Alessandro*[32] that she had a constitutional right to have the tube removed.

One of the most disturbing aspects of *Corbett* is the court's disregard of Florida's "living will" statute which specifically excluded nourishment from the life-prolonging procedures which a person could decline. Somehow the court thought that this should not affect the constitutional rights of someone in a permanent, vegetative state.

Bouvia v. *Superior Court* is the only appellate starvation case involving a competent adult. Elizabeth Bouvia, 28, had suffered from severe cerebral palsy since birth, and sought to have her nasogastric feeding tube removed. Although Bouvia had announced her intent to starve herself, the California Court of Appeals held that her motives were immaterial because she had a constitutional right to refuse "treatment." A concurring opinion called it a "right to die" and stated that this should ". . . include the ability to enlist assistance from others including the medical profession, making death as painless and quick as possible."[35] Bouvia has apparently chosen not to exercise her constitutional right to refuse "treatment"—she now eats voluntarily.[36]

Brophy v. *New England Sinai Hospital, Inc.*[37] is the only reported appellate court decision where a court actually authorized death in advance of the person's death. In the other starvation cases the patients either died before the court rendered a decision (*Barber*, *Conroy*, *Corbett*) or the patient, once given the right to starve, declined to exercise that right (*Bouvia*).

In March 1983, 47-year-old Paul Brophy suffered a ruptured aneurysm which left him in a "persistent vegetative state." Nine months later a gastronomy tube was inserted in his stomach to provide him with nutrition and hydration. There was expert testimony that Brophy could live for several years, that he was not terminally ill, nor was he in danger of death from any underlying illness. His wife requested that his feedings be discontinued. The trial court said "no." The Supreme Judicial Court, in a 4-3 decision, said "yes." Applying the doctrine of substituted judgment, the court decided that Brophy would have wanted it that way. The court's analysis, which relied heavily on the President's Commission Report, is by now a familiar syllogism: there is a common law right to refuse treatment; nutrition and hydration by means of a feeding tube is "treatment"; therefore, Paul Brophy had the right to refuse feeding through the gastronomy tube.

Brophy was decided on September 11, 1986. Several weeks later he was transferred to Emerson Hospital in Concord, Massachusetts where he died on October 23, after eight days without food.[38] The cause of death was listed as pneumonia. According to the chief of neurology at that hospital, "Not providing food may have weakened him to some

degree but it was not starvation like Dachau. What killed him was the decision not to do a bromchoscopy to suck out infection in his lungs."[39]

To its credit, the Massachusetts Supreme Judicial Court did not require the hospital which cared for Paul Brophy to participate in his death.[40] A later court has not been so considerate. On January 22, 1987 a Colorado court required a hospital to "terminate medicinal, feeding and hydration treatment"[41] for a mentally alert Hector Rodas, 34, who wanted to starve to death after becoming paralyzed from drug abuse. In response to the hospital's objection that its staff was being required to participate in suicide the court engaged in what has now become a familiar denial syndrome: ". . . suicide does not occur where the natural consequence of a person's illness is death."[42]

One of the more troublesome aspects of the starvation cases is that only the sick are implicated. Courts typically reject requests by healthy persons such as prisoners to starve themselves relying on the principle that the state's interest in preserving life outweighs a person's death wish.[43]

The courts' willingness to let only sick persons be starved has an uncomfortable similarity to the Third Reich's program for the mentally ill. Professor Robert Lifton writes (in his recently published book *Nazi Doctors: Medical Killing and the Psychology of Genocide*): "Starvation as a method of killing was a logical extension of the frequent imagery of mental patients as 'useless eaters.'"[44] The terminology used was never "starvation." Instead, special diets with inadequate calories to sustain life were given to patients. This ensured a slow death in about three months.[45]

The Rationalization Process

Until 1983 there was no precedent in American jurisprudence for permitting the starvation and dehydration of human beings. The notion that withdrawing food and water from individuals would be elevated to a constitutional right was unthinkable. The courts, assisted by the President's Commission Report and the American Medical Association, have accomplished this result in a three-part process which began with labeling food and water received through a tube as "medical treatment." Starvation and dehydration were then distinguished from killing. Finally, the courts formulated a tenuous rights-based analysis to

show that competent and incompetent individuals are exercising a common-law and constitutional right while being starved or dehydrated.

In order to separate the ideas of killing, euthanasia, and suicide from the idea of deliberate starvation and dehydration, the courts had to engage in conscious denial. Consider some of the statements:

> Euthanasia, of course is neither justifiable nor excusable in California. (*Barber*[46])

> Her decision to allow nature to take its course is not equivalent to an election to commit suicide with real parties aiding and abetting therein. (*Bouvia*[47])

> Nor do we consider his [Brophy's] death to be against the State's interest in the prevention of suicide. He suffers an "affliction," . . . which makes him incapable of swallowing. The discontinuance of the G-tube feedings will not be the death producing agent set in motion with the intent of causing his death. A death which occurs after the removal of life sustaining systems is from natural causes, neither set in motion nor intended by the patient. (*Brophy*[48])

> Declining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention merely allows the disease to take its natural course; if death were to eventually occur, it would be the result, primarily, of the underlying disease, and not the result of self-inflicted injury. (*Conroy*[49])

Distinguishing suicide from dying of natural causes is not only artificial line-drawing (as one writer has commented[50]), it is deceptive. A cerebral palsy victim such as Elizabeth Bouvia who does not eat and drink, dies as a direct result of not eating and drinking. She does not die from "natural causes." The New York Court of Appeals illustrated this point quite simply when it refused a request to discontinue blood transfusions for a cancer victim, John Storar: ". . . the transfusions were analogous to food—they would not cure the cancer, but they could eliminate the risk of death from another treatable cause."[51]

Despite the courts' protestations, suicide *is* an issue when a competent patient asks to starve. At the 1986 meeting of the American Academy of Psychiatry and the Law, Dr. Robert Simon stated that without realizing it the courts may be accomplices to "silent suicide" in emphasizing the right of competent patients to forego medical treatment. He defines this as "the masked intention, usually by depressed people, to kill themselves by not complying with essential medical treatment or by starvation."[52]

The common law and constitutional right which the courts have con-

ferred so gratuitously on incompetent patients is not without its downside.

Two physicians who observed Claire Conroy testified that her death from dehydration would be painful.[53] The trial judge who refused to allow Paul Brophy to be starved made the following findings:

> If food and water are withheld from Brophy pursuant to the guardian's request, his prognosis will be certain death from starvation, or more probably from dehydration, which would occur within a period of time ranging from a minimum of five days to a maximum of three weeks.
>
> During this time, Brophy's body would be likely to experience the following effects from the lack of hydration and nutrition:
>
> a) His mouth would dry out and become caked or coated with thick material.
> b) His lips would become parched and cracked or fissured.
> c) His tongue would become swollen and might crack.
> d) His eyes would sink back into their orbits.
> e) His cheeks would become hollow.
> f) The mucosa (lining) of his nose might crack and cause his nose to bleed.
> g) His skin would hang loose on his body and become dry and scaly.
> h) His urine would become highly concentrated, causing burning of the bladder.
> i) The lining of his stomach would dry out causing dry heaves and vomiting.
> j) He would develop hyperthermia, a very high body temperature.
> k) His brain cells would begin drying out, causing convulsions.
> l) His respiratory tract would dry out, giving rise to very thick secretions, which could plug his lungs and cause death.
> m) Eventually his major organs would fail, including his lungs, heart and brain.
>
> The above-described process is extremely painful for a human being. Brophy's attending physician was unable to imagine a more cruel and violent death than thirsting to death.[54]

It is difficult to imagine any person choosing starvation and dehydration. In fact there are few recorded instances in history where individuals have chosen this type of death voluntarily.

The denial syndrome is dangerous and not easily controlled. How will the courts contain the population at risk? Already, a question has arisen in the medical literature on the acceptability of withholding food and liquids from persons with Alzheimer's disease.[55] What about bottle-fed infants? The most vulnerable group right now are incompetent sick persons. Unlike Elizabeth Bouvia, they are not able to change their minds and choose not to starve. For the incompetent, the starvation and dehydration process is *imposed* and is *irreversible.* Can anyone feel complacent about that?

It is misplaced paternalism for the courts to assume that incompetent persons would choose the indignity of death by starvation and dehydration. The fact that the incompetent person, while competent, never expressed a desire to receive life-sustaining treatment is beside the point. How many Americans know that food and water is life-sustaining "treatment"?

The logic that supports this gratuitous right for incompetents equally supports a right *not* to be starved and dehydrated. This is the direction in which the courts must move *now*.

NOTES

1. e.g. Siegler & Wiesbard, "Against the Emerging Stream," 145 *Archives of Internal Medicine* 129 (1985).
2. e.g. Lynn J. & Childress J. F., "Must Patients Always Be Given Food and Water?" 13 *Hastings Center Reports* 17-21 (1983); Meyers, D. W., "Legal Aspects of Withdrawing Nourishment from an Incurably Ill Patient," 145 *Archives of Internal Medicine* 125 (1985).
3. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment,* 90 (1983).
4. American Medical Association, Council on Ethical and Judicial Affairs, Withholding or Withdrawing Life-Prolonging Medical Treatment, March 15, 1986 cited in *Corbett* v. *D'Alessandro,* 487 So. 2d 368, 371 n.1 (1986).
5. Altman, L., "A.M.A. Sets Ethics on Care of Dying," New York *Times,* March 15, 1986, p. 1, col. 1.
6. Byrn, "Compulsory Lifesaving Treatment for the Competent Adult," 44 *Fordham Law Review* 62 (1975).
7. AL, AZ, AR, CA, CO, CT, DE, DC, FL, GA, IL, IN, IA, KS, LA, ME, MD, MS, MO, MT, NV, NH, NM, NC, OK, OR, TN, TX, UT, VT, VA, WA, WV, WI, WY. See generally, Martyn, S. & Jacobs, L. "Legislating Advance Directives for the Terminally Ill: The Living Will and Durable Power of Attorney," 63 *Nebraska Law Review* 779 (1984).
8. IL, OR, FL, GA, WI, AZ, CO, CT, IN, IA, ME, MD, MO, NH, OK, TN, UT.
9. e.g. *Superintendent of Belchertown State School* v. *Saikewicz,* 373 Mass. 728, 370 N.E. 2d 417 (1977).
10. See cases collected in Byrn, *supra* note 6.
11. Weber, W., "Substituted Judgment Doctrine: A Critical Analysis," 1 *Issues in Law and Medicine* 131 (1985)
12. *In re Storar,* 52 NY 2d 363, 438 N.Y.S. 2d 266, 420 N.E. 2d 64 (1981).
13. 52 NY 2d at 372.
14. The surrogate could include the court as well as an appointed third person. See In re Storar, 52 NY 2d 363 (1981).
15. 52 NY 2d 363 (1981).
16. 420 N.E. 2d 64, 73 (1981).
17. *Superintendent of Belchertown State School* v. *Saikewicz,* 373 Mass. 728, 370 N.E. 2d 417 (1977).
18. *In re Spring,* 380 Mass. 629, 405 N.E. 2d 115 (1980).
19. In re Quinlan, 70 NJ 10, 355 A.2d 647 (1976).
20. Lo, "The Death of Clarence Herbert: Withdrawing Care Is Not Murder," 101 *Annals of Internal Medicine* 248, 250 (1984).
21. Johnson, D., "Withholding Fluids and Nutrition: Identifying the Populations at Risk," 2 *Issues in Law & Medicine* 189, 195 (1986).
22. 147 Cal. App. 3d. 1006, 195 Cal. RPTRT. 484 (1983).
23. 147 Cal. App. 3d at 1019.
24. *Idem.*
25 18 Mass. App. Ct. 200, 264 N.E. 2d 959 (1984).
26. Anna, G., "The Case of Mary Hier: When Substituted Judgment Becomes Sleight of Hand," *Hastings Center Reports, Aug. 1984, 23, 25.*

27. Idem at 25.
28. 98 NJ 321, 486 A.2d 1209 (1985).
29. 486 A.2d at 1232.
30. *Idem.*
31. Sullivan, J., "Jersey Court Wrestles Again with Death and Civil Rights," New York *Times*, October 20, 1986.
32. 487 So. 2d 368 (Fla. App. 2d Dist. 1986).
33. The Florida statute, entitled "Right to Decline Life-Prolonging Procedures," excludes the "provisions of sustenance" from procedures which a person may decline. Florida Statutes, Ch. 765, Sec. 765.03 (3) (b) (Supp. 1984) cited in 487 So. 2d at 370.
34. 179 Cal. App. 3d 1127, 255 Cal. Rptr. 297 (1986).
35. 225 Cal. Rptr. at 307.
36. Reid, "Quadriplegic Wins Right to Stop Living," The Washington *Post*, Jan. 23, 1987, A3, col. 2.
37.—Mass.—, 497 N.E. 2d 626 (1986). A similar case pending appeal is *Rasmussen* v. *Fleming*, No. 2, CA. Civ. 5622 (Ariz. Ct. App., June 25, 1986).
38. New York *Times*, Oct. 24, 1986, p. B9.
39. Anderson, P., "The Final Days of Paul Brophy," *The Boston Globe Magazine*, Jan. 25, 1987, p. 31.
40. 497 N.E. 2d at 638.
41. Reid, "Quadriplegic Wins Right to Stop Living," The Washington *Post*, Jan. 23, 1987, A3, col. 1.
42. New York *Times*, Jan. 27, 1987, p. B9, col. 1.
43. 450 N.Y.S. 2d 627 (1982). *Note*, "Criminal Liability for Assisting Suicide," 86 *Columbia Law Review* 348, 354 (1986).
44. Lifton, R., *The Nazi Doctors: Medical Killing and the Psychology of Genocide*, New York, 1986 at 98.
45. *Idem.*
46. *Barber*, 147 Cal. App. 3d at 1013.
47. *Bouvia*, 225 Cal. Rptr. at 306.
48. *Brophy*, 497 N.E. 2d at 638.
49. *Conroy*, 486 A. 2d at 1224 (1985).
50. Note, "Criminal Liability for Assisting Suicide," 86 *Columbia Law Review*, 348, 368 (1986).
51. *Storar*, 52 NY 2d at 382.
52. "Right to Refuse Care vs. 'Silent Suicide,'" *Internal Medicine News*, Dec. 15-31, p. 2 (1986).
53. *Conroy*, 486 A.2d at 1217.
54. *Brophy* v. *New England Sinai Hospital, Inc.* Docket No. 85E0009-G1, Findings of Fact, Slip, Op. p. 28, 29 (Oct. 21, 1985) (Probate and Family Court).
55. Volicer *et al.*, "Hospice Approach to the Treatment of Patients with Advanced Dementia of the Alzheimer Type," *Journal of the American Medical Association* Vol. 256, No. 16, p. 2210, Oct. 24/31 (1986).

APPENDIX A

[*Djibril Diallo, a Senegalese national, is chief spokesman for the United Nations Office for Emergency Operations in Africa. This article originally appeared in the* Christian Science Monitor *and is reprinted here with the author's permission.*]

Overpopulation and other myths about Africa

Djibril Diallo

Of all the myths prevailing about Africa in the West, none is propogated with more vigor and regularity than the notion that overpopulation is a central cause of African poverty. The recent famine has given propagators of this myth fresh ammunition with which to press home their argument.

All myths are dangerous, especially when they become the basis of policy. But the overpopulation myth is particularly harmful because it often preempts deeper probing into the complex causes of underdevelopment.

Moreover, the frequent repetition of this myth by outsiders actually contributes to resistance to family planning programs. After centuries of foreign domination, many Africans are deeply suspicious of any campaigns designed to alter the way they live and behave. Thus, even African governments committed to lower population growth rates are very careful about *how* they present these goals to the public.

Foreign pronouncements on the subject do not make their task any easier.

A brilliantly lucid example of this was provided recently in Kenya. Just as the Kenyan government was concluding careful negotiations with the United States Agency for International Development to launch a major marketing drive for contraceptives in the rural areas, children in the central highland areas suddenly stopped taking their free milk drinks at school. The reason became clear a few days later when a man appeared in court charged with spreading the rumor that the milk had been treated with contraceptive chemicals. The implication behind the rumor was that the authorities wished to reduce the population increase of the ethnic groups living in the region.

In any event, there is little agreement among Africans or those who know the continent well that overpopulation is the critical issue it is made out to be. Indeed, in many African regions the problem is *under*population: the people are so thinly spread out over large areas that it is often difficult to create a meaningful infrastructure to promote the interaction crucial to development.

Lloyd Timberlake, a respected writer familiar with the continent's diverse landscape, recently published an excellent study, "Africa in Crisis," in which he states, "The fact that African nations cannot feed themselves does not

prove that the continent is overpopulated." He makes the point that while industrialized countries like Switzerland, Japan, and the Netherlands are not self-sufficient in food, this does not have to be the case for Africa. Chad alone could feed the whole Sahel.

Key figures seem to undermine the myth's credibility. Africa's average population density is only 16 per square kilometer, against China's 100 per square kilometer and India's 225. Furthermore, Africa has more arable land per capita than any other developing region.

Africans also point to the case of India, condemned by many experts in the 1960s to perpetual hunger. Today India is producing the bulk of its own food. In their quest for appropriate solutions to their own food predicaments, more and more Africans are making their way to India to study breakthroughs there.

Given India's—and indeed China's—example, one can see that population in its isolated context does not provide the clue to a country's ability to feed itself, and that population policies are meaningless unless coupled with specific measures to promote economic growth.

Rapid population growth is a concern of African leaders. In fact many nations are trying to encourage family planning. But they always try to pursue such plans in ways derived from African cultures themselves.

Overpopulation is but one myth that abounds in Africa. Another one that seems to have taken root in the wake of the famine is that higher food prices make peasants boost food production dramatically.

But the fact is that price increases alone will accomplish little if all-weather roads do not exist along which peasants can transport their food to market. Nor will higher prices mean more production if the growers can't get credit to buy fertilizers, if land is used for speculative rather than agricultural purposes, or if steps are not taken to preserve or rehabilitate the soil.

Even so, it is sometimes found, the main beneficiaries of higher food prices are not producers but traders, who buy cheap at harvest time and sell dear later.

Myths sooner or later are punctured by reality. In Africa's case, unfortunately, it is mostly later, because of the historic neglect of the continent in the world press. Regrettably, even when the famine of 1984-85 forced Africa upon the world consciousness and provoked concerned scrutiny of the causes of hunger, many myths have been left intact partly because the news media neglected to report on what Africans were saying and thinking about the hotly debated food and development policies.

Innumerable Western experts were quoted on what Africa needs to do to

fight famine. But rarely, if ever, did the media seek the views of African planners, leaders, scholars, or public officials, not to mention our agronomists or peasant farmers.

So there is a danger here that instead of genuine education about Africa, the world press has helped form opinions and set the stage for new plans of action to which Africans themselves have contributed only their assent—the assent, at best, of unequal partners.

This course will result in a new round of policies out of harmony with primary African needs and likely to fail. This lapse in media coverage reflects the longstanding tendency in development and investment circles to treat Africa as if it were unable to formulate effective policies on its own.

Unfortunately, the view that outside experts—some of whom arrive in African capitals with briefcases bulging with solutions to problems they do not fully understand—know best has carried weight, even in Africa itself.

This has led to a readiness to accept guidance from those who do not take into consideration the needs and complexities of our diverse societies and fragile ecologies. The result is that even many Africans begin to repeat the myths conceived in distant lands.

There are no easy ways out of the predicament. It is very difficult to counter simplistic myths with complex explanations of the continent's interrelated problems. But a beginning can be made by the media, some elements of which are continuing to keep Africa's critical problems in the limelight. In this continuing coverage, they would do inestimable service to Africa and to their own nations if they were at least partly guided in their reporting by the views of the African people themselves.

APPENDIX B

[The recent Vatican document on "bio-technology" has caused considerable controversy, and of course it touches on many matters of interest to our readers. We asked our old friend Prof. Thomas Molnar (a well-known writer and lecturer on such subjects) if he would do a brief commentary for this issue, as a preface to an article for our next issue.—Ed.]

The New Vatican Document

Thomas Molnar

The new "Instruction on Respect for Human Life," issued by the Vatican's Sacred Congregation for the Doctrine of the Faith, is similar in importance to the encyclical *Humanae Vitae*, issued in 1968, almost two decades ago. The present document reaffirms the right of the child to life and parental care, but goes a big step farther by addressing the issue grown to frightening proportions since 1968: bio-genetic manipulation.

The integrity, and I daresay architectonic beauty, of the Instruction combine on these two issues. It is a difficult task, because bio-technicians and scientists argue that *any* kind of intervention with the biological material that produces life is a positive and desirable *démarche*—as long as it is technically feasible. And further, that research in these areas justifies the large-scale abortion, storage, freezing and commericial use of fetuses, to support a hypothetical betterment of the human race. In short, we are in the midst of Huxley's *Brave New World.*

This most timely Roman document draws the necessary line dividing the Catholic position from that of the mechanical manipulators. The controversy it is provoking should help men and women to see more clearly in the matter. Rome places the *moral* judgment—the licitness of human acts, including scientific research—higher than the mere *material* possibility of performing them.

Two aspects of the situation are repeatedly underlined: the dignity of life and the limits to be imposed on scientific experimentation, in the interests of life's primacy. Both propositions call forth violent protests because they interfere with "modern" liberal dogma: abortion (the woman's right to "control" her body) and the sacrilization of science.

The authors of the document reassert, nevertheless, the traditional teaching in the light of the newly-arisen situation. The old/new truth's are man's limited right (as distinct from possibilities) of dominion over nature, the fact that science cannot be free from values, and the moral guidance to which

technology too is subject. What may antagonize many people, many Catholics included, is the judgment that human birth must be the result of the natural act of love between husband and wife, *not* artificial insemination, surrogate motherhood, or the pre-birth selection of the child's sex, health, and other desired features. Thus not only is the dignity of life forcefully insisted upon, but also the dignity of human procreation and conjugal union.

What of sterile couples whose respectable intentions in securing a child the document recognizes? Bio-technical manipulations are not admissible in their case either, the document states. Having a child is not a *right*, it is a *gift*. Couples to which this gift is denied must find compensation in adoption or in conjugal love, and hope that medical research may one day cure their sterility.

In any case, for fertilization to be licit, it must take place inside the mother's body, not through the technical intervention of a third party, however competent. The drawing of the semen from the husband is assimilated to masturbation, and the preparation of the fetus *in vitro*, even by the father, falls in the domain of mechanical manipulation.

This summarizes the "technical" side of the document. But it does not stop there; it integrates moral and philosophical teachings in such a way that only those willfully renouncing common sense and moral evidence will refuse to consider its arguments. The document is a wonderful surprise in that it cuts a number of Gordian knots by answering the ideological hesitancies of our age.

Our materialists have long ago decided that life itself is a chance encounter of hydrogen and helium molecules out there in the galaxies. Rome quietly tells us that life is God's gift, therefore also spiritual and sacred at every level, from conception to bodily extinction. Its manipulation, transfer from womb to syringe to frigidaire—and back—is against the moral law. So is surrogate motherhood, where the child is the object of a monetary transaction or another sort of exchange. To insist, in these horror-filled days of commercialized fetus production, on the child's right to its natural parents and to unquestioned care and love in bringing it up, is like hearing the sun quieting the storm and dispelling the clouds in Beethoven's symphony.

The document is also marvelously consistent when (and this will be a tough nut for modernist ideologues to crack) on the one hand, it likens bio-manipulation to abuses like torture and psychiatric clinics, while, on the other hand, it declares that life, as such, is not the supreme value, but rather, Man's *moral personhood*. The significance of this statement transcends even the issue to which the document directly addresses itself.

Its "controversial" character is further underlined by its bold dethronement of technology—and thus of science as it is sacralized today—as a modern

ideology. Constantly and maliciously reminded of its "crime against Galileo" (but now, better than before, we understand why Galileo was *warned*), the Church's document is a brilliant reminder that anything made by the hand of man—therefore techniques—is limited; bio-geneticists, any more than rulers, ought not to be entrusted with the governance of human destiny. They too can be despots.

APPENDIX C

[The following article is adapted from an address given by the Roman Caholic Archbishop of Dublin to lecturers in medical ethics at Mater Dei, Dublin, in November, 1985; it is reprinted here with the Archbishop's permission.]

Christian Medical Ethics

Archbishop Kevin McNamara

The area of medical ethics is an exciting one at the present time. It is also, however, a difficult one, since there are many obstacles to a clear understanding of the Church's teaching in this area. I know that you try to confront these with insight and patience. As you endeavour to deepen your understanding of the teaching of the Church, you do your best to present it in the most effective way possible. For all this I am deeply grateful.

As teachers commissioned by the Church, it is your duty and privilege to be authentic representatives of the Church. In putting forward the Church's teaching with complete fidelity, and explaining the reasons behind it, you are not only earning the gratitude of the Church which has commissioned you; you are also fulfilling the expectations of your audience, who come to hear you for that purpose and on that understanding give you their respect and confidence.

As lecturers in medical ethics you play your part in the teaching role of the Church. Specifically your area is that of moral theology, but with particular reference to that area of human behaviour which is concerned with the physical and mental well-being of the human person.

A Dualist Conscience?

A question that sometimes arises is on what basis the moralist, the expert in the field of ethical norms, claims to pass judgment on matters relating to medical care and the procedures of medical science.

An idea sometimes found among medical practicioners is that, while it is normal to be guided by ethics and the moral teaching of the Church in their own personal behaviour, in medical matters their concern must be with the medical needs of the patient and the criterion of right procedure must accordingly be that which is medically advisable.

It is no doubt understandable that the doctor who, through study and experience, has acquired a certain degree of expertise in a complex field, and feels keenly the anxious expectations of his patients for effective treatment of their condition, may see the moralist, on occasion at least, as an unwelcome intruder who makes the doctor's task unnecessarily more difficult.

On the other hand, it is clear that morality extends to the whole of life and so there can be no legitimate compartmentalisation of the ethical and medical spheres. Another way of saying this is to state that a dualistic approach to conscience must be avoided. The conscience of the Christian, the conscience of the human person, is always one and indivisible. It transcends the distinction between the religious and secular spheres. There are no grounds, therefore, for distinguishing between one's private conscience as a Christian or a Catholic and one's conscience as a person engaged in a particular area of life, a conscience which then inevitably operates on the basis of criteria other than the Christian understanding of man and his destiny.

Perhaps one way of expressing what is happening here is that, in the area of medicine—as happens also in other spheres of life—the criterion of what is good is replaced by the criterion of what is useful. And this is done without adverting to the fact that the two concepts—the useful and the good—though they may sometimes lead to the same conclusion, do not necessarily do so and are, in reality, very different.

The blurring of the distinction between them is, no doubt, to a considerable extent a product of the society in which we live, of the dominant culture in the world around us. So high a value is placed on technology, production and efficiency that there is a great temptation to measure the worth of what we do primarily in terms of immediate practical results.

A Service to the Whole Person

In reality, however, the doctor does less than justice to his own profession, to the service he renders to humanity, when he sees it solely in terms of medical procedures and what is medically beneficial to his patients. For the doctor, in his authentic role, is not concerned simply with a particular medical condition and how to treat it. The service he renders is always a service to the whole person. It is to the total personal good of the individual that it is directed. Nothing the doctor does, no treatment he gives, should run counter to that overall human good in any of its essential dimensions.

To take a very obvious example, the doctor may not deliberately set out to shorten the life of a terminally ill patient, even if the patient is suffering and his life appears to be nothing but a burden to himself and to others. From the point of view of what is simply useful, it would be hard, in such circumstances, to oppose a decision to terminate life. From the point of view of the patient's real good, however, which the doctor, in common with every expert who has a special service to offer to others, must always respect, such a decision is inadmissable.

The reason is that the most basic human good of the person is life itself. As

such it may not be sacrificed to the advantage of others, or even to any immediate advantage of the individual person himself, not even his release from a painful and, as it may seem to him, entirely unprofitable and useless existence.

Ethics and the Ten Commandments

Not surprisingly, as in the example I have given, many of the problems that arise in the sphere of medical ethics have to do with respect for human life. It is, of course, the time-honoured understanding of the role of the physician to preserve life and to promote and restore health of body and mind. In recent times, however, the attempt is widely made to include within the ambit of legitimate medical treatment procedures which are intended to put an end to life, whether the life of the patient, or in the case of abortion, of another human being who is seen as a threat to the patient's life, or even to her "quality of life," to use the current expression. To say that such procedures are inadmissable is simply to say that medical practice is not exempt from the requirements of the fifth commandment.

The same is true of the eighth commandment, which impinges on medical practice in the area, for example, of professional secrecy or of appropriate counselling of the sick and dying.

It is also becoming more evident that the seventh commandment raises important questions in the area of health care ethics. Increasingly urgent problems arise today about the equitable distribution and use of public funds as between different areas of medicine. We have to ask what proportion of the available resources should be devoted to sophisticated medical techniques which entail extremely high costs but from which only a small number benefit. We have also to ask ourselves whether a much greater proportion of our resources should not be devoted to preventive as distinct from therapeutic medicine.

The sixth commandment, too, has a bearing on medical ethics, and it is under this heading, in fact, that some of the most critical questions arise.

Contraception

Because the sixth commandment has to do with God's design for the transmission of human life, it relates to the whole area of genetic engineering, as it is called, an area in which far-reaching developments are now taking place.

The moral aspect of these questions is, of course, inseparably linked to the teaching of the Church on the subject of contraception, which has been so much discussed, and at times so vehemently contested in recent years. At the core of that teaching is the principle that in human sexual intercourse the procreative meaning and the unitive meaning, each of which is intrinsic to it,

must not be deliberately separated, so that one is retained and the other rejected.

In the light of developments since *Humanae Vitae*, and against the background of the new questions now arising—the question of test-tube babies, for example—it is becoming increasingly clear that this principle of the inviolable unity of the procreative and interpersonal dimensions of marital intercourse is an indispensable condition for a consistent and viable moral teaching in the whole area of sexuality and the transmission of human life.

That is why I would ask you, in presenting this doctrine as teachers of medical ethics, that you would do your best to elucidate the reasons underlying it, to show its profound harmony with the dignity and well-being of the human person and with human sexuality as designed by God in relation to the person as a whole.

In this context, Pope John Paul II has made an important contribution. He has repeatedly stressed that husband and wife are co-operators with God in bringing new human life into being and, as such, must respect the role he has assigned to them. It is not for them, but for God, to decide on the coming into existence of a new human person. For that reason it is never lawful for them to annul the procreative potential of the marriage act, to detach it from the possibilities for new human life which God may wish to utilize.

A Total Gift of Self

Pope John Paul has also developed an argument against contraception based on the human meaning of marital intercourse. In the marriage act, the Pope observes, husband and wife make a total gift of themselves to each other. It is a gift from which nothing that belongs to the personal being of the partners is excluded. Here the Pope recalls the teaching of the Constitution of Vatican II on *The Church in the Modern World* according to which there occurs in the marriage act an exchange of love which "embraces the good of the whole person" (par. 49). This means that the capacity to create the conditions for the gift of God of new human life must not be excluded from the reciprocal self-giving of the partners. As the Pope expresses it, if the truth itself of conjugal love is to be respected, each partner must give to the other, without limitation or reservation, *all* the good of femininity on the one hand, of masculinity on the other.

Sterilization

These considerations evidently have an importance that goes beyond the question of contraception. They are also the basis for the Church's teaching in regard to sterilization, which is coming increasingly to the fore at the present time: sterilization is contraception made permanent; contraception is tempor-

ary sterilization. More generally, as I have already mentioned, the indivisible unity of the marriage act, of its unitive and procreative dimensions, is fundamental to the entire ethical position of the Church on sexuality and the transmission of human life. The inner strength and cohesion of that position depend on it. This inner consistency of Catholic teaching will again be tested by the new ethical questions which are now being posed by the developments in science concerning the origins of human life.

The Touchstone of Christian Ethics

I have touched on a few central areas which are of particular interest and importance in medical ethics today. There are many other areas which claim attention, but allow me to return to a theme I referred to at the beginning, the touchstone of correct ethical behaviour in the entire area of health care is the good of the human person as a whole. In spite of the growing complexity of medical treatment and the tendency towards depersonalization which is a feature of the large modern hospital, every effort must be made to safeguard the understanding of health care as a ministry of persons to persons.

For the Christian this has a divine as well as a human dimension, in that the person is understood as made in God's image and likeness and as someone destined for eternal union with God as his final goal.

In this perspective, health care is not only a humanitarian service, but a contribution to the realization of God's eternal plan of love. On the one hand, it aims to restore the sick person to a fully active role in the service of God and his Kingdom, while helping him or her to see the spiritual dimension of illness and suffering. On the other hand those involved in the health care ministry are able to see themselves as instruments of God's gracious providence in promoting the well-being of his children who are ill. As such, they are engaged in a free and intelligent partnership with God through which they themselves draw near to him and make progress along the way of salvation. None of this lies outside the perspectives of Christian medical ethics. To the extent that it is kept clearly in view, the contribution of medical ethics to an understanding of health care that is truly in accord with human dignity is assured.

APPENDIX D

[*The following article appeared in the January 12, 1987, issue of* Medical World News, *and is reprinted here with permission (© by HEI Publishing, Inc. All rights reserved.).*]

Access to New Drugs Should Be a Medical, Not a Social, Issue

Annette Oestreicher

While skimming the table of contents of a recent issue of *The New England Journal of Medicine*, I noticed a report on a study of a new progesterone antagonist used as an abortifacient in very early pregnancy.

The drug, RU 486 or Mifepristone, was effective in 85% of the women tested—about the same success rate recorded for prostaglandin analogs, according to the authors. But unlike prostaglandin analogs, RU 486 was not associated with adverse side effects such as painful uterine contractions and gastrointestinal complications. And, of course, the drug carries none of the risks of anesthesia and other complications of surgery.

However, a report in the *Houston Chronicle* noted that though the drug is being tested in at least four centers in this country, the manufacturer is not planning to seek approval to market the drug in the U.S. "because of the expected strong objections from antiabortion groups." That could change if the drug has a good record in Europe for a year or more, according to an article in the New York *Times*.

The company's fears seem justified. For example, several pharmaceutical firms have spent a great deal of time and money researching prostaglandin-type antiulcer compounds. These products have been held up at the FDA in part because they induce uterine contractions in some women. Despite manufacturers' testimony that the products would carry a warning that they should not be taken by pregnant women and that the drugs should be discontinued if pregnancy occurs, antiabortion groups lobby that women would take the drug specifically to abort unwanted fetuses.

Without getting into a discussion of the pros and cons of the clinical benefits of these and other pharmaceutical products—which logically fall to the FDA advisory committees with expertise in those fields—I find it tragic that Americans' access to drugs could be determined by activists protesting against them on grounds other than safety and efficacy.

Should morbidity and possibly mortality be required risks for those American women who elect abortion when a safer alternative may be feasible?

Should new therapeutic options be denied to the American public because of interest groups' opposition on social, rather than medical, grounds?

I have to answer these questions with a "no."

What would happen if antihomosexuality groups with a strong lobby pressed Congress to cut off funding for AIDS drugs and vaccines with the view that such prevention and therapy would support a lifestyle they consider abhorrent? What if an antismoking organization tried to quash lung cancer therapy because it might result in smokers' continuing a self-destructive behavior?

Would such groups refuse to honor accepted international codes to medically treat a captured enemy soldier?

It seems to me that medical diagnostic and therapeutic advances should be accepted or rejected on the basis of the clinical benefits they can provide.

Medical decisions should remain medical decisions and should be made by physicians and researchers who can interpret double-blind randomized trials, therapeutic indexes, clinical endpoints, statistical significance, and patient benefit.

Americans should have the same access to medical advances that people in other countries have. The so-called drug lag notwithstanding, we have in place an agency designed to evaluate new drugs on clinical grounds. The FDA is the watchdog whose job it is to protect us from harmful drugs. We don't need social organizations making medical judgments for us.

APPENDIX E

[The following syndicated newspaper column was released on March 10, and is reprinted here with permission (©1987 by Universal Press Syndicate).]

Bodies in the Dumpsters

Joseph Sobran

For the past few months, John Cavanaugh-O'Keefe and three friends have been collecting garbage bags. They get them at night, from dumpsters outside abortion mills, and they take them away and rummage through them.

Until the other night they did it secretly. But on Saturday, March 6, they invited a few journalists along. I went, feeling queasy.

We met back at a little office they'd borrowed. While the men went out to get more bags, ChristiAnne Collins showed me what they'd found in dumpsters on previous occasions: tiny, mangled human bodies, along with the medical records of the mothers.

The abortionists throw all that into garbage bags, so John, ChristiAnne, Dennis and Vincent have to pick it out of the mass of bloody surgical napkins, cigarette butts, and empty Coke cans.

ChristiAnne laid out eight of the little bodies on a table. She has preserved these. They are colorless, drained of blood, smelling of formaldehyde. They were aborted at about ten to twenty weeks after their conception. Some are two inches long, some eight inches, and might have been longer if they had heads. The abortionist usually has to crush the head to pull the body through the mother's undilated cervix.

One of the smaller ones still has part of her face. Her tongue, a small white tab, is hanging out, and her eyes bulge. The longest one is headless, though ChristiAnne laid a piece of his skull, part of his brain and one of his eyeballs beside him. (The eyeballs often fall out when the head is crushed.)

The lower half of his body is pretty much intact. From the waist up there is only the naked spinal cord plus the right shoulder, arm and hand. His legs are spread apart, with the knees bent and pointing away from each other. At first glance they look like frogs' legs until you notice his genitals, his calf muscles and his feet. His toes are curled tensely upward, as if he died in the middle of a spasm.

You can also see a few of his internal organs at a point where the upper part of his body has been torn away. If you were dissecting a dead frog you'd do it with more care than this little guy got. If nothing else, you'd respect the intricacy of it.

You don't need a theologian to tell you what you're seeing when you look at these. Whoever did this had to know what he was killing. ChristiAnne says an abortionist usually gets close to $2,000 for doing one this far along, as opposed to the usual rate of about $170.

Within the hour another batch of garbage bags arrived. ChristiAnne opened one and unfolded a surgical napkin, exposing a purple mash. She poked into it with her forefinger (she was wearing surgical gloves) and picked out a small arm, then a few other organs. They jiggled slightly in her hand as if all the life hadn't gone out of them yet. There was also some wet purple matter she said was the mother's placenta.

Before the night ended, the four had found the remains of 70 abortions, half of them with recognizable bodies or parts of bodies, the other half a reddish paste. I left early, while the TV camera crew was still there.

The next night, the local news reported the story of the bodies in the dumpsters. One abortionist, who wouldn't be interviewed, had his lawyer deny that he puts the bodies in the garbage. A spokeswoman for the National Abortion Federation says that anti-abortionists will "stop at nothing," and utters her "suspicion" that these bodies had been "planted."

Having had a front-row seat, I can tell you that these bodies were not planted. You could see, and smell, the fresh blood. These children had been killed that day. The medical records looked real too. Or were they planted as well?

Yes, there are people who will "stop at nothing." They will do absolutely anything for money. I saw their work. The reason they do it has nothing to do with sincere disagreements about theology. Abortion isn't a metaphysical issue, and the people who insist that it is are reluctant to let the public see the physical evidence.

It's physical, all right. If the general public saw what was in that room, abortion would be illegal again in a big hurry, and there would probably be Nuremburg trials for abortionists. A child who did to a small animal what these "doctors" do to children would be judged emotionally disturbed. But it might be good practice for a career in medicine, as we now know it.

APPENDIX F

[The following column appeared in New York Newsday *and other newspapers during the week of March 17. It is reprinted here by permission (©1987 by Newsday, Inc.).]*

Baby M: a Cold Contract

Murray Kempton

Mary Beth Whitehead concedes that she bound herself to the contract that committed her to surrogate motherhood without much attention to its terms.

She is a high school dropout, and her carelessness has been paid for with pains and trials for herself and others. But what excuse can there be for governors, legislatures and courts that have yet to look at contracts like the one she signed and wonder whether they might not be an offense to sound public policy?

The agreement between William Stern, natural father, and Mary Beth Whitehead, natural mother, was drafted by the Infertility Center of New York.

The rights and duties of the parties were allotted thus:

(A) To Mary Beth Whitehead, Natural Mother, or, as Dr. Lee Salk more precisely put it, "surrogate uterus":

Right: $10,000 to be deposited with the Infertility Center and await delivery in an escrow account.

Duty: To "assume all risks, including the risk of death."

(B) To William Stern, Natural Father, or, as Mary Beth Whitehead puts it, "sperm donor":

Rights: (1) All interest accruing in the escrow account.

(2) Cessation of the contract with no compensation to Mary Beth Whitehead if the child miscarries in the first five months.

(3) A test of the fetus somewhere between the 16th and 20th week of pregnancy and, if "physiological abnormalities" are detected, abortion "upon demand of William Stern."

Duties: (1) To pay $1,000 to Mary Beth Whitehead if her pregnancy is terminated after the fourth month by mandated abortion.

(2) To pay all medical expenses not covered by Mary Beth Whitehead's insurance.

(3) To pay $7,500 to the Infertility Center for administrative work and other labors markedly less strenuous than those that earn the mother a fee just 25 percent higher.

(C) To the Infertility Center of New York, Matchmaker.

Rights: (1) The $7,500 up front and "nonrefundable."

(2) Exemption from all guarantees that Mary Beth Whitehead will become pregnant or abide by her contract "to surrender custody."

To examine such a contract line by callous line can be to arrive at a suspension of judgment on either Mary Beth Whitehead or William Stern. They were wrong, and they have suffered for it more than they should. Their mistake was no more than a failure to anticipate the dictates of the human heart.

And they lapsed into that error with a multitude of company. The psychological exhibits in the Whitehead-Stern quarrel have few passages more poignant than Richard Whitehead's report on his surprise at how intensely he was drawn by the very first sight of a child that was his wife's and in no way his own.

Richard Whitehead can never be a natural father again. Some years ago, he insured himself against that inconvenience with a vasectomy. And now he had only to look at a baby in his wife's arms and feel the heart he had thought to empty well up with how wrong he had been. He was one with all those who thought there were no problems that cannot be solved with a quick divorce or a quick abortion and who know better now.

The only party to this contract that took account of the errantries of human sentiment was the Infertility Center of New York, and it insulated itself against them with a calculation so cold as to embarrass a social order that licenses works like these as a service.

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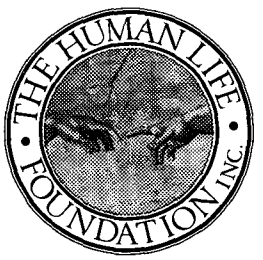
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