the HUMAN LIFE REVIEW

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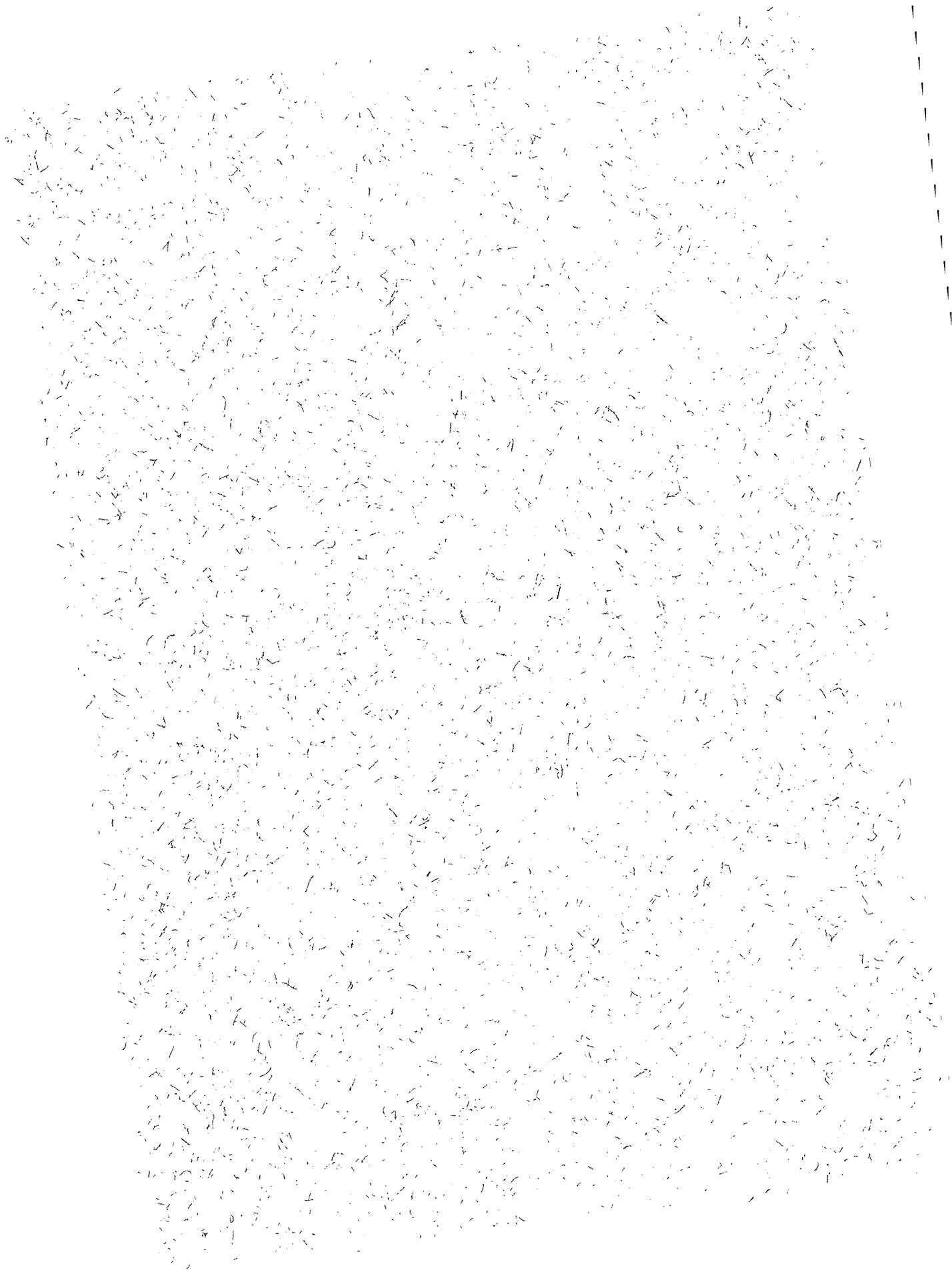

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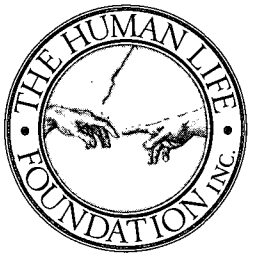

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. . . about THE HUMAN LIFE REVIEW

This review *makes no pretense to detail. Its purpose is to inform those already interested in and concerned about the meaning of life, and death. If in so doing we also perform a more general educational service—interesting those freshly arrived at such questions—we will of course be delighted (and to this end we mean to publish as much source and explanatory material as possible). But the casual reader may well find much that is implicit, or unexplained to his satisfaction, in what follows; for this we ask his indulgence, and hope that he will be inspired to pursue the answers himself.*

This first issue is devoted almost entirely to the problem of abortion, which raises very difficult questions, from the highest moral and philosophical levels down to basic social and even practical considerations. No single publication, much less a single issue of it, can attempt comprehensive treatment of so vast a subject. Consequently, what we have tried to achieve here is a broad range of material that will provide both general and specific knowledge of what is involved, in the opinion of men who have deeply pondered the matters about which they write. These include a religious leader, a senator, several lawyers and medical men, plus a young journalist of penetrating insight who gives a "layman's" viewpoint. We hope to greatly enlarge our spectrum of contributors in subsequent issues.

The articles include several specially written for this review, plus other material already published elsewhere, for while much remains to be said about abortion, much (of great value) that has already been said has received too little notice, and we want to bring a balanced *view to the attention of a wider audience.*

INTRODUCTION

ON JANUARY 22, 1973, the United States Supreme Court decided two abortion cases. Senator Birch Bayh of Indiana (who is chairman of the senate subcommittee now holding hearings on abortion) gives the following description of the Court's action: "The effect of these two cases was to rule unconstitutional every one of the 50 state laws regulating the practice of abortion. The Court held on a vote of 7 to 2 that, as a matter of law, an unborn child was not a 'person' within the Constitutional definition of that term and that the constitutional 'right to privacy' of a prospective mother barred any government, be it state or federal, from interfering with the absolute right of the woman to terminate her pregnancy up to the time of 'viability,' or the ability of the fetus to exist outside the mother's womb, which the Court arbitrarily defined as occurring only in the last three months of pregnancy."

Senator Bayh adds: "The Court's decision came as a shock to many legal scholars . . ."*

In fact, the Court's action shocked and surprised a great many other Americans as well. Understandably, those who had advocated abortion-on-demand were delighted, especially because the Court had gone further than even they had hoped or expected; anti-abortion activists were correspondingly angered at seeing their efforts—organized almost entirely on state and local levels—frustrated by a single *fiat* from the federal level. But, as is usual in such emotion-charged issues, both these factions were and remain minorities (however militant and vocal) at opposite ends of the spectrum. The great majority of Americans remain somewhere in between, and perhaps the biggest surprise of all is that the Court (perhaps to its *own* surprise) not only failed to *settle* the abortion issue, but also seems to have caused this great majority to consider it seriously for the first time. Whereas pre-1973 public opinion polls indicated that many were undecided (or just plain didn't know), recent polls show a remarkable upsurge in both interest and definite opinion: last year a Gallup Poll, which asked only whether or not the respondent favored the Court's rulings, found only 9% undecided (and a 47-44% margin in favor of the Court); a later poll by Sindlinger & Company (which *specifically* asked opinion on *abortion*) found only some 3% undecided (with a better than three-to-two vote—59.4% to 36.2%—against abortion).

We believe that such broad differences and shifts of opinion truly reflect

**The above is taken from a speech delivered by Senator Bayh to a "Right to Life" group. The full text of Sen. Bayh's remarks are reprinted, with permission, in Appendix A.*

the current situation. In our judgment, the majority of Americans, although now obviously very interested in the abortion issue, both wants to know more about it, and *needs* to know more if we, as a nation, are to achieve a workable solution to a dilemma that so closely (and often bitterly) divide us. *The Human Life Review* hopes and intends to contribute as much as possible to the narrowing of this information and education gap.

In our lead article, Senator James L. Buckley gives eloquent testimony in behalf of his own beliefs as to what the abortion issue means for all Americans. He does more, we think: for anyone coming upon this controversy for the first time, he provides a wealth of facts and information, an excellent introduction to the general arguments on both sides. He accompanied his speech (the original text is slightly abridged here) with a number of documents submitted for the record. For space reasons, we were unable to reprint them all in this issue, retaining only an editorial from a well-known medical journal that, we felt, was vital to the understanding of his arguments (see Appendix B). The full text, along with all the additional material submitted, is available in *The Congressional Record* for May 31, 1973.

In addition, a great wealth of material was developed during the hearings (still continuing) before Senator Bayh's subcommittee—again, more than we can possibly reprint—which will be published, eventually, in the official record. This testimony was roughly divided into medical, religious (and moral), and legal categories, although naturally the three have tended to overlap and mingle throughout the sessions. Here, we have tried to give some idea of what was said by choosing a) some unusual examples and b) other material that touches upon the same subject matter (but which was presented elsewhere) that should prove more congenial to the general reader. In Appendix C you will find excerpts from the testimony to the subcommittee given by a New Zealand medical expert, Dr. Albert W. Liley, and in Appendix D, excerpts from the testimony of a world-famous French doctor, Dr. Jerome Lejeune. These excerpts are not only typical of the kind of testimony given, but also serve to remind the American reader that abortion is by no means a local or parochial concern.

On the other hand, we reprint here the full text of a speech given by Dr. André Hellegers, a well-known American expert, to a session of the United Nation's world population meeting in Rumania last August. (Dr. Hellegers testified at length before the subcommittee, but we felt that his Bucharest speech, which covers much of the same subject matter, was a more general and succinct summary, and therefore of more immediate value to the reader).

The legal testimony (still continuing) was especially detailed and voluminous; here again, the editors believe that we can provide interesting and informative examples via the two articles selected. The first, by Prof. John T. Noonan, Jr., is an enlargement of his actual testimony to the Bayh subcommittee (prepared especially for this issue); the second, by Prof. John

Hart Ely (who testified the same day) is reprinted from an earlier article in the *Yale Law Journal* (with kind permission of the author). The two together give, we feel, a panoramic view of the legal difficulties and quandaries involved, as viewed from both sides (Mr. Noonan is strongly opposed to abortion-on-demand, Mr. Ely in favor).

The religio/moral arguments are perhaps the broadest category of all, and we hope to devote considerable additional space in future issues to a much more detailed analysis of the many arguments presented. For this issue, we have again attempted to present an unusual but striking example: the Jewish view, as witnessed by Rabbi Dr. Emmanuel Jacobovits, now Chief Rabbi of the British Commonwealth (but who is well-acquainted with the American scene, having been very active in Jewish affairs in New York for a decade).

Finally, we offer an altogether original view of the abortion controversy by Mr. M. J. Sobran, a brilliant young journalist who provides—with great warmth and vigor—a laymen's view of the meaning of it all.

Mr. Sobran would seem to be, in the context of the abortion controversy, the quintessential layman. His formal schooling has been in old-fashioned "liberal arts," not in medicine, or the law, or theology, or any other discipline normally associated with "expert" status in matters relating to abortion. Nor does he profess a particular religion (although he was "raised" a Catholic). By choice, he is a professional writer, without pretense to a particular ideology or sociology. Yet he *sees* something in this issue that affects us all.

Specifically, Sobran focuses on the American tendency to avoid crucial issues by assigning the arguments for or against them to particular "positions"—Catholics cannot be against abortion for any other reasons than "Catholic" ones (Catholic *prejudices,* really), Jews support the State of Israel only because they are Jews—and Protestants are all too often lumped together as "others," who are supposed to comprise some vague "majority" that is more "acceptable" to the extent that it is devoid of a specific *credo.*

As Sobran is at great pains to show, abortion is not the kind of issue that fits neatly into such polemical straight-jackets: it can and does touch everybody, more or less directly, because it cuts across a given individual's opinions and value judgments at so many different points. In effect, he argues, the only reason that more Americans have not taken a stand on abortion is that they have not *yet* fully understood all that is involved; when they do so understand the issue, he concludes, the majority will find themselves against permissive abortion, because, he says, "the 'prejudice' in favor of life is so deep, so much in our speech . . . that its suspension is an unnatural act."

In future issues of this review we hope to pursue such questions as these in even greater depth. For we agree that the abortion issue is intimately linked to many other problems that confront Americans today, from such

obviously-related life-and-death issues as euthanasia to much broader social questions that are bound to arise if, in fact, the "abortion mentality" produces a society in which the "future" generations are a distinct minority. Our hope is that we might contribute to solutions which, while not perhaps final, will be workable for our own generation, and useful for the future.

J. P. McFadden
for the Foundation

A Human Life Amendment

Senator James L. Buckley

THE Supreme Court, in a pair of highly controversial, precedent-shattering decisions, *Roe against Wade* and *Doe against Bolton*, ruled that a pregnant woman has a constitutional right to destroy the life of her unborn child. In so doing, the Court not only contravened the express will of every State legislature in the country; it not only removed every vestige or legal protection hitherto enjoyed by the child in the mother's womb; but it reached its result through a curious and confusing chain of reasoning that, logically extended, could apply with equal force to the genetically deficient infant, the retarded child, or the insane or senile adult.

After reviewing these decisions, I concluded that, given the gravity of the issues at stake and the way in which the Court had carefully closed off alternative means of redress, a constitutional amendment was the only way to remedy the damage wrought by the Court. My decision was not lightly taken for I believe that only matters of permanent and fundamental interest are properly the subject for constitutional amendment. I regret the necessity for having to take this serious step, but the Court's decisions, unfortunately, leave those who respect human life in all its stages from inception to death with no other recourse.

To those who argue that an amendment to the Constitution affecting abortion and related matters would encumber the document with details more appropriately regulated by statute, I can only reply that the ultimate responsibility must be borne by the High Court itself. With Mr. Justice White, who dissented so vigorously in the abortion cases:

> I find nothing in the language or history of the Constitution to support the Court's judgment.

James L. Buckley is the junior United States Senator from New York; he introduced his Human Life Amendment on the Senate floor on May 31, 1973. This article is a slightly-abridged version of his address to the Senate that day. (The address was published in full in *The Congressional Record,* along with several appendices and other documents relating to the Senator's remarks.)

The Court simply carved out of thin air a previously undisclosed right of "privacy" that is nowhere mentioned in the Constitution, a right of privacy which, oddly, can be exercised in this instance only by destroying the life and, therefore, the privacy of an unborn child. As Mr. Justice White remarked last January:

> As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court.

In the intervening weeks since the Court's decisions, I have sought the advice of men and women trained in medicine, ethics, and the law. They have given me the most discriminating and exacting counsel on virtually every aspect of the issues involved and have provided invaluable assistance in drawing up an amendment that reflects the latest and best scientific fact, and that comports with our most cherished legal traditions.

What Did the Court Really Do?

Before discussing the specific language of my proposed amendment, I believe it necessary first to analyze the effect and implications of *Wade* and *Bolton*, and then to place them in the context of current attacks on our traditional attitudes toward human life. At the outset, it is necessary to discuss with some care what the Court in fact held in its abortion decisions. This is, I must confess, not an easy task. For parsing the Court's opinions in these cases requires that one attempt to follow a labyrinthine path of argument that simultaneously ignores or confuses a long line of legal precedent and flies in the face of well-established scientific fact.

The Court's labored reasoning in these cases has been a source of considerable puzzlement to all who have the slightest familiarity with the biological facts of human life before birth or with the legal protections previously provided for the unborn child. The Court's substantial errors of law and fact have been so well documented by others that it would be superfluous for me to attempt to add anything of my own.

The full import of the Court's action is as yet incompletely understood by large segments of the public and by many legislators and commentators. It seems to be rather widely held, for example, that the Court authorized abortion on request in the first 6 months of pregnancy, leaving the States free to proscribe the act thereafter. But such is far from the truth. The truth of the matter is that, under

these decisions, a woman may at any time during pregnancy exercise a constitutional right to have an abortion provided only that she can find a physician willing to certify that her "health" requires it; and as the word "health" is defined, that in essence means abortion on demand.

The Court attempts to distinguish three stages of pregnancy, but upon examination this attempt yields, in practical effect, distinctions without a difference. In the first 3 months, in the words of the Court, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." This means, for all intents and purposes, abortion on request. During the second trimester of pregnancy, the State may—but it need not—regulate the abortion procedure in ways that are reasonably related to maternal health. The power of the State's regulation here is effectively limited to matters of time, place and perhaps manner.

Thus, through approximately the first 6 months of pregnancy, the woman has a constitutionally protected right to take the life of her unborn child, and the State has no "compelling interest" that would justify prohibiting abortion if a woman insists on one.

After the period of "viability," which the Court marks at 6, or alternatively 7, months of pregnancy, the State "may"—but, again, it need not—proscribe abortion except "where it is necessary for the preservation of the life or health of the mother." This provision, which appears at first glance to be an important restriction, turns out to be none at all, as the Court defines health to include "psychological as well as physical well-being," and states that the necessary "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being" of the mother. The Court, in short, has included under the umbrella of "health" just about every conceivable reason a woman might want to advance for having an abortion.

It is clear, then, that at no time prior to natural delivery is the unborn child considered a legal person entitled to constitutional protections; at no time may the unborn child's life take precedence over the mother's subjectively-based assertion that her well-being is at stake.

In reaching these findings, the Court in effect wrote a statute governing abortion for the entire country, a statute more permissive than that enacted by the hitherto most permissive jurisdiction in the country; namely, my own State of New York. Nor is that all. In the course of its deliberations, the Court found it necessary to concede

a series of premises that can lead to conclusions far beyond the immediate question of abortion itself. These premises have to do with the conditions under which human beings, born or unborn, may be said to possess fundamental rights. I would like to touch briefly on one or two basic points:

First, it would now appear that the question of who is or is not a "person" entitled to the full protection of the law is a question of legal definition as opposed to practical determination. Thus, contrary to the meaning of the Declaration of Independence, contrary to the intent of the framers of the 14th amendment, and contrary to previous holdings of the Court, to be created human is no longer a guarantee that one will be possessed of inalienable rights in the sight of the law. The Court has extended to government, it would seem, the power to decide the terms and conditions under which membership in good standing in the human race is determined. This statement of the decisions' effect may strike many as overwrought, but it will not appear as such to those who have followed the abortion debate carefully or to those who have read the Court's decisions in full. When, for example, the Court states that the unborn are not recognized by the law as "persons in the whole sense," and when, further, it uses as a precondition for legal protection the test whether one has a "capability of meaningful life," a thoughtful man is necessarily invited to speculate on what the logical extension of such arguments might be.

If constitutional rights are deemed to hinge on one's being a "person in the whole sense," where does one draw the line between "whole" and something less than "whole"? It is simply a question of physical or mental development? If so, how does one distinguish between the child in his 23rd week of gestation who is lifted alive from his mother's womb and allowed to die in the process of abortion by hysterotomy, and the one that is prematurely born and rushed to an incubator? It is a well known scientific fact that the greater part of a child's cerebral cortex is not formed, that a child does not become a "cognitive person", until some months after normal delivery. Might we not someday determine that a child does not become a "whole" person until sometimes after birth, or never become "whole" if born with serious defects? And what about those who, having been born healthy, later lose their mental or physical capacity? Will it one day be found that a person, by virtue of mental illness, or serious accident, or senility, ceases to be a "person in the whole sense", or ceases to have the "capability for meaningful life," and as such no longer entitled to the full protection of the law?

The list of such questions is virtually endless. The Court in at-

tempting to solve one problem has ended up by creating 20 others. One can read the Court's opinions in the abortion cases from beginning to end and back again, but he will not find even the glimmer of an answer to these questions; indeed, one will not even find the glimmer of an indication that the Court was aware that such questions might be raised or might be considered important.

A second general consideration I should like to raise has to do with the Court's definition of "health" as involving "all factors—physical, emotional, psychological familial, and the woman's age—relevant to . . . well-being." It is a little remarked but ultimately momentous part of the abortion decisions that the Court, consciously or unconsciously, has adopted wholesale the controversial definition of "health" popularized by the World Health Organization. According to the WHO, "health" is "a state of complete physical, mental, and social well-being, not simply the absence of illness and disease." In this context, the Court's definition acquires a special importance, not only because it can be used to justify abortion any time a woman feels discomfited by pregnancy, but because the Court made pointed reference to the "compelling interest" of the State in matters of health in general and maternal health in particular. One is bound to wonder whether the State's interest in maternal health would ever be sufficiently "compelling" to warrant an abortion against a pregnant woman's will. This is no mere academic matter. An unwed, pregnant teenage girl was ordered by a lower court in Maryland just last year, against her will, to have an abortion. The girl was able to frustrate the order by running away. The order was later overturned by a Maryland appellate court; but the important point is that an analog to the compelling State interest argument was used by the lower court to justify its holding.

Let us consider, for example, the case of a pregnant mental patient. Would the State's compelling interest in her health ever be sufficient to force an abortion upon her? What of the unmarried mother on welfare who is already unable to cope with her existing children? Again, I am not raising an academic point for the sake of disputation. In the abortion cases, the Supreme Court breathed life into the notorious precedent of *Buck against Bell.* The *Bell* cases, it will be recalled, upheld the right of a State to sterilize a mental incompetent without her consent.

The Court held in that case that—

> The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.

One is necessarily bound to wonder whether, by analogous extension, the principle that sustains compulsory sterilization of mental patients is broad enough to cover compulsory abortion of mental patients; and if of mental patients, then why not, as the lower court in Maryland suggested, of unwed minor girls? And if of unwed minor girls, then why not of any other woman? Just how "compelling" is the State's interest in matters of "health"? Where does the power begin or end? In the abortion cases, *Bell* curiously, is cited for the proposition that a woman does not have an unlimited right to her own body, whence the only inference to be drawn is that the reason she doesn't have an unlimited right is that the State may qualify that right because of its "compelling interest" in "health." I find that a strange doctrine to be celebrated by the proponents of women's liberation.

These larger and deeply troubling considerations, may in the long run be as important to us as the special concern that many of us have with the matter of abortion itself. Every premise conceded by the Court in order to justify the killing of an unborn child can be extended to justify the killing of anyone else if, like the unborn child, he is found to be less than a person in the "whole" sense or incapable of "meaningful" life. The removal of all legal restrictions against abortion must, in short, be seen in the light of a changing attitude regarding the sanctity of individual life, the effects of which will be felt not only by the unborn child who is torn from its mother's womb but as well by all those who may someday fall beyond the arbitrary boundaries of the Court's definition of humanity.

Which Ethic Will Govern?

This wider context of the abortion controversy was brought to my attention most forcefully by an unusually candid editorial entitled "A New Ethic for Medicine and Society" that was published two and a half years ago in *California Medicine*, the official journal of the California Medical Association. It was occasioned, as I understand it, by the debate then taking place in our largest State regarding the liberalization of the abortion law.

The thrust of the editorial is simply this: That the controversy over abortion represents the first phase of a head-on conflict between the traditional, Judeo-Christian medical and legal ethic—in which the intrinsic worth and equal value of every human life is secured by law, regardless of age, health or condition of dependency—and a new ethic, according to which human life can be taken for what are

held to be the compelling social, economic or psychological needs of others. Mr. President, I ask unanimous consent that the editorial referred to be printed in the *Record* at the conclusion of my remarks. (See Appendix B.)

Let me for a moment dwell on a crucial point in that editorial. The author writes:

> The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition, or status, abortion is becoming accepted by society as moral, right, and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws and public policy rather than the reverse. Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.

Lest there be any ambiguity as to the ultimate thrust of the "new ethics," the *California Medicine* editorial went on to state the following in discussing the growing role of physicans in deciding who will and will not live:

> One may anticipate further development of these roles as the problems of birth control and birth selection are extended inevitably to death selection and death control whether by the individual or by society . . .

I find the editorial a powerful, eloquent, and compelling statement of the ultimate questions involved in the abortion controversy. The question in issue—the Supreme Court to the contrary notwithstanding—is not to determine when life begins, for that is one of scientific fact requiring neither philosophical nor theological knowledge to answer. The question, rather, is what value we shall place on human life in general and whether unborn human life in particular is entitled to legal protection.

Whether or not our society shall continue its commitment to the old ethic, or transfer its allegiance to the new, is not a question to be decided by a transitory majority of the Supreme Court, but by the people acting through their political processes. I concur in Mr. Justice White's condemnation of the *Wade* decision as "an exercise

of raw judicial power" that is "improvident and extravagant." I concur in finding unacceptable the Court's action in "interposing a constitutional barrier to State efforts to protect human life and—in—investing mothers and doctors with the constitutionally protected right to exterminate it."

The majority of the Court, however, has rendered its decision. We as a people have been committed by seven men to the "new ethic"; and because of the finality of their decisions, because there are now no practical curbs on the killing of the unborn to suit the convenience or whim of the mother, those who continue to believe in the old ethic have no recourse but to resort to the political process. That is why I intend to do what I can to give the American people the opportunity to determine for themselves which ethic will govern this country in what is, after all, quite literally a matter of life or death. That is why I send my proposed Human Life Amendment to the desk and ask that it be printed and appropriately referred.

The Proposed Amendment

In doing so, Mr. President, may I say how deeply gratified I am to be joined in introducing this amendment by my distinguished colleagues from Oregon, Iowa, Utah, Nebraska, Oklahoma, and North Dakota. Senators Hatfield, Hughes, Bennett, Bartlett, Curtis, and Young* are known in this body and elsewhere as exceptionally thoughtful and dedicated men whose day-to-day political activities are informed by devotion to first principles. When such a geographically, ideologically, and religiously diverse group of Senators can agree on a major issue like this, it suggests that opposition to abortion is truly ecumenical and national in scope. These Senators honor me by their cosponsorship, and I consider it a privilege to work together with them in this great cause. I would simply like to take this occasion to extend to each of them my personal gratitude for their help and cooperation and to say how much I look forward to working jointly with them in the months ahead.

The text of our amendment reads as follows:

> **Section 1.** *With respect to the right to life, the word 'person', as used in this Article and in the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States, applies to all human beings, includ-*

**Shortly thereafter, these Senators were joined by Senator James O. Eastland, Democrat, of Mississippi and Senator Jesse Helms, Republican, of North Carolina.*

ing their unborn offspring at every stage of their biological development, irrespective of age, health, function or condition or dependency.

Section 2. *This Article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.*

Section 3. *Congress and the several States shall have power to enforce this Article by appropriate legislation within their respective jurisdictions.*

The amendment's central purpose is to create, or rather, as will be made clear below, to restore a constitutionally compelling identity between the biological category "human being" and the legal category "person". This has been made necessary by two factors: First, the more or less conscious dissemblance on the part of abortion proponents, by virtue of which the universally agreed upon facts of biology are made to appear as questions of value—a false argument that the Supreme Court adopted wholesale; and second, the holding of the Court in *Wade* and *Bolton* that the test of personhood is one of legal rather than of biological definition. The amendment addresses these difficulties by making the biological test constitutionally binding, on the ground that only such a test will restrain the tendency of certain courts and legislatures to arrogate to themselves the power to determine who is or who is not human and, therefore, who is or is not entitled to constitutional protections. The amendment is founded on the belief that the ultimate safeguard of all persons, born or unborn, normal or defective, is to compel courts and legislatures to rest their decisions on scientific fact rather than on political, sociological, or other opinion.

Such a test will return the law to a position compatible with the original understanding of the 14th amendment. As the debates in Congress during consideration of that amendment make clear, it was precisely the intention of Congress to make "legal person" and "human being" synonymous categories. By so doing, Congress wrote into the Constitution that understanding of the Declaration of Independence best articulated by Abraham Lincoln; namely, that to be human is to possess certain rights by nature, rights that no court and no legislature can legitimately remove. Chief among these, of course, is the right to life.

On the specific subject of abortion, it is notable that the same men who passed the 14th amendment also enacted an expanded Assimilative Crimes Statute, April, 1866, which adopted recently passed State anti-abortion statutes. These statutes, in turn, had been enacted as a result of a concerted effort by medical societies to bring to legislators' attention the recently discovered facts of human conception. The

Court's opinion in *Wade* totally misreads—if the Court was aware of it at all—the fascinating medico-legal history of the enactment of 19th century antiabortion statutes, and ignores altogether the fundamental intention which animated the framers of the 14th amendment.

Section 1 of the proposed amendment would restore and make explicit the biological test for legal protection of human life. The generic category is "human being," which includes, but is not limited to, "unborn offspring—at every stage of their biological development." It is a question of biological fact as to what constitutes "human being" and as to when "offspring" may be said to come into existence. While the basic facts concerning these matters are not in dispute among informed members of the scientific community, the ways in which these facts are to be ascertained in any particular case will depend on the specifications contained in implementing legislation passed consistent with the standard established by the amendment. Such legislation would have to consider, in the light of the best available scientific information, the establishment of reasonable standards for determining when a woman is in fact pregnant, and if so, what limitations are to be placed on the performance of certain medical procedures or the administering of certain drugs.

Section 1, it will also be noted, reaches the more general case of euthanasia. This is made necessary because of the widespread and growing talk of legalizing "death with dignity," and because of the alarming dicta in the *Wade* opinion by which legal protection seems to be conditioned on whether one has the "capability of meaningful life" or whether one is a "person in the whole sense." Such language in the Court's opinion, when combined with the Court's frequent references to the State's "compelling interest" in matters of "health," is pointedly brought to our attention by the revival in *Wade* of the notorious 1927 case of *Buck against Bell*—which upheld the right of the State to sterilize a mentally defective woman without her consent. The *Wade* and *Bolton* opinions taken as a whole seem to suggest that unborn children are not the only ones whose right to life is now legally unprotected. Thus, the proposed amendment explicitly extends its protections to all those whose physical or mental condition might make them especially vulnerable victims of the "new ethic."

Regarding the specific subject of abortion, section 2 makes an explicit exception for the life of the pregnant woman. There seems to be a widespread misimpression that pregnancy is a medically dangerous condition, when the truth of the matter is that under most circumstances a pregnant woman can deliver her child with minimal

risk to her own life and health. There is, however, an exceedingly small class of pregnancies where continuation of pregnancy will cause the death of the woman. The most common example is the ectopic or tubal pregnancy. It is our intention to exempt this unique class of pregnancies, without opening the door to spurious claims of risk of death.

Under the amendment, there must be an emergency in which reasonable medical certainty exists that continuation of pregnancy will cause the death of the woman. This is designed to cover the legitimate emergency cases, such as the ectopic pregnancy, while closing the door to unethical physicians who in the past have been willing to sign statements attesting to risk of death when in fact none exists or when the prospect is so remote in time or circumstance as to be unrelated to the pregnancy. Contrary to the opinion of the Supreme Court, which assumes that pregnancy is a pathological state, modern obstetrical advances have succeeded in removing virtually every major medical risk once associated with pregnancy. As Dr. Alan Guttmacher himself remarked nearly a decade ago, modern obstetrical practice has eliminated almost all medical indications for abortion. In certain limited instances, however, a genuine threat to the woman's life remains, and it is felt that excepting such situations is compatible with long-standing moral custom and legal tradition.

What Kind of Society?

I profoundly believe that such popularity, as the idea of abortion as acquired, derives from the ability of the proponents of abortion to dissemble the true facts concerning the nature of unborn life and the true facts concerning what is actually involved in abortion. I further believe that when these facts are fully made known to the public, they will reject abortion save under the most exigent circumstances; that is, those in which the physical life of the mother is itself at stake. In recent weeks, in discussing this matter with friends and colleagues, I have found that, like many of the rest of us, they labor under certain misimpressions created by the proponents of permissive abortion. I, therefore, believe that it would be useful for me to call our colleagues' attention to clinical evidence upon these points.

First, I will quote a particularly felicitous description of the biological and physical character of the unborn child by Dr. A. W. Liley, research professor in fetal physiology at National Women's Hospital, Auckland, New Zealand, a man renowned throughout the

world as one of the principal founders and masters of the relatively new field of fetology. Dr. Liley writes:

> In a world in which adults control power and purse, the fetus is at a disadvantage being small, naked, nameless and voiceless. He has no one except sympathetic adults to speak up for him and defend him—and equally no one except callous adults to condemn and attack him. Mr. Peter Stanley of Langham Street Clinic, Britain's largest and busiest private abortorium with nearly 7,000 abortions per year, can assure us that "under 28 weeks the foetus is so much garbage—there is no such thing as a living foetus." Dr. Bernard Nathanson, a prominent New York abortionist, can complain that it is difficult to get nurses to aid in abortions beyond the twelfth week because the nurses and often the doctors emotionally assume that a large foetus is more human than a small one. But when Stanley and Nathanson profit handsomely from abortion we can question their detachment because what is good for a doctors' pocket may not be best for mother or baby.
>
> Biologically, at no stage can we subscribe to the view that the foetus is a mere appendage of the mother. Genetically, mother and baby are separate individuals from conception, Physiologically, we must accept that the conceptus is, in very large measure, in charge of the pregnancy, in command of his own environment and destiny with a tenacious purpose.
>
> It is the early embryo who stops mother's periods and proceeds to induce all manner of changes in maternal physiology to make his mother a suitable host for him. Although women speak of their waters breaking or their membranes rupturing, these structures belong to the foetus and he regulates his own amniotic fluid volume. It is the foetus who is responsible for the immunological success of pregnancy—the dazzling achievement by which foetus and mother, although immunological foreigners, tolerate each other in parabiosis for nine months. And finally it is the foetus, not the mother, who decides when labour should be initiated.
>
> One hour after the sperm has penetrated the ovum, the nuclei of the two cells have fused and the genetic instructions from one parent have met the complementary instructions from the other parent to establish the whole design, the inheritance of a new person. The one cell divides into two, the two into four and so on while over a span of 7 or 8 days this ball of cells traverses the Fallopian tube to reach the uterus. On reaching the uterus, this young individual implants in the spongy lining and with a display of physiological power suppresses his mother's menstrual period. This is his home for the next 270 days and to make it habitable the embryo develops a placenta and a protective capsule of fluid for himself. By 25 days the developing heart starts beating, the first strokes of a pump that will make 3,000 million beats in a lifetime. By 30 days and just 2 weeks past mother's first missed period, the baby, ¼ inch long, has a brain of unmistakable human proportions, eyes, ears, mouth, kidneys, liver and umbilical cord and a heart pumping blood he has made himself. By 45 days, about the time of mother's second missed period, the baby's skeleton is complete, in cartilage not bone, the buds of the milk teeth appear and he makes his first

movements of his limbs and body—although it will be another 12 weeks before mother notices movements. By 63 days he will grasp an object placed in his palm and can make a fist.

Most of our studies of foetal behavior have been made later in pregnancy, partly because we lack techniques for investigation earlier and partly because it is only the exigencies of late pregnancy which provide us with opportunities to invade the privacy of the foetus. We know that he moves with a delightful easy grace in his buoyant world, that foetal comfort determines foetal position. He is responsive to pain and touch and cold and sound and light. He drinks his amniotic fluid, more if it is artificially sweetened and less if it is given an unpleasant taste. He gets hiccups and sucks his thumb. He wakes and sleeps. He gets bored with repetitive signals but can be taught to be alerted by a first signal for a second different one. Despite all that has been written by poets and song writers, we believe babies cry at birth because they have been hurt. In all the discussions that have taken place on pain relief in labour, only the pain of mothers have been been considered—no one has bothered to think of the baby.

This then is the foetus we know and indeed each once were. This is the foetus we look after in modern obstetrics, the same baby we are caring for before and after birth, who before birth can be ill and need diagnosis and treatment just like any other patient. This is also the foetus whose existence and identity must be so callously ignored or energetically denied by advocates of abortion.

I consider this issue to be of paramount importance. As we stand here on this day, quite literally thousands of unborn children will be sacrificed before the sun sets in the name of the new ethic. Such a situation cannot continue indefinitely without doing irreparable damage to the most cherished principles of humanity and to the moral sensibilities of our people. The issue at stake is not only what we do to unborn children, but what we do to ourselves by permitting them to be killed. With every day that passes, we run the risk of stumbling, willy-nilly, down the path that leads inexorably to the devaluation of all stages of human life, born or unborn. But a few short years ago, a moderate liberalization of abortion was being urged upon us. The most grievous hypothetical circumstances were cast before us to justify giving in a little bit here, a little bit there; and step by step, with the inevitability of gradualness, we were led to the point where, now, we no longer have any valid legal constraints on abortion.

What kind of society is it that will abide this sort of senseless destruction? What kind of people are we that can tolerate this mass extermination? What kind of Constitution is it that can elevate this sort of conduct to the level of a sacrosanct right, presumptively endowed with the blessings of the Founding Fathers, who looked to the laws of nature and of nature's God as the foundation of this Nation?

Abortion, which was once universally condemned in the Western World as a heinous moral and legal offense, is now presented to us as not only a necessary, sometime evil, but as a morally and socially beneficial act. The Christian counsel of perfection which teaches that the greatest love consists in laying down one's life for one's friend, has now become, it seems, an injunction to take another's life for the security and comfort of one's own. Men who one day argue against the killing of innocent human life in war will be found the next arguing in praise of killing innocent human life the womb. Doctors foresworn to apply the healing arts to save life now dedicate themselves and their skills to the destruction of life.

To enter the world of abortion on request, Mr. President, is to enter a world that is upside down: It is a world in which black becomes white, and right wrong, a world in which the powerful are authorized to destroy the weak and defenseless, a world in which the child's natural protector, his own mother, becomes the very agent of his destruction.

I urge my colleagues to join me in protecting the lives of all human beings, born and unborn, for their sake, for our own sake, for the sake of our children, and for the sake of all those who may someday become the victims of the new ethic.

Abortion: "Another Form of Birth Control"?

Dr. André E. Hellegers

THE organizers of the Tribune have invited me to address myself to the issue of abortion, and as an obstetrician with a major interest in fetal physiology, I am delighted to do so.

Most modern discussions on abortion are replete with statistics and technology. They deal with numbers of abortions, maternal mortality and morbidity, hospital beds occupied, costs of abortion, whether the poor can afford as many abortions as the rich (to which the answer must be, by definition: no) and what are the best techniques of abortion.

Of course, similar discussions can be held on any issue involving medical technology, ranging from dentistry to orthopedics. But then an obvious question arises. Is abortion just a matter of technology? Obviously it is not, or we would not find the subject as controversial as it is.

It has always surprised me that those who advocate that abortion should be freely available, or should even be a "human right," put in all sorts of cautions which I find quite illuminating. Abortion to many such advocates is "just another method of birth control," yet always we hear that it should not be a *primary* method of birth control. I find this approach very puzzling. If abortion is a "human right" or "just another method of birth control" then why should it only be a *backstop* to contraception? Why should it not be a primary method of birth control? We hear that the mortality rate with induced abortion in several countries is 1:100,000 or 2:100,000 or 3:100,000. I think these figures are provided to reassure us about the safety of the procedure.

But what do these figures mean? I am reminded that studies have shown that the mortality rates from thromboembolic diseases (clots)

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caused by the pill is 3:100,000 per year. If these figures are correct, should we not then advocate that women should stop taking the pill and switch to abortion instead? And if abortions are now so simple that they only take 10 minutes, then why should women have to undergo the many miserable side effects of the pill day after day, rather than have a quick—and safer—abortion once every so many months or years? Why should they not exercise their safest right?

It seems to me the answer is eminently obvious. It is that whatever statistics may show about *maternal* mortality or morbidity, the fact remains that abortion is quite fatal to the *fetus*. If it were not for this simple and clear fact, I do not think this Population Tribune would be devoting two entire days to abortion. We are not holding two day meetings on diaphragms, pills, condoms, basal body temperatures, foams, jellies, or the I.U.D. In brief, we are not speaking of "just another method of birth control."

To discuss abortion only in terms of the mother, but never the fetus, is like discussing slavery only in terms of the owner but never the slave.

It may be said, and it is, indeed, said, that abortion has existed for a long time, as if this lent it a certain legitimacy. Of course, this can also be said for slavery, for colonialism, for poverty. But does the duration of these facts justify them? I should hope not. Injustice and poverty, like abortion have existed for centuries, and, like abortion, they have been condemned for centuries. No one would dream of legitimizing them on the basis of their length of existence only.

In each of these cases—slavery, injustice, abortion—we are faced with a confrontation between the powerful and the powerless. What is striking about the abortion debate is the ways in which we address ourselves to it and attempt to develop euphemisms for it. We pretend that it is a medical issue, but obviously it is not. As the well-known American obstetrician Howard Taylor, once said of the U.S.: "If you can find a medical indication to abort 750,000 women, you can find an indication to abort anyone." Today in the U.S. we have more than one million abortions.

The issue of abortion is no longer medical, it has become the simple application of technology to a social problem. Nor can it any longer be described as an "agonizing decision" between the welfare of a mother and her unborn child. Any such "agonizing decision" which results so consistently in the death of the fetus should not be described as an "agonizing choice." It is, rather, an exercise of power of the stronger against the weaker, and we should not grace it with an aura of hard medical decision-making.

In no way can the difference in attitudes towards abortion be better illustrated than by studying the terms used to describe the process. Let me give a range of them. It has variously been called "murdering the child," "killing the child," "murdering the baby," "killing the baby," "murdering the fetus," "killing the fetus," "destroying the fetus," "destroying the embryo," "terminating the pregnancy," "ending the pregnancy," "interrupting the pregnancy,"—as if it could be started again after a brief pause—"emptying the uterus," "menstrual extraction," "menstrual induction," "regularizing the menstrual cycle," or "backstopping contraception." The range of terms clearly ranges from those most concerned with the fetus to those who are least so. Yet even this is not good enough. Not only must we attempt to avoid thinking about what is done: we must tell ourselves that what we are doing is a positive good. We declare that a fetus is aborted so that "every child can be wanted" or so that "every child can be well-born." Of course in the process we must deny the right of the fetus to be born at all. It obviously also omits to say that if the child is unwanted it is the non-wanters who take the life and death decision and not the unwanted.

It is clear that my way of presenting the problem implies that I believe that in abortion human life is indeed killed. Perhaps this demands a defense of that position.

The facts seem to me elementary. Each life biologically begins at conception. A recent newspaper story once again made it clear. It was announced in Britain that three "test tube babies" had been born. They had spent six days in a "test tube" and 260 days inside their mother's wombs. Yet they were named after the first six days, not the next 260. Why? The answer is obvious. Because their lives began in the test tube. This simply acknowledges that we know *when* life begins and *how* it begins. It is a matter of elementary education about the nature of sperm and ova.

Neither is there much doubt about the stages of development after this fertilization. Implantation into the uterus occurs at about one week and from about that time we can detect the presence of the fetus through modern pregnancy tests. At three weeks the heartbeat appears. At six weeks all organs are there; at eight weeks there are brain waves; at eleven weeks a fetus has been observed to suck its thumb etc., etc. I do not want to bore you with a lecture in fetal physiology. I shall be brief: the fetus is alive, it is not dead. It is human and not a cat, rat, horse or elephant. Biologically, all species are identified by their genetic composition and the fetus is human from conception. In brief it is a *biological human being.*

But does that end the abortion debate? I do not think it does, even though perhaps it should. What the abortion issue is really about is not when human life begins *biologically*, because we know that. What it is about is whether we shall attach any importance to abortion debate has been of long standing. It is that people have biological human life—when shall we *begin* to do so and when shall we *cease* to do so? My own objection to the nature of the present abortion debate has been of long standing. It is that people have pretended that we do not know when human life starts or that it is not clear—as if we did not know it *biologically*. But of course we do.

So the question really is this: knowing that biological human life starts at fertilization when shall we confer on the fetus such crucial attributes as "value," "dignity," "soul," "protection under the law," "inviolability" and a host of other, similar notions?

And so some are developing a different philosophical system. They would hold that your value, your dignity, your worthiness of protection does not lie in your being a genetically live human being. Rather, you must be loved, wanted, accepted, recognized, capable of achievement (however that is to be defined). In brief, your dignity does not lie in your self—it lies in someone else's acceptance of you. I would deny it.

I would assert that in describing the human genetically and biologically we are on firmer ground than those who would try to assess our humanity by concepts of achievement and social or economic acceptability. In brief, I would hold that the human, including the fetus, should be assessed genetically rather than sociologically, economically, or relationally. The analysis is objective, rather than subjective. But let us at least realize that that is what the debate is about.

It would seem to me also, then, that within the context of the U.N. it would be very atypical to opt for a definition of the human which is based on the social, the economic, or the relational. It seems to me the entire philosophical basis for the U.N. has been to consider all equal, regardless of social or economic worth, or of alleged achievement. The basic U.N. philosophy has been *in*clusionary rather than *ex*clusionary. And so it should be in my view, with the inclusion of the smallest and weakest of us as humans.

It was well stated in the U.N. Declaration of the Rights of the Child, unanimously adopted on November 20, 1959: "The Child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before* as well as *after* birth." Yet today it is proposed that the immaturity is the precise justification for death. This is then in part justified on the

statistical grounds of the safety of the abortion procedure. As if the nature and worth of a genetically human life can be properly described by the ease of its destruction.

What then do I believe the U.N. should do in terms of abortion? The right of parents to determine the number and spacing of their children has already been affirmed. It seems to me that we must, then, develop the methods by which that right can become possible. There may be, indeed there are, differences of opinion on what are appropriate methods. What is, however, clear is that all of them are presently inadequate, not to say appallingly primitive.

This condition will not change until fundamental reproductive biology research is considered a medical priority in the world. If the population problem is as serious as I believe it is; if abortion kills human life, as I believe it does; if perinatal and infant death control are as important for responsible family planning as I think they are through providing some security of child survival; then I believe that all could agree on the importance of reproduction research. It is the only hope for producing fertility control methods which all might find acceptable.

Any look at any budget, whether it be at governmental level or university level, will show vast expenditures to control heart disease, cancer, or those diseases which affect adults. In each country that I have been in, and they have been many in Europe and the Americas, it is a constant finding that whether at the basic science level, or at the clinical level, work in human reproduction is rated somewhere near the bottom of the pole. Given the fact that we allege the importance of reproduction as a subject I would simply ask that we translate this importance into fact. Hopefully in so doing we will present mankind one day with the opportunity to ensure that its children will be healthy and wanted, without having to resort to killing them before their birth, while using all sorts of euphemisms to hide the stark and awful facts. Perhaps then we will not have to demand their social acceptability as the criterion for their inclusion in the human race. Perhaps then being human genetically will be sufficient ground for inclusion in the human race.

Why a Constitutional Amendment?

John T. Noonan Jr.

ON JANUARY 22, 1973, the Supreme Court of the United States announced that a new personal liberty existed in the Constitution—the liberty of a woman to procure the termination of her pregnancy at any time in its course. The Court was not sure where the Constitution had mentioned this right, although the Court was clear that the Constitution had not mentioned it explicitly. "We feel," said Justice Blackmun for the majority, "that the right is located in the Fourteenth Amendment's concept of personal liberty," but he thought that it also could be placed "in the Ninth Amendment's reservation of rights to the people."[1]

Vague as to the exact constitutional provision, the Court was sure of its power to proclaim an exact constitutional mandate. It propounded a doctrine on human life which had, until then, escaped the notice of the Congress of the United States and the legislators of all fifty states. It set out criteria it said were required by the Constitution which made invalid the regulation of abortion in every state in the Union, the District of Columbia, the Commonwealth of Puerto Rico, and the City of New York. No one of these bodies had read the Constitution.

Wherever the liberty came from in the Constitution and however recent its discovery was, it was of a very high rank. It deserved to be classified as "fundamental" and as "implicit in the concept of ordered liberty."[2] With these characterizations, the right took its

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place with such foundations of civilized society as the requirement of fair and public trials and the right to a secret ballot. Justice Blackmun seemed to sense no incongruity in giving so basic a position to a demand which had, until his opinion, been consistently and unanimously rejected by the people of the United States. He did not pause to wonder how the nation had survived before January 22, 1973, in steadfastly repudiating a right implied in the concept of ordered liberty.

Some of the legislation affected was old, going back to the mid-nineteenth century; some was recent, reflecting the wisdom of the American Law Institute or containing explicit statements of intent to protect the fetus.[3] Some of the legislation had been confirmed by recent popular referenda, as in Michigan and North Dakota; some of the legislation was in the process of repeal, as in New York.[4] Old or new, compromise or complete protection from conception, passed by nineteenth-century males or confirmed by popular vote of both sexes, maintained by apathy or reaffirmed in vigorous democratic battle, none of the existing legislation on abortion conformed to the Court's criteria. By this basic fact alone, the *Abortion Cases*, *Roe v. Wade* and *Doe v. Bolton*, may stand as the most radical decisions ever issued by the Supreme Court.

That these opinions came from a Court substantially dominated by appointees of Richard Nixon, a president in theory dedicated to strict construction of the Constitution, that they should be drafted by a Justice whose antecedents were Republican, were ironies which did not abate the revolutionary character of what the Court had done in the exercise of what Justice White, in dissent, called "raw judicial power."[5] In rhetoric, the style was that of a judicial body. In substance, the opinions could have been authored by Paul Ehrlich or Bella Abzug.

Radicalism marked not only the Court's treatment of the states and its preference for the views of an elite to the results of democratic contests. Radicalism was also the mark of the Court's results. In October, 1963, Glanville Williams, the spiritual father of abortion-on-demand, put the proposition to the Abortion Law Reform Association that abortion be made a matter between woman and physician up to the end of the third month. His proposal was voted down by the then most organized advocates of abortion.[6] In less than ten years the Supreme Court in *Roe* and *Doe* wrote into the Constitution a far more radical doctrine. By virtue of its opinions, human life has less protection in the United States today than at any time since the inception of the country. By virtue of its opinions, human life has less

protection in the United States than in any country of the Western World.[7]

The Court's Holdings

Did the Court really go so far? Here is what it held:

1. Until a human being is "viable" or "capable of meaningful life," a state has no "compelling interest" that justifies it in restricting in any way in favor of the fetus a woman's fundamental personal liberty of abortion.[8] For six month, or "usually" for seven months (the Court's reckoning),[9] the fetus is denied the protection of law by virtue of either the Ninth Amendment or the Fourteenth Amendment.

2. After viability has been reached, the human being is not a person "in the whole sense," so that even after viability he or she is not protected by the Fourteenth Amendment's guarantee that life shall not be taken without due process of law.[10] At this point he or she is, however, legally recognizable as "potential life."[11]

3. A state may nonetheless not protect a viable human being by preventing an abortion undertaken to preserve the health of the mother.[12] Therefore a fetus of seven, eight, or nine months is subordinated by the Court's reading of the Constitution to the demand for abortion predicated on health.

4. What the health of a mother requires in any particular case is a medical judgment to be "exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[13]

5. The state may require that after the first trimester abortions be performed in licensed "facilities," and that after viability they be regulated so long as "health" abortions are not denied. [14] The state is constitutionally barred, however, from requiring review of the abortion decision by a hospital committee or concurrence in the decision by two physicians other than the attending physician.[15] The Constitution also prohibits a state from requiring that the abortion be in a hospital licensed by the Joint Committee on Accreditation of Hospitals or indeed that it be in a hospital at all.[16]

Confusion has persisted as to what the Court actually decided in *Roe* and *Doe*, in part because of the inordinate length of the opinions, in part because of a certain wooliness in their composition, and in part because of inaccurate reporting by the media. Even ardent opponents of abortion have sometimes misstated and underestimated the sweep of the Court's holdings.

The Court did *not* decide that at the end of the second trimester the child in the womb could, in some fashion, be protected—it expressly said that viability, when a species of protection could be given, was "usually placed at *seven* months" (emphasis supplied).[17] The Court did not say that the child after seven months had the rights of a person—it expressly said that "the unborn have never

been recognized in the law as persons *in the whole sense*" (emphasis supplied).[18] The Court did not hold that after seven months, the State could prohibit abortion—it expressly held in *Roe* a prohibition even in the last two months of pregnancy was subject to exception in favor of "the life or *health* of the mother" (emphasis supplied).[19]

Putting health in terms of "well-being," the Court created a basis for an abortion such that no physician could ever be prevented by law from performing an abortion that he believed was for the well-being of the woman who requested it. In a concurring opinion Chief Justice Burger said "plainly the Court today rejects any claim that the Constitution requires abortion on demand."[20] But if no barrier can be constitutionally set by law to the doctor's discretion to operate, abortion-on-demand exists as long as there is a doctor willing to answer a request for an abortion.

Plainly, there cannot be the slightest doubt that for the first six to seven months of fetal existence, the Court made abortion-on-demand a constitutional right. Opposed to the mother's "fundamental personal liberty," the embryo or fetus was valued at precisely zero. His or her very existence seemed to be doubted by the Court, which referred to the state's interest here not as an interest in actual lives but as an interest in a "theory of life."[21] The woman's right was treated as an absolute, abridgeable only for her own sake by the requirements as to licensed facilities.

Abortion-on-demand after the first six or seven months of fetal existence was effected by the Court through its denial of personhood to the viable fetus, on the one hand, and through its broad definition of health, on the other. Because the seven-month-old fetus is not a person—cannot be a person—because the fetus now bears the label "potential life," the fetus is not a patient whose interest the physician must consult. In the Court's scheme, the physician has one person as patient, the mother.

When the doctor considers the mother's health, he is to think in terms of the extensive definition of health first popularized by the World Health Organization (WHO). According to the WHO declaration, health is "a state of complete physical, mental, and social well-being, not simply the absence of illness and disease."[22] The Supreme Court affixed a seal of approval to this definition, substituting "familial" for "social," but essentially equating health with well-being. What physician could now be shown to have performed an abortion, at any time in the pregnancy, which was not intended to be for the well-being of the mother? What person would have difficulty in finding a physician who, in full compliance with the Court's

criteria, could advise an abortion if the patient's emotional demand was intense enough? Never before in British or American law has a baby in the last stages of pregnancy been so exposed to destruction at the desire of the parent.

The Consequences of the Abortion Cases

In the less than two years that has elapsed since The *Abortion Cases* were decided, the courts have spelled out in detail their implications and underlined their ominous significance for American society. The principal consequences are three:

First. The Subversion of the Structure of the Family.

1. The Supreme Court noted deliberately in *Roe* that it was not deciding the constitutionality of a statute requiring a father's consent for a legal abortion.[23] The Court set up, however, such an unqualified right in a mother to dispose of her offspring while alive within her body that it was almost inevitable that a father's interest would be treated as negligible. A three-judge federal court in Florida interpreted *Roe* and *Doe* to mean that the State had no interest to protect in the young fetus, and that if the State had no interest, the State could not create an interest in the father. The natural interest of the father in his child was analyzed as contingent upon the State's interest. A Florida statute requiring the father's consent was held unconstitutional.[24]

In Utah a statute was enacted after *Roe* and *Doe* to require that the father consent, that the mother be counselled as to the alternatives to abortion, and that a judicial hearing be promptly held to ascertain that the consent and counselling had been given. A three-judge federal court invalidated the entire law. It was, said Chief Judge Ritter, unconstitutional to subject "exercise of the individual right of privacy of the mother" to "the consent of others" or to "judicial scrutiny."[25]

In these decisions *Roe* and *Doe* are seen to stand for a view of a woman's dominion over her offspring in which the father's role in the child's procreation is ignored and the father's concern for his offspring's welfare is given a zero value. The father is simply classified with "others."

2. The *Abortion Cases* were applied in Alabama to affect the action of a local school board setting standards for the conduct of public school teachers. An unmarried teacher became pregnant and sought information from a hospital about abortion. Word of her condition came to the Board of Education of Covington County, which, after a hearing, fired her for immoral behavior. A three-judge federal court held the Alabama statute permitting the discharge of teachers for immorality to be unconstitutional as applied to this teacher. The court held that the right of privacy created by *Roe* and *Doe* had been infringed.[26]

Teaching is as much by conduct as by words. A school system which employs pregnant unmarried women teaches a view of marriage more eloquently than a hundred textbooks on social ethics. Yet, the Supreme Court itself in *Roe* and *Doe* had made a point of treating the married and the unmarried plaintiffs exactly alike. The federal court in Alabama

only went a slight step further in interpreting *Roe* to require that the unmarried woman's right to an abortion be treated as superior to any interest of the State in teaching that the procreation of children should occur only in marriage.

Second. The Mandated Public Funding of Abortion.

Roe and *Doe* as interpreted by the federal courts not only treat the procreation of children atomistically as if it were the individual activity of women, married or unmarried. They require that public funds be spent on abortion if public funds are spent on surgery. They make it highly unlikely, for example, that a national health bill can be enacted which constitutionally excludes abortion from the surgical services to be federally financed.

The leading cases are *Nyberg v. City of Virginia, Doe v. Wohlgemuth,* and above all, *Hathaway v. Worcester City Hospital.*

1. *Nyberg,* decided by the federal district court in Minnesota, held that a municipal hospital must provide abortion services and invalidated the hospital's restriction of abortion to that which is necessary to save a mother's life. Judge Neville said, "It seems to this court that *Roe v. Wade* leaves no room for exception or for equivocation. Its mandate is clear and explicit." Applying the Court's teaching, he required "the hospital administrators to take positive steps within a period of 30 days from date hereof to provide abortion services and facilities to licensed physicians. . . ."[27]

2. *Wohlgemuth* held unconstitutional a portion of Pennsylvania's medical assistance program under the Social Security Act. The program compensated for abortions performed when continuation of pregnancy threatened the health or life of the mother, but did not pay for elective abortions. Speaking for a three-judge federal court, Judge Snyder held that the program "deprived the women who choose abortions of the equal protection rights guaranteed by the Fourteenth Amendment." The State, he said, could not "justify on the basis of financial integrity" a regulation excluding a woman who exercised her constitutional right not to bear a child.[28] The State must finance voluntary abortions.

The general principle of these cases was put in *Hathaway v. Worcester City Hospital* where, after *Roe* and *Doe* were decided, the federal court ruled that the City of Worcester must provide sterilization services in its municipal hospital. The State, Judge Coffin wrote, could not "constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights." The city hospital was bound by statute to care for persons "requiring relief during temporary sickness." The hospital performed surgery on "benign tumors which caused subsequent neurological problems." The "appellant's capacity for childbearing," the court ruled, should be treated similarly as a form of sickness.[29]

As long as these interpretations of *Roe* and *Doe* are the law, the states and the Congress will not, it seems, be able to create health programs which, in providing surgical assistance, draw the line at elective abortion. *Roe* and *Doe,* as interpreted, have read the Fourteenth Amendment to create a right to the public financing of abortion.

As a result of these decisions and the interpretation of the laws by the Department of Health, Education and Welfare of the Social Security Act in accordance with these decisions, the federal government in 1973 provided funds for at least 220,000 abortions and for perhaps as many as 278,000 abortions.[30] The federal administrators were indifferent as to which figure was correct, 58,000 lives meaning little when the scale of certain abortions was so large. The federal government was substantially committed to the funding of abortion.

Third. The Unmaking of Human Beings.

The worst of the consequences of *Roe* and *Doe* is the acceptance of the principle that the law can say who is not a human being. All of our constitutional liberties are nothing if we can be defined out of the human species. In *Dred Scott v. Sanford* the Supreme Court declared that the descendant of African slaves could never be a citizen of the United States,[31] but even that most dreadful of decisions did not carry so far as *Roe* and *Doe*. These decisions, as now interpreted by the courts, arrogate to the courts the power to decide who is human.

Hear, for example, Chief Judge Pettine in Providence, ruling on a Rhode Island statute, enacted after *Roe* and *Doe*, which expressly declared that in Rhode Island a person "commences to exist at the instant of conception."[32] The state produced witnesses with credentials that the judge acknowledged to be impressive, to testify that the embryo was a member of the human species: "I neither summarize nor make any findings of fact as to their testimony. To me the United States Supreme Court made it unmistakably clear that the question of when life begins needed no resolution by the judiciary as it was not a question of fact. . . . I find it irrelevant to all the issues presented for adjudications."[33] Once the Supreme Court had ruled that a fetus was not a person, it was, Judge Pettine held, "frivolous" for a state to try to show the contrary.[34] The Rhode Island statute was invalidated. The First Circuit affirmed. The Supreme Court refused to review the ruling that Rhode Island had acted so frivolously that a single federal judge could annul its legislation.[35]

Lawyers are used to dealing with presumptions, with creations of law, with fictions. At first appearance the denial of humanity to the fetus may appear as just another fiction, not more shocking than many other fictions necessary for the working of law. For the purposes of the Fourteenth Amendment, the fetus is not human; for the purposes of the Social Security Act, the fetus is human. The fetus is an "individual" for the purposes of receiving aid under Social Security; under another branch of Social Security, the State may be compensated for exterminating this "individual."[36] Distinctions drawn on the bases of different purposes are not uncommon to the law, although when Social Security is interpreted to such different purposes even a case-oriented lawyer might blink. But what is shocking, repelling, fatal in this distinction, in this fiction is that the courts here assume the power to exclude a species of humanity in determining fundamental protection under the Constitution and to exclude that species beyond the power of any legislature to restore.

If, by constitutional fiction, persons only exist at birth, by another

constitutional fiction persons may cease to exist at eighty or seventy, or whatever a balancing of interests suggests as reasonable to a majority of the Court. The Supreme Court itself hints at such a standard in *Roe* by referring to a fetus' lack of "meaningful life."[37] If what five judges view as meaningful life is the test of personhood for the Constitution, if facts are irrelevant in determining who is entitled to constitutional protection, the judiciary has absolute power to contract the protection of the Constitution to the healthy or the mentally alert.

The sequelae of *Roe* and *Doe* are not merely judicial. They are attitudinal. Other organs of government besides the courts are enlisted in the education of the public to accept abortion. When Senator James Buckley proposed to eliminate the funding of abortions from Medicaid, the Department of Health, Education, and Welfare sent to the Conference Committee of the Senate and House a memorandum setting out the cost of such an exclusion. It cost, the Department said, $200 to perform an abortion, it cost $1000 to bring a baby to term.[38] It was left for the congressmen to infer that 278,000 Medicaid abortions per year saved $22,400,000. The cost/benefit approach to the taking of lives, formerly practiced in some military circles, now provided the way of evaluating abortion as public policy. In terms of body count and cost saving, abortion was a public blessing.

When Aldous Huxley wrote his famous satire of technological society, the Abortion Center which he put in Chelsea was as bizarre a touch of fantasy as the breeding laboratories for babies. Huxley rightly saw State control of reproduction was to be one of the great issues of the future. He did not envision how closely in our brave new world the appropriate Department would calculate the saving achievable by killing the offspring of the poor.

The Department of Health, Education, and Welfare has also attempted to achieve by way of definition—often the most powerful instrument of government propaganda—a fusion of normal childbirth and the destructive act of abortion. The Department's proposed regulations on sex discrimination in federally assisted programs of education now read: "For the purpose of this subpart, 'pregnancy' means the entire process of pregnancy, childbirth, and recovery therefrom, and includes false pregnancy, miscarriage, and abortion."[39]

"War is Peace. Freedom is Slavery. Ignorance is Strength", and of government departments the Ministry of Love is "the really frightening one."[40] I quote of course from *Nineteen Eighty-Four* by George Orwell. Even Orwell did not imagine a world in which the Ministry of Health defines pregnancy to include abortion. Nor did he imagine a society in which childbearing capacity is analogized to a tumor causing neurological problems, in which a father has no interest in the life of the child he has begotten, in which the State need not pay for childbirth but must pay for abortion, in which biological facts are irrelevant to the definition of human life. Yet to that society we have come through the teaching of our courts and the response of federal bureaucracy to that teaching in the second year after *Roe* and *Doe*. If this is what they do in the green wood, what will they do in the dry?

How What Has Happened Should Be Judged

Seventy years ago a majority of the Supreme Court held that the Fourteenth Amendment was violated by New York's limiting the hours of bakers to sixty hours a week. Such legislation, the Court said, deprived the employers of the bakers of a basic liberty.[41] In dissent Justice Oliver Wendell Holmes, Jr. wrote: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[42]

Common law restricting abortion was as old as the Constitution.[43] The people of all fifty states had statutes regulating abortion in force on January 22, 1973.[44] Would a fair and reasonable man be compelled to admit that every one of these statutes had in fact infringed fundamental principles as those principles have been understood by our people and our law? By Holmes' criterion the *Abortion Cases* pervert the meaning of liberty.

Apologists have tried to link these decisions with earlier decisions of the Court upholding the rights of parents and married persons against arbitrary restrictions by the State—*Meyer v. Nebraska* striking down a prohibition against teaching German to young children; *Pierce v. Society of Sisters,* invalidating a statute which prevented parents from choosing the school where their children would be educated; *Skinner v. Oklahoma,* denying the State the power to sterilize a chicken thief; *Loving v. Virginia,* holding unconstitutional any anti-miscegenation law against mixed marriage; *Boddie v. Connecticut,* denying the State power to condition divorce upon payment of fees beyond the means of the poor; *Griswold v. Connecticut* holding that a law against the use of contraceptives unconstitutionally invaded the privacy of marriage.[45]

The difference between these cases and the *Abortion Cases* is that each of the statutes the Court invalidated in the earlier cases had infringed "fundamental principles *as they have been understood by the traditions of our people and our law.*" Oklahoma in *Skinner* had tried to take away a man's capacity to procreate.[46] Nebraska in *Meyer* and Oregon in *Pierce* had invaded the parents' right to educate.[74] *Loving, Boddie,* and *Griswold* each asserted the special prerogatives of the married against the State. *Loving* spoke of marriage as "one

of the vital personal rights essential to the orderly pursuit of happiness of free men."[48] *Boddie* acknowledged "the basic position of the marriage relationship in this society's hierarchy of values."[49] Marriage, said Griswold, is an association older than the Bill of Rights, with which the State could not tamper.[50] No parity exists between these recognitions of traditional liberties—to marry, to have children, to educate the children—and the denial of fundamental principles as they have been traditionally understood, which the *Abortion Cases* accomplished.

A single case, decided one year before *Roe* and *Doe*, provided a clue as to the direction in which the Court might go. Holding that Massachusetts could not regulate the distribution of contraceptives to the unmarried, Justice Brennan wrote "the rights must be the same for the unmarried and the married alike."[51] The rationale of *Griswold* —that "the sacred precincts" of the marital bedroom might not be invaded by the State[52]—was stood on its head. In this decision, *Eisenstadt v. Baird,* the Court showed to the special place of marriage in our society an insensitivity which was to be enlarged in *Roe* and *Doe* to a general insensitivity to the traditions of our people on the procreation and education of offspring.

A more ingenious defense of the Court's action has attempted to explain it on grounds unmentioned by the Court. What happened in *Roe* and *Doe,* it has been argued, may be explained as an extension of the First Amendment's strictness against "the establishment of religion." Abortion, it is contested, is an "intrinsically" religious subject, because it requires a decision as to when life begins.[53] Being "intrinsically" religious, and so involving "the views of organized religious groups," abortion may not be a subject of governmental action.[54] All "substantive governmental controls within the 'entangled zone' could quite plausibly be deemed tainted, and hence unconstitutional."[55]

The transparent beauty of this argument is that, while devised *ad hoc* to defend the Court, it is capable of expanded application to invalidate other legislative action rooted in religious principles which have become controversial—for example, monogamous marriage could easily be viewed as religious in origin and inexplicable apart from religious assumptions, and the elevation of this religious creation to a statutory status endowed with privilege could be constitutionally challenged.[56] The vision to which this argument is attached is wonderfully illustrated by its author's conclusion that while it would be intrusion into a religious zone for the government to con-

trol abortion, there would be no such barrier to the government funding abortion; indeed, such funding is properly required.[57]

The difficulty with this straightforward effort to identify the Constitution with the aspirations of one band of American secularists is twofold:

First. The argument goes too far. Are laws stopping work on Sunday unconstitutional because the choice of the day was intrinsically religious and is controversial? The Court has said, No.[58] Are conscientious objection exemptions to be denied, because they rest on a respect for an individual's response to God and are not free from controversy? The Court has said, No.[59] Is heterosexual marriage to become a suspect category, constitutionally speaking, because communes and other forms of sexual associations challenge it and point to its religious character? Despite recent wobbling by the Court, it is unlikely.[60] An argument which is so exposed to objection upon its extension appears to be no more than a rationalization of the case at hand.

Second. The traditions of our people and our laws rest on a religious basis. It is the author of the Declaration of Independence who wrote, "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?"[61] Jefferson's appeal to the religious roots of liberty is embodied here in an argument for the emancipation of the slaves, so that the controversial question of freeing them is presented as intrinsically religious—what is given by God to all can be denied by law to none. It is the same kind of argument that the opponents of abortion now make—you cannot deny life to any part of the human species. And Jefferson's immediately subsequent words still have a prophetic resonance if transferred to our present situations where one class of humanity is put beyond the law's protection: "Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep forever . . ."[62] To suppose that the question of who is part of the human species and the question of what is owed to the human species are ever free from controversy and that such questions are not intrinsically religious is to be unresponsive to the greatest division in the country in the past and to be unaware of the great challenges of contemporary pessimism.

Nothing in long-established precedent, nothing in the traditions of our people, nothing in history justified the majority's interpretations of the term liberty. In the words of one contemporary professor of constitutional law at Harvard Law School, *Roe v. Wade* is "a very

bad decision. . . . It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[63] In the words of the Phelps Professor of Law at Yale Law School, the Supreme Court had "no such mandate" from the Constitution to elaborate its own views of morality in "elaborating the concept of liberty in the Fourteenth Amendment."[64] These are severe criticisms from sober academic authorities, themselves not unsympathetic to the arguments favoring abortion.

The most appropriate language to evaluate what the Court did is provided by the Court itself. The rebuke addressed by Justice Benjamin R. Curtis to his brethren who decided *Dred Scott v. Sanford* is appropriate: "Political reasons have not the requisite certainty to afford rules of judicial interpretation. They are different in different men. They are different in the same men at different times. . . . We are under the government of individual men, who for the time being have power to deduce what the Constitution is, according to their own views of what it ought to mean."[65] The same rebuke, in different language, was conveyed in Justice Byron White's description of the majority's action in *Roe* and *Doe*. It was, so Justice White put it, an exercise in "raw judicial power."[66]

By Holmes' standard is constitutional decision-making of this kind conscionable?

The sequelae have taken *Roe* and *Doe* even further from the criteria set out by Holmes. Would a rational and fair man necessarily admit that the Alabama, Florida, and Utah statutes infringed fundamental principles as they have been understood by our people and our law? Rather, have not our people and our law always treated marriage as the meeting of two persons, equal in their love and concern for their children, united in a status privileged and fostered by law? If the Constitution did not enact Mr. Herbert Spencer's *Social Statics,* neither did it enact Ms. Germaine Greer's *The Female Eunuch.*

The sequelae have ignored the consciences of those opposed to the practice of abortion. They have conscripted all federal taxpayers into paying for abortion. They have made the liberty of obtaining an abortion so mighty that they have given no weight to the violation of other liberties when citizens are made against their conscience the sponsors of surgical services and welfare programs designed to kill.

The sequelae have made unassailable in the courts the claim of the courts to be arbiters of who is a person.

By Holmes' standard, what kind of constitution-making is this?—for it is constitution making when those within the protection of the laws are put beyond the power of law to protect. Must a reasonable and fair man agree that, when seven members of the Supreme Court decide that the offspring of human persons is not a human person, fundamental principles as understood by our people and our law are infringed if a State calls attention to the facts and says, "You are mistaken. The child is human."

What Is to Be Done?

A famous black historian, after surveying the half-hearted and ineffectual measures to end the slave trade taken by the United States right up until 1860, wrote a final chapter entitled "The Lesson For Americans." "The most obvious question which this study suggests," he wrote, "is: How far in a State can a recognized moral wrong safely be compromised? And although this chapter of history can give us no definite answer suited to the ever-varying aspects of political life, yet it would seem to warn any nation from allowing, through carelessness and moral cowardice, any social evil to grow. No persons would have seen the Civil War with more surprise and horror than the Revolutionists of 1776; yet from the small and apparently dying institution of their day arose the walled and castled Slave-Power. From this we may conclude that it behooves nations as well as men to do things at the very moment when they ought to be done."[67]

What ought to be done now is correct the Court's error by amending the Constitution. What is necessary is law setting the country in the direction of distinguishing between death and life. No less a law than an Amendment to the Constitution can effect this change. The states are helpless. Minnesota has seen its municipal hospitals compelled to provide abortions; New York and Pennsylvania have seen themselves compelled to fund abortions.[68] Alabama has seen its moral standard for school teachers set aside.[69] Arizona, Connecticut, Florida, Georgia, Iowa, Kentucky, Maryland, Michigan, Montana, Rhode Island, South Carolina, Texas, Utah, and Wyoming have seen their statutes on abortion formally declared unconstitutional.[70] It has made no difference to the courts that large popular votes before *Roe* and *Doe* rejected change in the statutes, as in Michigan in November, 1972.[71] It has made no difference that the legislatures attempted to act within the openings they thought *Roe* and *Doe* had left as did Rhode Island and Utah.[72] The judges have not doubted that they know better what liberty in the Fourteenth Amendment re-

quires. All the attempts of the people have been struck down. Only an Amendment can now change the law.

Amendment of the Constitution to eliminate error grafted on it by the Court is not to tamper with the historic charter of American freedoms drafted by the Founding Fathers but to use the amending process as the Founding Fathers designed it—to prevent any branch of government from holding monarchial sway. To resolve by constitutional amendment an impasse created by the Supreme Court, or to correct gross and substantial error committed by the Court, is neither improper nor unprecedented. The Sixteenth Amendment became inevitable after the Court had decided *Pollock v. Farmers' Loan and Trust Company.*[73] The Fourteenth Amendment was the necessary answer, after bloody war, to *Dred Scott v. Sanford.*[74] A proper balance between the organs of government and the people requires that no determination by a governmental body be irreversible and no fundamental distortion beyond popular correction. The Constitution itself provides in the amending process the means of redress.

What An Amendment Can Do

An Amendment cannot be foolproof. No form of words conceivable by the human mind is immune from distortion. Who would have imagined in 1868, or even in 1968, that "liberty" in the Fourteenth Amendment meant "right to an abortion," and that an Amendment designed principally to protect an oppressed minority would itself be read in 1973 to put another minority beyond the law's protection? A constitution designed to endure must run the risks of later misinterpretations. We can point our descendants in the right direction. We cannot guarantee that they will reach it.

An Amendment cannot be immune from polemical distortion in debate over its desirability. A striking example is the interpretation of the Buckley "Person" Amendment in testimony before the Senate by Phillip Heymann, a professor of law opposed to its adoption. The Amendment defines the fetus as a person from the moment of conception.[75] Heymann objected that the Amendment would not stop abortions. All that the Amendment would have created was a conflict of rights which a court would have to resolve. A court, he said, could subordinate the right to live of a person in the womb to a mother's right of privacy.[76]

At the level of classroom play this construction of the Buckley Amendment cannot be faulted. It is logically possible to analyze its effect in the way described. As a realistic appraisal of what any court, even the most unsympathetic, would do if the Amendment

were enacted, Heymann's contention is fantasy. If an anti-abortion Amendment of the Buckley type was enacted, no body of judges would defy its mandate by the logically conceivable but realistically improbable preference of a person's privacy to a person's life.

Heymann's contention was a debating point, implicitly conceded to be so by Heymann himself when later in the same testimony he said that the Buckley Amendment would make abortion the same as murder.[77] In debate of this kind you may have it both ways—the Amendment does nothing, the Amendment makes abortion murder. That the words of an Amendment can be stretched two different ways at once proves very little except that words are marvelously malleable if they are detached from their context in a life situation. Drafters of an Amendment should be aware of how debaters may distort their language, but they should not be unduly concerned to prevent all the rhetorical manipulations conceivable.

An Amendment is not a criminal code, to be drafted with exactness of language to forestall the evasions of evildoers and to warn them in advance of where they will act at their peril. Look at any one of the great Amendments. They speak with a largeness of language and a breadth of spirit. They could be misinterpreted by any sophist. They are not addressed to sophists, but to the people.

An Amendment cannot make the world safe from abortion. Whatever width the Amendment has, there will be jurisdictions in the United States in which it will be honored in the breach, not the observance. Habits, where they are entrenched, will not be uprooted overnight. However zealous the States become in protecting life, other jurisdictions—across the border, in the Caribbean, across the Pacific—will exist where easy abortion will be available. It would be a great mistake, then, to devise an Amendment with the chimerical goal of making sure that no abortions are obtained by Americans.

An Amendment can effect two large goods. *One*: It can effectually restrain the government from killing. Operating upon Congress and the States it can set a barrier to taking the life of anyone on account of age, health, or condition of dependency. *Two*: It can teach that abortion is wrong. It can perform the most important of constitutional chores, the education of the country.

At issue is the balance of power between the federal judiciary and the states. At issue is the structure of the family as the legally recognized union of female and male endowed with equal rights. At issue is the role of government in sponsoring the taking of life through government medical services and health care programs. Above all,

at issue is the law's ability to defend the life of every member of the human species.

In the bicentennial of our birth as a nation, an Amendment can set out the values on which our policy depends, it can correct the perversion of liberty in *Roe* and *Doe*, it can restrain the State from taking life, it can recognize that the most precious liberty is the liberty to live and restore the possibility of protecting by law a uniquely vulnerable portion of the human species.

**Subsequent to this article, Professor Noonan has submitted a suggested wording of such an amendment, along with his own views on what the amendment would accomplish. For the full text see Appendix E, in this issue.*

NOTES

1. **Roe v. Wade**, 410 U.S. 113 at 153, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973).
2. *Ibid.* at 152, quoting Justice Cardozo in **Palko v. Connecticut**, 302 U.S. 319, 325 (1937).
3. The Texas statute invalidated in **Roe** was of the older variety; the Georgia statute, invalidated in **Doe v. Bolton**, 410 U.S. 179, 35 L.Ed.2d 201, 93 S.Ct. 739 (1973), was of the kind proposed by the American Law Institute's **Model Penal Code** reproduced in Appendix B to the Court's opinion, 410 U.S. 113, at 205-207. Before **Roe** and **Doe** had been decided, on May 23, 1972, Connecticut had enacted a new abortion law declaring that its purpose was to protect the life of the fetus. This law was invalidated by a three-judge federal court applying **Roe, Abele v. Markle** 369 *F. Supp.* 807 (D. Conn. 1973).
4. **New York Times**, December 31, 1973, p. 32.
5. **Doe v. Bolton**, 410 U.S. 179 at 222 (dissenting opinion).
6. See Caleb Foote, Robert J. Levy, and Frank E. A. Sander, **Cases and Materials on Family Law** (1966) 616-617.
7. See Luke T. Lee and Arthur Larson, eds., **Population and the Law** (1971) for representative restrictions on abortion in Western European countries: 165-166 (Belgium, even therapeutic abortion forbidden by law although permitted in practice); 212 (Germany, only therapeutic abortion permitted); 184-187 (Sweden, abortion up to five months permitted but only after approval by state officials).
8. **Roe v. Wade**, 410 U.S. at 163.
9. *Ibid.* at 160.
10. *Ibid.* at 162.
11. *Ibid.* at 163.
12. *Ibid.* at 164.
13. **Doe v. Bolton**, 410 U.S. 179 at 192.
14. **Roe v. Wade**, 410 U.S. 113 at 163. There is a potential conflict in the Court's opinion as to whether the State may require that abortions be performed by licensed physicians in the first three months, as the Court appears to sanction at 164. If, as the Court says at 163, the State's "compelling interest" begins at the end of the first three months, where does the State derive power to require performance by physicians in the early stages? In a criminal prosecution, a good defense would seem to be that the Court has denied any interest to the State.
15. **Doe v. Bolton**, 410 U.S. 179 at 198 and 199.
16. *Ibid.* at 194.
17. **Roe v. Wade**, 410 U.S. 113 at 160.
18. *Ibid.* at 160.
19. *Ibid.* at 165.
20. **Doe v. Bolton**, 410 U.S. 179 at 208 (concurring opinion).

21. **Roe v. Wade**, 410 U.S. 113 at 162.
22. See New York Academy of Medicine, **Bulletin** (1965) vol. 41, p. 410.
23. **Roe v. Wade**, 410 U.S. 113 at 165.
24. **Coe v. Gerstein**, 1974-1975 **Reporter on Human Reproduction and the Law**, (Legal-Medical Studies, Box 8219, John F. Kennedy Station, Boston, Mass. 02414) I-C-2 (the **Reporter** will be hereafter cited as **RHRL**).
25. **Doe v. Rampton**, 366 *F. Supp.* 189 at 193 (D. Utah 1973).
26. **Drake v. Covington County Board of Education**, 371 *F. Supp.* 974 (D. Ala. 1974).
27. **Nyberg v. City of Virginia**, 361 *F. Supp.* 932 at 938 (D. Minn. 1973).
28. **Doe v. Wohlgemuth, 1974-1975 RHRL** I-C-49 (W. D. Penn. 1974) (opinion by Snyder, J., Weis, J. dissenting).
29. **Hathaway v. Worcester City Hospital**, 475 F.2d 201 at 705, 706 (1st Cir. 1973).
30. Department of Health, Education, and Welfare, "The Effects of General Provision 413 of the Labor-HEW Appropriations Act," Memorandum to Senate-House Conferees, September 24, 1974.
31. **Dred Scott v. Sanford**, 19 How. 393 at 403, 427 (1838).
32. Rhode Island Criminal Abortion Statute 73-S287, Substitute A, Rhode Island General Laws, sec. 11-3-1, set out in **Doe v. Israel**, 358 *F. Supp.* 193 (D.R.I., May 16, 1973).
33. **Doe v. Israel**, 358 *F. Supp.* 1193 at 1197.
34. *Ibid.* at 1199.
35. 42 **U.S. Law Week** 3632 (May 13, 1974).
36. Compare **Carver v. Hooker** 364 *F. Supp.* 204 (D. N.H. 1973) accord **Doe v. Lukhard** 493 F.2d 54 (4th Cir. 1974) holding the fetus an "individual" under Section 402 (a) (10) of the Social Security Act, 42 U.S.C. sec. 602 (a) (10) with the policy of the Department of Health, Education, and Welfare, reimbursing States for abortions 42 U.S.C. 1396b *et seq.*, see n. 30.
37. **Roe v. Wade** 410 U.S. 113 at 163 (1973).
38. See note 30.
39. Department of Health, Education, and Welfare, "Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance," 86.47(c), **Federal Register**, June 30, 1974, p. 22237.
40. George Orwell, **Nineteen Eighty-Four** (1949) 17-18.
41. **Lochner v. New York**, 198 U.S. 45 (1905).
42. *Ibid.* at 75 (dissenting opinion).
43. See John T. Noonan, Jr., ed., **The Morality of Abortion: Legal and Historical Perspectives** (1970) 223-225.
44. *Ibid.* 225, 248-250.
45. Philip B. Heymann and Douglas E. Barzelay, "The Forest and the Trees: Roe v. Wade and Its Critics," 53 **Boston University Law Review** 769-775 (1973).
46. 316 U.S. 535 (1942).
47. **Meyer v. Nebraska**, 262 U.S. 390 (1923); **Pierce v. Society of Sisters**, 268 U.S. 510 (1925).
48. **Loving v. Virginia**, 388 U.S. 1, 12 (1967), quoting from **Skinner v. Oklahoma**, 316 U.S. 535, 541.
49. **Boddie v. Connecticut**, 401 U.S. 371 at 374 (1971).
50. **Griswold v. Connecticut**, 381 U.S. 479 at 486 (1965).
51. **Eisenstadt v. Baird** 405 U.S. 438 at 453 (1972).
52. **Griswold v. Connecticut** 381 U.S. 479 (1965).
53. Lawrence H. Tribe, Foreward to "The Supreme Court, 1972 Term," 87 **Harvard Law Review** 1 at 18-25 (1973).
54. *Ibid.* at 23.
55. *Ibid.* at 24.
56. See John T. Noonan, Jr., "The Family and the Supreme Court," 23 **Catholic University Law Review** 255 at 265-268 (1974).
57. Tribe, *op. cit supra* n. 53, at 45.
58. **McGowan v. Maryland** 366 U.S. 420 (1961); **Braunfeld v. Brown** 366 U.S. 599 (1961).
59. *E.g.* **Sicurella v. United States** 348 U.S. at 390-391 (1955).
60. See Noonan, *op. cit supra*, n. 56 at 270-273.
61. Thomas Jefferson, Query XVIII, **Notes on the State of Virginia**, ed. William Peden p. 152.
62. *Idem.*

63. John Hart Ely, "The Wages of Crying Wolf: A comment on **Roe v. Walde,**" 82 **Yale Law Journal** 920 at 947 (1973).
64. Harry Wellington, "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication," 83 **Yale Law Journal** 221 at 311 (1973).
65. **Dred Scot v. Sanford** 19 How. 393 at 620 (dissenting opinion).
66. **Doe v. Bolton** 410 U.S. 179 at 222 (dissenting opinion).
67. W. E. B. DuBois, **The Suppression of the African Slave Trade to the United States of America 1638-1870** (1970 ed.) 199.
68. **Nyberg v. City of Virginia**, *supra* n. 27. **Klein v. Nassau County Medical Center**, 347 *F. Supp.* 496. (E. D. N.Y. 1973); **Wohlgemuth v. Doe**, *supra*, n. 28.
69. **Drake v. Covington County Board of Education**, *supra*, n. 26.
70. Arizona: **Nelson v. Planned Parenthood Center of Tucson, Inc.**, 19 Ariz. App. 142, 505 P.2d 580, 590 (1973);
Connecticut: **Abele v. Markle,** 369 *F. Supp.* 807 (D. Conn. 1973);
Florida: **Coe v. Gerstein, Reporter on Human Reproduction and the Law** I-C-2 (S.D. Fla. 1973);
Georgia: **Doe v. Bolton**, 410 U.S. 179 (1973);
Iowa: **Doe v. Turner**, 361 *F. Supp.* 1288 (S.D. Iowa 1973).
Kentucky: **Sasaki v. Commonwealth**, 497 S.W.2d 713 (1973).
Maryland: **State v. Ingel**, 18 Md. App. 514, 308 A.2d 223 (1973).
Michigan: **People v. Bricker**, 389 Mich. 524, 208 N.W.2d 173 (1973).
Montana: **Doe v. Woodall, Reporter on Human Reproduction and the Law** I-C-30 (D. Mont. 1973).
Rhode Island: **Doe v. Israel**, 358 *F. Supp.* 1193 (D.R.I. (1973), **affirmed** 482 F.2d 156; **cert. denied** 42 **U.S. Law Week** 3632 (1974).
South Carolina: **State v. Lawrence**, 198 S.E.2d 253 (1973).
Texas: **Roe v. Wade**, 410 U.S. 113 (1973).
Utah: **Doe v. Rampton**, 366 *F. Supp.* 189 (1973).
Wyoming: **Doe v. Burk, Reporter on Human Reproduction and the Law** I-C-9 (1973).
71. *Supra*, **Time** November 13, 1972.
72. *Supra*, n. 25 and n. 32.
73. 157 U.S. 429 (1895).
74. 19 How. 393 (1856).
75. S. J. Res. 169 (1974).
76. **New York Times**, October 8, p. 16.
77. *Idem.*

The Wages of Crying Wolf

John Hart Ely

The interests of the mother and the fetus are opposed. On which side should the State throw its weight? The issue is volatile; and it is resolved by the moral code which an individual has.[1]

IN *Roe v. Wade,*[1] decided January 22, 1973, the Supreme Court—Justice Blackmun speaking for everyone but Justices White and Rehnquist[2]—held unconstitutional Texas's (and virtually every other state's[4]) criminal abortion statute. The broad outlines of its argument are not difficult to make out.

1. The right to privacy, though not explicitly mentioned in the Constitution, is protected by the Due Process Clause of the Fourteenth Amendment.[5]

2. This right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[6]

3. This right to an abortion is "fundamental" and can therefore be regulated only on the basis of a "compelling" state interest.[7]

4. The state does have two "important and legitimate" interests here,[8] the first in protecting maternal health, the second in protecting the life (or potential life[9]) of the fetus.[10] But neither can be counted "compelling" throughout the entire pregnancy: Each matures with the unborn child.

> These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."[11]

5. During the first trimester of pregnancy, neither interest is sufficiently compelling to justify any interference with the decision of the woman and her physician. Appellants have referred the Court to medical data indicating that mortality rates for women undergoing early abortions, where abortion is legal, "appear to be as low as or lower than the rates for normal childbirth."[12] Thus the state's interest in protecting maternal health is not compelling during the first trimester. Since the interest in protecting

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the fetus is not yet compelling either,[13] during the first trimester the state can neither prohibit an abortion nor regulate the conditions under which one is performed.[14]

6. As we move into the second trimester, the interest in protecting the fetus remains less than compelling, and the decision to have an abortion thus continues to control. However, at this point the health risks of abortion begin to exceed those of childbirth. "It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[15] Abortion may not be prohibited during the second trimester, however.[16]

7. At the point at which the fetus becomes viable[17] the interest in protecting it becomes compelling,[18] and therefore from that point on the state can prohibit abortions *except*—and this limitation is also apparently a constitutional command, though it receives no justification in the opinion —when they are necessary to protect maternal life or health.[19]

Did the Court Go Too Far?

A number of fairly standard criticisms can be made of *Roe.* A plausible narrower basis of decision, that of vagueness, is brushed aside in the rush toward broader ground.[20] The opinion strikes the reader initially as a sort of guide book, addressing questions not before the Court and drawing lines with an apparent precision one generally associates with a commissioner's regulations.[21] On closer examination, however, the precision proves largely illusory. Confusing signals are emitted, particularly with respect to the nature of the doctor's responsibilities[22] and the permissible scope of health regulations after the first trimester.[23] The Court seems, moreover, to get carried away on the subject of remedies: Even assuming the case can be made for an unusually protected constitutional right to an abortion, it hardly seems necessary to have banned during the first trimester *all* state regulation of the conditions under which abortions can be performed.[24]

By terming such criticisms "standard," I do not mean to suggest they are unimportant, for they are not. But if they were all that was wrong with *Roe,* it would not merit special comment.[25]

What Is at Stake?

Let us not underestimate what is at stake: Having an unwanted child can go a long way toward ruining a woman's life.[26] And at bottom *Roe* signals the Court's judgment that this result cannot be justified by any good that anti-abortion legislation accomplishes. This surely is an understandable conclusion—indeed it is one with which I agree[27]—but ordinarily the Court claims no mandate to second-guess

legislative balances, at least not when the Constitution has designated neither of the values in conflict as entitled to special protection.[28] But even assuming it would be a good idea for the Court to assume this function, *Roe* seems a curious place to have begun. Laws prohibiting the use of "soft" drugs or, even more obviously, homosexual acts between consenting adults can stunt "the preferred life styles"[29] of those against whom enforcement is threatened in very serious ways. It is clear such acts harm no one besides the participants, and indeed the case that the participants are harmed is a rather shaky one.[30] Yet such laws survive,[31] on the theory that there exists a societal consensus that the behavior involved is revolting or at any rate immoral.[32] Of course the consensus is not universal but it is sufficient, and this is what is counted crucial, to get the laws passed and keep them on the books. Whether anti-abortion legislation cramps the life style of an unwilling mother more significantly than anti-homosexuality legislation cramps the life style of a homosexual is a close question. But even granting that it does, the *other* side of the balance looks very different. For there is more than simple societal revulsion to support legislation restricting abortion.[33] Abortion ends (or if it makes a difference, prevents) the life of a human being other than the one making the choice.

The Court's response here is simply not adequate. It agrees, indeed it holds, that after the point of viability (a concept it fails to note will become even less clear than it is now as the technology of birth continues to develop[34]) the interest in protecting the fetus is compelling.[35] Exactly why that is the magic moment is not made clear: Viability, as the Court defines it,[36] is achieved some six to twelve weeks after quickening.[37] (Quickening is the point at which the fetus begins discernibly to move independently of the mother[38] and the point that has historically been deemed crucial—to the extent *any* point between conception and birth has been focused on.[39]) But no, it is *viability* that is constitutionally critical: the Court's defense seems to make a definition for a syllogism.

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capacity of meaningful life outside the mother's womb.[40]

With regard to why the state cannot consider this "important and legitimate interest" prior to viability, the opinion is even less satisfactory. The discussion begins sensibly enough: The interest asserted is not necessarily tied to the question whether the fetus is "alive," for whether or not one calls it a living being, it is an entity with the po-

tential for (and indeed the likelihood) of life.[41] But all of arguable relevance that follows[42] are arguments that fetuses (a) are not recognized as "persons in the whole sense" by legal doctrine generally[43] and (b) are not "persons" protected by the Fourteenth Amendment.[44]

To the extent they are not entirely inconclusive, the bodies of doctrine to which the Court adverts respecting the protection of fetuses under general legal doctrine tend to undercut rather than support its conclusion.[45] And the argument that fetuses (unlike, say, corporations) are not "persons" under the Fourteenth Amendment fares little better. The Court notes that most constitutional clauses using the word "persons"—such as the one outlining the qualifications for the Presidency—appear to have been drafted with postnatal beings in mind. (It might have added that most of them were plainly drafted with *adults* in mind, but I suppose that wouldn't have helped.) In addition, "the appellee conceded on reargument that no case can be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."[46] (The other legal contexts in which the question could have arisen are not enumerated.)

The canons of construction employed here are perhaps most intriguing when they are contrasted with those invoked to derive the constitutional right to an abortion.[47] But in any event, the argument that fetuses lack constitutional rights is simply irrelevant. For it has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, *whether or not that activity is constitutionally protected,* must implicate either the life or the constitutional rights of another person.[48] Dogs are not "persons in the whole sense" nor have they constitutional rights, but that does not mean the state cannot prohibit killing them: It does not even mean the state cannot prohibit killing them in the exercise of the First Amendment right of political protest. Come to think of it, draft cards aren't persons either.[49]

Thus even assuming the Court ought generally to get into the business of second-guessing legislative balances, it has picked a strange case with which to begin. Its purported evaluation of the balance that produced anti-abortion legislation simply does not meet the issue: That the life plans of the mother must, not simply may, prevail over the state's desire to protect the fetus simply does not follow from the judgment that the fetus is not a person. Beyond all that, however, the Court has no business getting into that business.

The Moral Issues Are Complex

Were I a legislator I would vote for a statute very much like the

one the Court ends up drafting.[50] I hope this reaction reflects more than the psychological phenomenon that keeps bombardiers sane—the fact that it is somehow easier to "terminate" those you cannot see—and am inclined to think it does: That the mother, unlike the unborn child, has begun to imagine a future for herself strikes me as morally quite significant. But God knows I'm not *happy* with that resolution. Abortion is too much like infanticide on the one hand, and too much like contraception on the other, to leave one comfortable with any answer; and the moral issue it poses is as fiendish as any philosopher's hypothetical.[51]

Of course, the Court often resolves difficult moral questions, and difficult questions yield controversial answers. I doubt, for example, that most people would agree that letting a drug peddler go unapprehended is morally preferable to letting the police kick down his door without probable cause. The difference, of course, is that the Constitution, which legitimates and theoretically controls judicial intervention, has some rather pointed things to say about this choice. There will of course be difficult questions about the applicability of its language to specific facts, but at least the document's special concern with one of the values in conflict is manifest. It simply says nothing, clear or fuzzy, about abortion.[52]

The matter cannot end there, however. The Burger Court, like the Warren Court before it, has been especially solicitous of the right to travel from state to state, demanding a compelling state interest if it is to be inhibited.[53] Yet nowhere in the Constitution is such a right mentioned. It is, however, as clear as such things can be that this right was one the framers intended to protect, most specifically[54] by the Privileges and Immunities Clause of Article IV.[55] The right is, moreover, plausibly inferable from the system of government, and the citizen's role therein, contemplated by the Constitution.[56] The Court in *Roe* suggests an inference of neither sort—from the intent of the framers,[57] or from the governmental system contemplated by the Constitution—in support of the constitutional right to an abortion.

What the Court does assert is that there is a general right of privacy granted special protection—that is, protection above and beyond the baseline requirement of "rationality"—by the Fourteenth Amendment,[58] and that that right "is broad enough to encompass" the right to an abortion. The general right of privacy is inferred, as it was in *Griswold v. Connecticut*,[59] from various provisions of the Bill of Rights manifesting a concern with privacy, notably the Fourth Amendment's guarantee against unreasonable searches, the Fifth Amendment's privilege against self-incrimination, and the right, in-

ferred from the First Amendment, to keep one's political associations secret.[60]

One possible response is that all this proves is that the things explicitly mentioned are forbidden, if indeed it does not actually demonstrate a disposition *not* to enshrine anything that might be called a general right of privacy.[61] In fact the Court takes this view when it suits its purposes. (On the *same day* it decided *Roe,* the Court held that a showing of reasonableness was not needed to force someone to provide a grand jury with a voice exemplar, reasoning that the Fifth Amendment was not implicated because the evidence was not "testimonial" and that the *Fourth Amendment* did not apply because there was no "seizure."[62]) But this approach is unduly crabbed. Surely the Court is entitled, indeed I think it is obligated, to seek out the sorts of evils the framers meant to combat and to move against their twentieth century counterparts.[63]

Thus it seems to me entirely proper to infer a general right of privacy, *so long as some care is taken in defining the sort of right the inference will support.* Those aspects of the First, Fourth and Fifth Amendments to which the Court refers all limit the ways in which, and the circumstances under which, the government can go about gathering information about a person he would rather it did not have.[64] *Katz v. United States,*[65] limiting governmental tapping of telephones, may not involve what the framers would have called a "search," but it plainly involves this general concern with privacy.[66] *Griswold* is a long step, even a leap, beyond this, but at least the connection is discernible. Had it been a case that purported to discover in the Constitution a "right to contraception," it would have been *Roe's* strongest precedent.[67] But the Court in *Roe* gives no evidence of so regarding it,[68] and rightly not.[69] Commentators tend to forget, though the Court plainly has not,[70] that the Court in *Griswold* stressed that it was invalidating only that portion of the Connecticut law that proscribed the *use,* as opposed to the manufacture, sale, or other distribution of contraceptives. That distinction (which would be silly were the right to contraception being constitutionally enshrined) makes sense if the case is rationalized on the ground that the section of the law whose constitutionality was in issue was such that *its enforcement would have been virtually impossible without* the most outrageous sort of governmental prying into the privacy of the home.[71] And this, indeed, is the theory on which the Court appeared rather explicitly to settle:

> The present case, then, concerns a relationship lying within the zone of

> privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that "a governmental purpose to control or prevent activities constitutionally subject to state regulation and may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama,* 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[72]

Thus even assuming (as the Court surely seemed to) that a state can constitutionally seek to minimize or eliminate the circulation and use of contraceptives, Connecticut had acted unconstitutionally by selecting a means, that is a direct ban on use, that would generate intolerably intrusive modes of data-gathering.[73] No such rationalization is attempted by the Court in *Roe*—understandably not, for whatever else may be involved, it is not a case about governmental snooping.[74]

The Court reports that some amici curiae argued for an unlimited right to do as one wishes with one's body. This theory holds, for me at any rate, much appeal. However, there would have been serious problems with its invocation in this case. In the first place, more than the mother's own body is involved in a decision to have an abortion; a fetus may not be a "person in the whole sense," but it is certainly not nothing.[75] Second, it is difficult to find a basis for thinking that the theory was meant to be given constitutional sanction: Surely it is no part of the "privacy" interest the Bill of Rights suggests.[76]

> [I]t is not clear to us that the claim . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy. . . .[77]

Unfortunately, having thus rejected the amici's attempt to define the bounds of the general constitutional right of which the right to an abortion is a part,[78] on the theory that the general right described has little to do with privacy, the Court provides neither an alternative definition[79] nor an account of why *it* thinks privacy is involved. It simply announces that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Apparently this conclusion is thought to derive from the passage that immediately follows it:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[80]

All of this is true and ought to be taken very seriously. But it has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests.[81] I suppose there is nothing to prevent one from using the word "privacy" to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term.[82] Nor could it, for such a right is at stake in *every* case. Our life styles are constantly limited, often seriously, by governmental regulation; and while many of us would prefer less direction, granting that desire the status of a preferred constitutional right would yield a system of "government" virtually unrecognizable to us and only slightly more recognizable to our forefathers.[83] The Court's observations concerning the serious, life-shaping costs of having a child prove what might to the thoughtless have seemed unprovable: That even though a human life, or a potential human life, hangs in the balance, the moral dilemma abortion poses is so difficult as to be heartbreaking. What they fail to do is even begin to resolve that dilemma so far as our governmental system is concerned by associating either side of the balance with a value inferable from the Constitution.

But perhaps the inquiry should not end even there. In his famous *Carolene Products* footnote, Justice Stone suggested that the interests to which the Court can responsibly give extraordinary constitutional protection include not only those expressed in the Constitution but also those that are unlikely to receive adequate consideration in the political process, specifically the interests of "discrete and insular minorities" unable to form effective political alliances.[84] There can be little doubt that such considerations have influenced the direction, if only occasionally the rhetoric, of the recent Courts. My repeated efforts to convince my students that sex should be treated as a "suspect classification" have convinced me it is no easy matter to state such considerations in a "principled" way. But passing that problem, *Roe* is not an appropriate case for their invocation.

Compared with men, very few women sit in our legislatures, a fact

I believe should bear some relevance—even without an Equal Rights Amendment—to the appropriate standard of review for legislation that favors men over women.[85] But *no* fetuses sit in our legislatures. Of course they have their champions, but so have women. The two interests have clashed repeatedly in the political arena, and had continued to do so up to the date of the opinion, generating quite a wide variety of accommodations.[86] By the Court's lights virtually all of the legislative accommodations had unduly favored fetuses; by its definition of victory, women had lost. Yet in every legislative balance one of the competing interests loses to some extent; indeed usually, as here, they both do. On some occasions the Constitution throws its weight on the side of one of them, indicating the balance must be restruck. And on others—and this is Justice Stone's suggestion—it is at least arguable that, constitutional directive or not, the Court should throw *its* weight on the side of a minority demanding in court more than it was able to achieve politically. But even assuming this suggestion can be given principled content, it was clearly intended and should be reserved for those interests which, *as compared with the interests to which they have been subordinated,* constitute minorities unusually incapable of protecting themselves.[87] Compared with men, women may constitute such a "minority"; compared with the unborn, they do not.[88] I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer.[89]

Of course a woman's freedom to choose an abortion is part of the "liberty" the Fourteenth Amendment says shall not be denied without due process of law, as indeed is anyone's freedom to do what he wants. But "due process" generally guarantees only that the inhibition be procedurally fair and that it have some "rational" connection—though plausible is probably a better word[90]—with a permissible governmental goal.[91] What is unusual about *Roe* is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus's existence is unable to overcome it—a protection more stringent, I think it fair to say, than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment.[92] What is frightening about *Roe* is that this superprotected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included,[93] or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-

a-vis the interest that legislatively prevailed over it.[94] And that, I believe—the predictable[95] early reaction to *Roe* notwithstanding ("more of the same Warren-type activism"[96])—is a charge that can responbly be leveled at no other decision of the past twenty years.[97] At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.

Why Roe Is a Dangerous Precedent

Not in the last thirty-five years at any rate. For, as the received learning has it, this sort of thing did happen before, repeatedly. From its 1905 decision in *Lochner v. New York*[98] into the 1930's the Court, frequently though not always under the rubric of "liberty of contract," employed the Due Process Clauses of the Fourteenth and Fifth Amendments to invalidate a good deal of legislation. According to the dissenters at the time and virtually all the commentators since, the Court had simply manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures. So indeed the Court itself came to see the matter, and its reaction was complete:

> There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner v New York,* 198 U.S. 45 (1905), outlawing "yellow dog" contracts, *Coppage v. Kansas,* 236 U.S. 1 (1915), setting minimum wages for women, *Adkins v. Childrens' Hospital,* 261 U.S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co. v. Bryan,* 264 U.S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time . . . Mr. Justice Holmes said,
>
> > *"I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."*
>
> . . . The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition

> that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.[99]

It may be objected that *Lochner et al.* protected the "economic rights" of businessmen whereas *Roe* protects a "human right." It should be noted, however, that not all of the *Lochner* series involved economic regulation,[100] that even those that did resist the "big business" stereotype with which the commentators tend to associate them; and that in some of them the employer's "liberty of contract" claim was joined by the employee, who knew that if he had to be employed on the terms set by the law in question, he could not be employed at all.[101] This is a predicament that is economic to be sure, but is not without its "human" dimension. Similarly "human" seems the predicament of the appellees in the 1970 case of *Dandridge v. Williams,*[102] who challenged the Maryland Welfare Department's practice of limiting AFDC grants to $250 regardless of family size or need. Yet in language that remains among its favored points of reference,[103] the Court, speaking through Justice Stewart,[104] dismissed the complaint as "social and economic" and therefore essentially Lochneresque.

> [W]e deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights. . . . For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." . . . That era long passed into history. . . .
>
> To be sure, the cases cited . . . have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. . . . It is a standard . . . that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of wise economic or social policy.[105]

It may be, however—at least it is not the sort of claim one can disprove—that the "right to an abortion," or noneconomic rights generally, accord more closely with "this generation's idealization of America"[106] than the "rights" asserted in either *Lochner or Dandridge.* But that attitude, of course, is *precisely* the point of the *Lochner* philosophy, which would grant unusual protection to those

"rights" that somehow *seem* most pressing, regardless of whether the Constitution suggests any special solicitude for them. The Constitution has little to say about contract,[107] less about abortion, and those who would speculate about which the framers would have been more likely to protect may not be pleased with the answer. The Court continues to disavow the philosophy of *Lochner*.[108] Yet as Justice Stewart's concurrence admits, it is impossible candidly to regard *Roe* as the product of anything else.[109]

That alone should be enough to damn it. Criticism of the *Lochner* philosophy has been virtually universal and will not be rehearsed here. I would, however, like to suggest briefly that although *Lochner* and *Roe* are twins to be sure, they are not identical. While I would hesitate to argue that one is more defensible than the other in terms of judicial style, there *are* differences in that regard that suggest *Roe* may turn out to be the more dangerous precedent.

All the "superimposition of the Court's own value choices" talk is, of course, the characterization of others and not the language of *Lochner* or its progeny. Indeed, those cases did not argue that "liberty of contract" was a preferred constitutional freedom, but rather represented it as merely one among the numerous aspects of "liberty" the Fourteenth Amendment protects, therefore requiring of its inhibitors a "rational" defense.

> In our opinion that section . . . is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good.[110]

> Undoubtedly, the police power of the State may be exerted to protect purchasers from imposition by sale of short weight loaves. . . . Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted.[111]

Thus the test *Lochner* and its progeny purported to apply is that which would theoretically control the same questions today: Whether a plausible argument can be made that the legislative action furthers some permissible governmental goal.[112] The trouble, of course, is they

misapplied it. *Roe,* on the other hand, is quite explicit that the right to an abortion is a "fundamental" one, requiring not merely a "rational" defense for its inhibition but rather a "compelling" one.

A second difference between *Lochner et al.* and *Roe* has to do with the nature of the legislative judgments being second-guessed. In the main, the "refutations" tendered by the *Lochner* series were of two sorts. The first took the form of declarations that the goals in terms of which the legislatures' actions were defended were impermissible. Thus, for example, the equalization of unequal bargaining power and the strengthening of the labor movement are simply ends the legislature had no business pursuing, and consequently its actions cannot thereby be justified.[113] The second form of "refutation" took the form not of denying the legitimacy of the goal relied on but rather of denying the plausibility of the legislature's empirical judgment that its action would *promote* that goal.

> In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman.[114]

> There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a nine and a half or a ten ounce loaf for a pound (16 ounce) loaf, or an eighteen and a half or a 19 ounce loaf for a pound and a half (24 ounce) loaf; and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception.[115]

The *Roe* opinion's "refutation" of the legislative judgment that anti-abortion statutes can be justified in terms of the protection of the fetus takes neither of these forms. The Court grants that protecting the fetus is an "important and legitimate" governmental goal,[116] and of course it does not deny that restricting abortion promotes it.[117] What it does, instead, is simply announce that that goal is not important enough to sustain the restriction. There is little doubt that judgments of this sort were involved in *Lochner et al.*,[118] but what the Court *said* in those cases was not that the legislature had incorrectly balanced two legitimate but competing goals, but rather that the goal it had favored was impermissible or the legislation involved did not really promote it.[119]

Perhaps this is merely a rhetorical difference, but it could prove to be important. *Lochner et al.* were thoroughly disreputable decisions; but at least they did us the favor of sowing the seeds of their own destruction. To say that the equalization of bargaining power or the

fostering of the labor movement is a goal outside the ambit of a "police power" broad enough to forbid all contracts the state legislature can reasonably regard "as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good"[120] is to say something that is, in a word, wrong.[121] And it is just as obviously wrong to declare, for example, that restrictions on long working hours cannot reasonably be said to promote health and safety.[122] *Roe's* "refutation" of the legislative judgment, on the other, is *not* obviously wrong, for the substitution of one nonrational judgment for another concerning the relative importance of a mother's opportunity to live the life she has planned and a fetus's opportunity to live at all, can be labeled neither wrong nor right. The problem with *Roe* is not so much that it bungles the question it set itself,[123] but rather that it sets itself a question the Constitution has not made the Court's business. It *looks* different from *Lochner*—it has the shape if not the substance of a judgment that is very much the Court's business, one vindicating an interest the Constitution marks as special—and it is for that reason perhaps more dangerous. Of course in a sense it is more candid than *Lochner*.[124] But the employment of a higher standard of judicial review, no matter how candid the recognition that it is indeed higher, loses some of its admirability when it is accompanied by neither a coherent account of why such a standard is appropriate nor any indication of why it has not been satisfied.

We Must Share the Blame

I do wish "Wolf!" hadn't been cried so often. When I suggest to my students that *Roe* lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine, they tell me they've heard all that before. When I point out they haven't heard it before from *me,* I can't really blame them for smiling.

But at least crying "Wolf!" doesn't influence the wolves; crying "Lochner!" may. Of course the Warren Court was aggressive in enforcing its ideals of liberty and equality. *But by and large, it attempted to defend its decisions in terms of inferences from values the Constitution marks as special.*[125] Its inferences were often controversial, but just as often our profession's prominent criticism deigned not to address them on their terms and contented itself with assertions that the Court was indulging in sheer acts of will, ramming its personal preferences down the country's throat—that it was, in a word, Lochnering. One possible judicial response to this style of criticism would be to conclude that one might as well be hanged for a sheep as a goat: So long as you're going to be told, no matter what you say,

that all you do is Lochner, you might as well Lochner. Another, perhaps more likely in a new appointee, might be to reason that since Lochnering has so long been standard procedure, "just one more" (in a good cause, of course) can hardly matter. Actual reactions, of course, are not likely to be this self-conscious, but the critical style of offhand dismissal may have taken its toll nonetheless.

Of course the Court has been aware that criticism of much that it has done has been widespread in academic as well as popular circles. But when it looks to the past decade's most prominent academic criticism, it will often find little there to distinguish it from the popular. Disagreements with the chain of inference by which the Court got from the Constitution to its result, if mentioned at all, have tended to be announced in the most conclusory terms, and the impression has often been left that the real quarrel of the Academy, like that of the laity, is with the results the Court has been reaching and perhaps with judicial "activism" in general.[126] Naturally the Court is sensitive to criticism of this sort, but these are issues on which it will, when push comes to shove, trust its own judgment. (And it has no reason not to: Law professors do not agree on what results are "good," and even if they did, there is no reason to assume their judgment is any better on *that* issue than the Court's.) And academic criticism of the sort that might (because it should) have some effect—criticism suggesting misperceptions in the Court's reading of the value structure set forth in the document from which it derives its authority, or unjustifiable inferences it has drawn from that value structure—has seemed for a time somehow out of fashion, the voguish course being simply to dismiss the process by which a disfavored result was reached as Lochnering pure and simple. But if the critics cannot trouble themselves with such details, it is difficult to expect the Court to worry much about them either.

This tendency of commentators to substitute snappy dismissal for careful evaluation of the Court's constitutional inferences—and of course it is simply a tendency, never universally shared and hopefully on the wane—may include among its causes simple laziness, boredom and a natural reluctance to get out of step with the high-steppers. But in part it has also reflected a considered rejection of the view of constitutional adjudication from which my remarks have proceeded. There is a powerful body of opinion that would dismiss the call for substantive criticism—and its underlying assumption that some constitutional inferences are responsible while others are not—as naive. For, the theory goes, except as to the most trivial and least controversial questions (such as the length of a senator's term), the Consti-

tution speaks in the vaguest and most general terms,[127] the most its clauses can provide are "more or less suitable pegs on which judicial policy choices are hung."[128] Thus anyone who suggests the Constitution can provide significant guidance for today's difficult questions either deludes himself or seeks to delude the Court. Essentially all the Court *can* do is honor the value preferences it sees fit, and it should be graded according to the judgment and skill with which it does so.[129]

One version of this view appears to be held by President Nixon. It is true that in announcing the appointment of Justices Powell and Rehnquist, he described a "judicial conservative"—his kind of Justice —as one who does not "twist or bend the Constitution in order to perpetuate his personal political and social views."[130] But the example he then gave bore witness that he was not so "naive" after all.

> As a judicial conservative, I believe some court decisions have gone too far in the past in weakening the peace forces as against the criminal forces in our society. . . . [T]he peace forces must not be denied the legal tools they need to protect the innocent from criminal elements.[131]

That this sort of invitation, to get in there and Lochner for the right goals, can contribute to opinions like *Roe* is obvious. In terms of process, it is just what the President ordered.

The academic version of this general view is considerably more subtle. It agrees that the Court will find little help in the Constitution and therefore has no real choice other than to decide for itself which value preferences to honor, but denies that it should necessarily opt for the preferences favored by the Justices themselves or the President who appointed them. To the extent "progress" is to concern the Justices at all, it should be defined not in terms of what they would like it to be but rather in terms of their best estimate of what over time the American people will make it[132]—that is, they should seek "durable" decisions.[133] This, however, is no easy task, and the goals that receive practically all the critics' attention, and presumably are supposed to receive practically all the Court's, are its own institutional survival and effectiveness. [134]

Whatever the other merits or demerits of this sort of criticism, it plainly is not what it is meant to be—an effective argument for judicial self-restraint. For a Governor Warren or a Senator Black will rightly see no reason to defer to law professors on the probable direction of progress; even less do they need the Academy's advice on what is politically feasible; and they know that despite the Court's history of frequent immersion in hot water,[135] its "institutional position" has been getting stronger for 200 years.

Roe is a case in point. Certainly, many will view it as social progress. (Surely that is the Court's view, and indeed the legislatures had been moving perceptibly, albeit too slowly for many of us, toward relaxing their anti-abortion legislation.)[136] And it is difficult to see how it will weaken the Court's position. Fears of official disobedience are obviously groundless when it is a criminal statute that has been invalidated.[137] To the public the *Roe* decision must look very much like the New York Legislature's recent liberalization of its abortion law.[138] Even in the unlikely event someone should catch the public's ear long enough to charge that the wrong institution did the repealing, they have heard that "legalism" before without taking to the streets. Nor are the political branches, and this of course is what really counts, likely to take up the cry very strenuously: The sighs of relief as this particular albatross was cut from the legislative and executive necks seemed to me audible. Perhaps I heard wrong—I live in the Northeast, indeed not so very far from Hyannis Port. It is even possible that a constitutional amendment will emerge, though that too has happened before without serious impairment of the Position of the Institution. But I doubt one will: *Roe v. Wade* seems like a durable decision.

It is, nevertheless, a very bad decision. Not because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress[139] or what the evidence suggests is society's[140]—it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.[141]

I am aware the Court cannot simply "lay the Article of the Constitution which is invoked beside the statute which is challenged and . . . decide whether the latter squares with the former."[142] That is precisely the reason commentators are needed.

> [P]recisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the Constitutionality of state action must be a rational one, approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government.[143]

> No matter how imprecise in application to specific modern fact situations, the constitutional guarantees do provide a direction, a goal, an ideal citizen-government relationship. They rule out many alternative directions, goals, and ideals.[144]

And they fail to support the ruling out of others.

Of course that only begins the inquiry. Identification and definition of the values with which the Constitution is concerned will often fall short of indicating with anything resembling clarity the deference to be given those values when they conflict with others society finds important. (Though even here the process is sometimes more helpful than the commentators would allow.) Nor is it often likely to generate, fullblown, the "neutral" principle that will avoid embarrassment in future cases.[145] But though the identification of a constitutional connection is only the beginning of analysis, it is a necessary beginning. The point that often gets lost in the commentary, and obviously got lost in *Roe,* is that *before* the Court can get to the "balancing" stage, *before* it can worry about the next case and the case after that (or even about its institutional position) it is under an obligation to trace its premises to the charter from which it derives its authority. A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.[146] I hope that will seem obvious to the point of banality. Yet those of us to whom it does seem obvious have seldom troubled to say so.[147] And because we have not, we must share in the blame for this decision.

NOTES

1. **United States v. Vuitch**, 402 U.S. 62, 80 (1971) (Douglas, J., dissenting in part).
2. 93 S. Ct. 705 (1973).
3. Were the dissents adequate, this comment would be unnecessary. But each is so brief as to signal no particular conviction that **Roe** represents an important, or unusually dangerous, constitutional development.
4. *See* 93 S. Ct. at 709-10 n.2. *See also* **Doe v. Bolton**, 93 S. Ct. 739, 742 (1973).
5. *Id.* at 727. *But cf.* note 58 *infra.*
6. 93 S. Ct. at 727.
7. *Id.* at 728.
8. *Id.* at 731.
9. The Court indicates that the constitutional issue is not to be solved by attempting to answer "the difficult question of when life begins." *Id.* at 730. *See also id.* at 725. *But see* pp. 925-26 *infra.*
10. The suggestion that the interest in protecting prenatal life should not be considered because the original legislative history of most laws restricting abortion concerned itself with maternal health, *see* 93 S. Ct. at 725-26, is rightly rejected—by clear implication in **Roe** and rather explicitly in **Doe**. *Id.* at 747.
11. *Id.* at 731.
12. *Id.* at 725. *But cf.* note 117 *infra.*
13. *See* pp. 925-26 *infra.*
14. *See* 93 S. Ct. at 732. *But see* note 117 *infra.*
15. 93 S. Ct. at 732. *But see* note 117 *infra.*
16. 93 S. Ct. at 732.

17. This, the Court tells us, is somewhere between the twenty-fourth and twenty-eighth weeks. *Id.* at 730. *But cf.* p. 924 *infra.*

18. *See* p. 924 *infra.*

19. 93 S. Ct. at 732. (Thus the statutes of most states must be unconstitutional *even as applied to the final trimester,* since they permit abortion only for the purpose of saving the mother's life. *See id.* at 709). This holding—that even after viability the mother's life *or health* (which presumably is to be defined very broadly indeed, so as to include what many might regard as the mother's convenience, *see* 93 S. Ct. at 755 (Burger, C.J., concurring); **United States v. Vuitch,** 402 U.S. 62 (1971), must as a matter of constitutional law, take precedence over what the Court seems prepared to grant at this point has become the fetus's *life,* see p. 924 *infra*—seems to me at least as controversial as its holding respecting the period prior to viability. (Typically, of course, one is not privileged even statutorily, let alone constitutionally, to take another's life in order to save his own life, much less his health.) Since, however, the Court does not see fit to defend this aspect of its decision at all, there is not a great deal that can be said by way of criticism.

20. The Court's theory seems to be that narrow grounds need not be considered when there is a broad one that will do the trick: "This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness." 93 S. Ct. at 732. *Compare id.* at 710-11; **Doe v. Bolton,** 93 S. Ct. at 747; **Roe v. Wade,** 314 *F. Supp.* 1217, 1223 (N.D. Tex. 1970); cases cited 93 S. Ct. at 727; and **United States v. Vuitch,** 402 U.S. 62 (1971), bearing in mind that the Supreme Court lacks jurisdiction to "construe" a state statute so as to save it from the vice of vagueness.

21. *See also* **Doe v. Bolton,** 93 S. Ct. 739 (1973).

22. Apparently doctors are expected, or at least can be required despite the decisions, to exercise their best "medical" or "clinical" judgment (and presumably can be prosecuted if they perform abortions conflicting with that judgment). 93 S. Ct. at 747, 751. *But cf.* **United States v. Vuitch,** 402 U.S. 62, 97 (Stewart, J., dissenting in part). But if it is unconstitutional to limit the justifications for an abortion to considerations of maternal life and health, what kind of "medical" judgment does the Court have in mind? *See* Stone, *Abortion and the Supreme Court,* Modern Medicine (1973): "[T]here are no clear medical indications for abortion in the vast majority of cases. Where there are no indications, there is no room for clinical judgment."

23. *Compare* 93 S. Ct. at 732 *with id.* at 748-51. An additional element of confusion may have been injected by Justice Douglas's indication in his concurrence that "quickening" is the point at which the interest in protecting the fetus becomes compelling. *Id.* at 759. *But see id.* at 730, where the Court distinguishes quickening from viability and holds the latter to be the crucial point. *See also id.* at 732; p. 924 *infra.*

24. The state *can* require that the abortion be performed by a doctor, but that is all. *But see* note 117 *infra.* Even after the first trimester, the limits on state regulation of the conditions under which an abortion can be performed are extremely stringent. *See* **Doe v. Bolton,** 93 S. Ct. 739 (1973).

25. With respect to the capital punishment litigation too, the Court rejected a narrow ground of invalidation one term only to come back with a *coup de main* the next. *Compare* **McGautha v. Calfornia,** 402 U.S. 183 (1971) *with* **Furman v. Georgia,** 408 U.S. 238 (1972). **Miranda v. Arizona,** 384 U.S. 436 (1966), has something of a "guidebook" quality about it. *See* **Dershowitz & Ely, Harris v. New York:** *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 **Yale L.J.** 1198, 1210 (1971). **United States v. Wade,** 388 U.S. 218 (1967), to take but one example, has always struck me as a case where the Court, starting from the entirely valid realization that trials cannot be fair if lineups are not, went a bit far in limiting the appropriate remedies. And of course many opinions have emitted confusing signals respecting what is henceforth permissible. *See, e.g.,* pp. 929-30 *infra.*

26. The child may not fare so well either. Of course the Court requires of the mother neither sort of showing, though it may be hoping the doctors will do so. *But cf.* note 22 *supra.*

It is also probably the case, although this is the sort of issue where reliable statistics and comparisons are largely unobtainable, that a number of women have died from illegal abortions who would have lived had they been able to secure legal abortions. It is a strange argument for the unconstitutionality of a law that those who evade it suffer, but it is one that must nevertheless be weighed in the balance as a cost of anti-abortion legisla-

tion. The Court does not mention it, however; and given the severe restrictions it places on state regulation of the conditions under which an abortion can be performed, it apparently did not appreciably inform its judgment.

27. *See* pp. 926-27 *infra.*

28. *See* pp. 926-37 *infra.* Even where the Constitution does single out one of the values for special protection, the Court has shown an increasing tendency to avoid balancing, or at least to talk as though it were. *See* **Brandenburg v. Ohio,** 395 U.S. 444 (1969). *See also* **United States v. Robel,** 389 U.S. 258, 268 n.20 (1967); *but see* Note, *Less Drastic Means and the First Amendment,* 78 **Yale** L.J. 464, 467-68 (1969). *See also* **United States v. O'Brien,** 391 U.S. 367, 376-77 (1968); *but cf.* Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 **Yale L.J.** 1205, 1340-41 (1970).

29. 93 S. Ct. at 759 (Douglas, J., concurring).

30. The claim that the participants are injuring their health seems at least as plausible respecting abortion. *Cf.* note 117 *infra.* To the extent that the use of soft drugs and homosexual activities interfere with the lives of those other than the participants, those interferences can be dealt with discretely.

31. *Cf.* **Poe v. Ullman,** 367 U.S. 497, 551-53 (1961), (Harlan, J., dissenting), *quoted* in part in **Griswold v. Connecticut,** 381 U.S. 479, 499 (1965) (Goldberg, J., concurring), distinguishing laws proscribing homosexual acts (even those performed in the home) as not involving the "right" at stake in those cases.

32. *See, e.g.,* **Poe v. Ullman,** 367 U.S. 497, 545-46 (Harlan, J., dissenting).

33. Nor is the Court's conclusion that early abortion does not present serious physical risk to the woman involved shared by all doctors. *Cf.* note 117 *infra.*

34. It defines viability so as not to exclude the possibility of artificial support, 93 S. Ct. at 730, and later indicates its awareness of the continuing development of artificial wombs. *Id.* at 731. It gives no sign of having considered the implications of that combination for the trimester program the Constitution is held to mandate, however.

35. Albeit not so compelling that a state is permitted to honor it at the expense of the mother's health. *See* note 19 *supra.*

36. Note 17 *supra.*

37. *See* 93 S. Ct. at 716.

38. *Id.*

39. *Id.* at 716-20.

40. *Id.* at 732. *See also id.* at 730:

> Physicians and their scientific colleagues have regarded [quickening] with less interest and have tended to focus either upon conception or upon live birth or upon the interim point at which the fetus becomes "viable," . . . .

The relevance of this observation is not explained. It is, moreover, of questionable validity: This line is drawn beyond quickening, beyond the point where any religion has assumed that life begins, beyond the time when abortion is a simple procedure, and beyond the point when most physicians and nurses will feel the procedure is victimless. It is also beyond the point which would have satisfied many who, like myself, were long term supporters of the right to abortion.

Stone, *supra* note 22.

41. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

93 S. Ct. at 725. *See also id.* at 730:

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

The Texas statute, like those of many states, had declared fetuses to be living beings. *See id.* at 709 n.1, 710 n.3; *cf. id.* at 721, 723 n.40, 729 n.55.

42. The opinion does contain a lengthy survey of "historical attitudes" toward abortion, culminating in a discussion of the positions of the American Medical Association, the American Public Health Association, and the American Bar Association. *Id.* at 715-24. (The discussion's high point is probably reached where the Court explains away the

Hippocratic Oath's prohibition of abortion on the grounds that Hippocrates was a Pythagorean, and Pythagoreans were a minority. *Id.* at 715-16.) The Court does not seem entirely clear as to what this discussion has to do with the legal argument, *id.* at 709, 715, and the reader is left in much the same quandary. It surely does not seem to support the Court's position, unless a record of serious historical and contemporary dispute is somehow thought to generate a constitutional mandate.

43. *Id.* at 731.

44. *Id.* at 728-30.

45. [T]he traditional rule of tort law had denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarily, unborn children have been recognized as acquiring rights or interests by way of inheritance or other revolution of property, and have been represented by guardians upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

Id. at 731 (footnotes omitted). *See also, e.g.,* W. Prosser, **Handbook of the Law of Torts** 355 (3d ed. 1964).

46. *Id.* at 728-29 (footnote omitted).

47. *See* pp. 928-33 *infra.*

48. Indeed it is difficult to think of a single instance where the justification given for upholding a governmental limitation of a protected right has involved the constitutional rights of others. A "free press-fair trial" situation might provide the basis for such an order, but thus far the Court has refused to approve one. *See* Ely, *Trial by Newspaper & Its Cures,* **Encounter,** March 1967, at 80-82.

In the Court's defense it should be noted that it errs in the other direction as well, by suggesting that if a fetus *were* a person protected by the Fourteenth Amendment, it would necessarily follow that appellants would lose. 93 S. Ct. at 728. Yet in fact all that would thereby be established is that one right granted special protection by the Fourteenth Amendment was in conflict with what the Court felt was another; it would not tell us which must prevail.

49. *See* **United States v. O'Brien,** 391 U.S. 367, 376-77 (1968). And if you don't like that example, substitute post offices for draft cards.

50. I would, however, omit the series restrictions the Court puts on state health regulation of the conditions under which an abortion can be performed, and give serious thought—though the practical difference here is not likely to be great—to placing the critical line at quickening rather than viability. *See* note 40 *supra.*

51. Some of us who fought for the right to abortion did so with a divided spirit. We have always felt that the decision to abort was a human tragedy to be accepted only because an unwanted pregnancy was even more tragic.

Stone, *supra* note 22.

52. Of course the opportunity to have an abortion should be considered part of the "liberty" protected by the Fourteenth Amendment. *See* p. 935 *infra.*

53. *See, e.g.,* **Dunn v. Blumstein,** 405 U.S. 330 (1972); **Shapiro v. Thompson,** 394 U.S. 618 (1969).

54. *See also* **Edwards v. California,** 314 U.S. 160 (1941).

55. *See* **United States v. Wheeler,** 254 U.S. 281, 294 (1920); **Slaughterhouse Cases,** 83 U.S. (16 Wall.) 36, 75 (1872); **U.S. Arts. Confld.** art. IV; 3 M. Farrand, **The Records of the Federal Convention of 1787,** at 112 (1911); *cf.* **The Federalist,** No. 42, at 307 (Wright ed. 1961).

56. *See* **Crandall v. Nevada,** 73 U.S. (6 Wall.) 35 (1867); C. Black, **Structure and Relationship in Constitutional Law** (1969). The Court seems to regard the opportunity to travel *outside* the United States as merely an aspect of the "liberty" that under the Fifth and Fourteenth Amendments cannot be denied without due process. *See* **Zemel v. Rusk,** 381 U.S. 1, 14 (1965). *Cf.* p. 935 *infra.*

57. Abortions had, of course, been performed, and intermittently proscribed, for cen-

turies prior to the framing of the Constitution. That alone, however, need not be dispositive. *See* p. 929 *infra* & note 97 *infra*.

58. The Court does not seem entirely certain about which provision protects the right to privacy and its included right to an abortion.

Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras . . . or among those rights reserved to the people by the Ninth Amendment . . . .
93 S. Ct. at 715.

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. *Id.* at 727. This inability to pigeonhole confidently the right involved is not important in and of itself. It might, however, have alerted the Court to what *is* an important question: Whether the Constitution speaks to the matter at all.

59. 381 U.S. 479 (1965).

60. *See* NAACP **v. Alabama,** 357 U.S. 449 (1958), relied on in **Griswold,** 381 U.S. at 483. The **Roe** Court's reference to Justice Goldberg's concurrence in **Griswold** for the proposition that "the roots of" the right of privacy can be found in the Ninth Amendment, 93 S. Ct. at 726, misconceives the use the earlier opinion made of that Amendment. *See* 381 U.S. at 492-93. A reference to "the penumbras of the Bill of Rights," 93 S. Ct. at 726, can have no content independent of a description of some general value or values inferable from the provisions involved (and therefore assignable to their penumbras). *See* **San Antonio Independent School Dist. v. Rodriguez,** 41 U.S.L.W. 4407, 4438 (U.S. March 21, 1973) (Marshall, J., dissenting); pp. 929-30 *infra*.

61. *See* **Katz v. United States,** 389 U.S. 347, 364 (1967) (Black, J., dissenting); **Griswold v. Connecticut,** 381 U.S. 479, 529 (Stewart, J., dissenting).

62. **United States v. Dionisio,** 93 S. Ct. 764 (1973). *See also* **United States v. Mara,** 93 S. Ct. 774 (1973) (handwriting exemplars), also decided the same day as **Roe,** and **Couch v. United States,** 93 S. Ct. 611 (1973) (finding no privacy interest in records a taxpayer had turned over to her accountant) decided thirteen days earlier.

63. [T]he proper scope of [a constitutional provision], and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. **United States v. Brown,** 381 U.S. 437, 442 (1965). *See also* **Weems v. United States,** 217 U.S. 349, 373 (1910); Reich, *Mr. Justice Black and the Living Constitution,* 76 **Harv. L. Rev.** 673 (1963); Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause,* 72 **Yale L.J.** 330 (1962).

64. *Cf.* Fried, *Privacy,* 77 **Yale L.J.** 475 (1968). The Third Amendment, mentioned in **Griswold** though not in **Roe,** surely has this aspect to it as well, though it probably grew in even larger measure out of a general concern with the pervasiveness of military power.

65. 389 U.S. 347 (1967).

66. *Cf.* **Schmerber v. California,** 384 U.S. 757 (1966).

67. Contraception and at least early abortion obviously have much in common. *See* Stone, *supra* note 22.

68. The **Roe** opinion does not rely on the obvious contraception-abortion comparison and indeed gives no sign that it finds **Griswold** stronger precedent than a number of other cases. *See* 93 S. Ct. at 726-27; note 79 *infra*. In fact it seems to go out of its way to characterize **Griswold** and **Eisenstadt v. Baird,** 405 U.S. 438 (1972), as cases concerned with the privacy of the bedroom. *See* 93 S. Ct. at 730; note 79 *infra*. It is true that in **Eisenstadt** the Court at one point characterized **Griswold** as protecting the "decision whether to bear and beget a child," 405 U.S. at 453, but it also, mysteriously in light of that characterization, pointedly refused to decide whether the earlier case extended beyond use, to the distribution of contraceptives. *Id.* at 452-53. Nor is there any possibility the refusal to extend **Griswold** in this way was ill-considered; such an extension would have obviated the **Eisenstadt** Court's obviously strained performance respecting the Equal Protection Clause.

69. Admittedly the **Griswold** opinion is vague and open-ended, but the language quoted in the text at note 72 *infra* seems plainly inconsistent with the view that it is a case not

about likely invasions of the privacy of the bedroom but rather directly enshrining a right to contraception.

70. *See* **Eisenstadt v. Baird,** 405 U.S. 438, 443 (1972). *Cf.* 93 S. Ct. at 730; note 79 *infra.*

71. **Stanley v. Georgia,** 394 U.S. 557 (1969), cited by the Court in **Roe,** might also be rationalized on such a theory, *cf. id.* at 565, though it reads more like a "pure" First Amendment case concerned with governmental attempts at thought control.

72. 381 U.S. at 485-86 (emphasis in original).

73. *See also* **Poe v. Ullman,** 367 U.S. 497, 548-49, 553-54 (1961) (Harlan, J., dissenting). That the Court in **Griswold** saw fit to quote **Boyd v. United States,** 116 U.S. 616, 630 (1886), is also significant. *See* 381 U.S. at 484-85 n.*. *See also* **United States v. Grunewald,** 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting).

The theory suggested in **Poe v. Ullman,** *supra,* at 551-52 (Harlan, J., dissenting), extending heightened protection to activities (though it turns out to be *some* activities, note 31 *supra*) customarily performed in the home, is also inapplicable to *Roe.*

74. Of course in individual cases the government might seek to enforce legislation restricting abortion, as indeed it might seek to enforce any law, in ways that violate the Fourth Amendment or otherwise intrude upon the general privacy interest the Bill of Rights suggests. The Court does not suggest, however, that the laws at issue in **Roe** are in any sense unusually calculated to generate such intrusions.

75. *See* pp. 925-26 *supra.*

76. *See* pp. 929-30 *supra.*

77. 93 S. Ct. at 727.

78. The Court's rejection of the "non-paternalism" argument is of course underlined by the health regulations it is prepared to allow during the second trimester, *before* the interest in protecting the fetus is cognizable. *See* p. 921 *supra.*

79. The Court does assert that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," **Palko v. Connecticut,** 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, **Loving v. Virginia,** 388 U.S. 1, 12 (1967), procreation, **Skinner v. Oklahoma,** 316 U.S. 535, 541-42 (1942), contraception, **Eisenstadt v. Baird,** 405 U.S. 438, 453-54 (1972); *id.* at 460, 463-65 (White, J., concurring), family relationships, **Prince v. Massachusetts,** 321 U.S. 158, 166 (1944), and child rearing and education, **Pierce v. Society of Sisters,** 268 U.S. 510, 535 (1925), **Meyer v. Nebraska,** [262 U.S. 390, 399 (1923)].
93 S. Ct. at 726-27. The **Palko** test was stated and has heretofore been taken as a definition (of questionable contemporary vitality) of due process generally, not of privacy. **Loving** was a case involving explicit racial discrimination and therefore decidable (and decided) by a rather straightforward application of the Equal Protection Clause. *See* Ely, *supra* note 28, at 1230. And while the **Loving** Court did, inexplicably, append a reference to due process, it did not mention privacy. **Skinner** invalidated the Oklahoma criminal sterilization act's distinction between larcenists and embezzlers. Although it too did not allude to privacy, it did suggest it was applying a higher equal protection standard than usual. Why it did so is unclear. "Faced with the possibility of a finding of cruel and unusual punishment and the virtual certainty of invalidation under the clause proscribing *ex post facto* laws, the state declined to argue the case on the theory that the . . . Act was a penal statute, and therefore tried to justify the distinction in 'regulatory' terms." Ely, *supra,* at 1235 n.101. That being so, the state was unable to come up with even a plausible justification for the distinction. **Eisenstadt** was a case applying "traditional" equal protection standards, albeit in a less than satisfactory way. *See Note, Legislative Purpose, Rationality, and Equal Protection,* 82 **Yale L.J.** 123 (1972). The passage cited by the Court in **Roe** reiterated **Griswold**'s conclusion that privacy interests are threatened by a ban on the use of contraceptives, but declined to decide whether its rationale should be extended to restrictions on distribution. *See* p. 930 *supra.* **Prince** upheld the application of a child labor law to Jehovah's Witness children distributing religious literature. It did, however, reiterate the conclusion of **Pierce** and **Meyer** that family relationships are entitled to special protection. Those two cases are products of "the **Lochner** era," *see* pp. 937-43 *infra.* The vitality of the theory on which they rested has been questioned, **Epperson v. Arkansas,** 393 U.S. 97, 104-06 (1968), and the Court has attempted to recast them as First Amendment cases. **Griswold v. Connecticut,** 381 U.S. 479, 482 (1965); *cf.* **Poe v. Ullman,** 367 U.S. 497, 533-

34 (1961) (Harlan, J., dissenting). Even reading the cases cited "for all that they are worth," it is difficult to isolate the "privacy" factor (or any other factor that seems constitutionally relevant) that unites them with each other and with **Roe.** So the Court seems to admit by indicating that privacy has "some extension" to the activities involved, and so it seems later to grant even more explicitly.

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which **Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce,** and **Meyer** were respectively concerned.

93 S. Ct. at 730.

80. 93 S. Ct. at 727. *See also id.* at 757 (Douglas, J., concurring).

81. It might be noted that most of the factors enumerated also apply to the inconvenience of having an unwanted two-year-old, or a senile parent, around. Would the Court find the constitutional right of privacy invaded in those situations too? I find it hard to believe it would; even if it did, of course, it would not find a constitutional right to "terminate" the annoyance—presumably because "real" persons are now involved. *But cf.* p. 926 *supra & note* 48 *supra.* But what about ways of removing the annoyance that do not involve "termination"? Can they really be matters of constitutional entitlement?

82. *But cf.* 93 S.Ct. at 758-59 (Douglas, J., concurring).

83. *Cf.* **Katz v. United States,** 389 U.S. 347, 350-51 (1967).

84. **United States v. Carolene Products Co.,** 304 U.S. 144, 152n.4 (1938).

85. This is not the place for a full treatment of the subject, but the general idea is this: Classifications by sex, like classifications by race, differ from the usual classification —to which the traditional "reasonable generalization" standard is properly applied—in that they rest on "we-they" generalizations as opposed to a "they-they" generalization. Take a familiar example of the usual approach, **Williamson v. Lee Optical Co.,** 348 U.S. 483 (1955). Of course few legislators are opticians. But few are optometrists either. Thus while a decision to distinguish opticians from optometrists will incorporate a stereotypical comparison of two classes of people, it is a comparison of two "they" stereotypes, *viz.* "They [opticians] are generally inferior to or not so well qualified as *they* [optometrists] are in the following respect(s), which we find sufficient to justify the classification: . . . ." However, legislators traditionally have not only not been black (or female); they have been white (and male). A decision to distinguish blacks from whites (or women from men) will therefore have its roots in a comparison between a "we" stereotype and a "they" stereotype, *viz.* "They [blacks or women] are generally inferior to or not so well qualified as *we* [whites or men] are in the following respect(s), which we find sufficient to justify the classification: . . ."

The choice between classifying on the basis of a comparative generalization and attempting to come up with a more discriminating formula always involves balancing the increase in fairness which greater individualization will produce against the added costs it will entail. It is no startling psychological insight, however, that most of us are delighted to hear and prone to accept comparative characterizations of groups that suggest that the groups to which *we* belong are in some way superior to others. (I would be inclined to exclude most situations where the "we's" used to be "they's," *cf.* **Ferguson v. Skrupa,** 372 U.S. 726 (1963), and would therefore agree that the unchangeability of the distinguishing characteristic is indeed relevant, though it is only part of the story.) The danger is therefore greater in we-they situations that we will overestimate the validity of the proposed stereotypical classification by seizing upon the positive myths about our own class and the negative myths about theirs—or indeed the realities respecting some or most members of the two classes—and too readily assuming that virtually the entire membership of the two classes fit the stereotypes and therefore that not many of "them" will be unfairly deprived, nor many of "us" unfairly benefitted, by the proposed classification. In short, I trust your generalizations about the differences between my gang and Wilfred's more than I do your generalizations about the differences between my gang and yours.

Of course most judges, like most legislators, are white males, and there is no particular reason to suppose they are any more immune to the conscious and unconscious temptations that inhere in we-they generalizations. Obviously the factors mentioned can distort the evaluation of a classification fully as much as they can distort its formation. But all this is only to suggest that the Court has chosen the right course in reviewing classifications it

has decided are suspicious—a course not of restriking or second-guessing the legislative cost-benefit balance but rather of demanding a congruence between the classification and its goal as perfect as practicable. When in a given situation you can't be trusted to generalize and I can't be trusted to generalize, the answer is not to generalize—so long as a bearable alternative exists. And here, the Court has recognized, one does—the alternative of forcing the system to absorb the additional cost that case by case determinations of qualification will entail. Legislatures incur this cost voluntarily in a great many situations, and courts have on other occasions forced them to do so where constitutionally protected interests will be threatened by an imperfectly fitting classification. The unusual dangers of distortion that inhere in a we-they process of comparative generalization, the Court seems to have been telling us in the racial classification cases, also demand that we bear the increased cost of individual justice.

86. *See* 93 S. Ct. at 708-10, 720, 723-24, 742-43, 752-55.

87. If the mere fact that the classification in issue disadvantages a minority whose viewpoint was not appreciated by a majority of the legislature that enacted it were sufficient to render it suspect, *all* classifications would be suspect.

88. Even if the case could be made that abortion is an issue that pits the interests of men against those of women, that alone would not bring it within a theory that readers suspect classifications based on generalizations about the characteristics of men and women. And even if there were some way to expand the theory (and I confess I cannot see what judicial remedy would be appropriate were the theory expanded, *but see* note 85 *supra,* third paragraph) to cover all "interests of men versus interests of women" situations, it will take some proving to establish that this is one:

> [D]ecisions in society are made by those who have power and not by those who have rights. Husbands and boy friends may in the end wield the power and make the abortion decision. Many women may be forced to have abortions not because it is their right, but because they are forced by egocentric men to submit to this procedure to avoid an unwanted inconvenience to men.

Stone, *supra* note 22.

89. It might be suggested that legislation restricting abortion had been kept on the books by the efforts of an intense minority and did not represent the will of most legislative majorities. Though I am aware of no basis for inferring this is any truer here than it is with respect to other sorts of legislation, *see also* note 86 *supra,* it is the sort of claim that is hard to disprove. (The phenomenon described at pp. 946-47 *infra,* one of relief that the issue has been taken out of the political arena, is a very different matter.) In any event it is not the Court's job to repeal such legislation. In the first place there is nothing unusual, and I was not aware there was anything wrong, with an intense minority's compromising on issues about which it feels less strongly in order to garner support on those it cares most about. Moreover, precisely because the claims involved are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them—certainly not under the guise of enforcing the Constitution. Leaving aside the arguable case of a law that has been neither legislatively considered *nor enforced* for decades, *see* A. Bickel, **The Least Dangerous Branch** 143-56 (1962), the Court should rest its declaration of unconstitutionality, if any, on more than a guess about how widespread and intense the support for the law "really" is.

90. The claimed connection is often empirical, causal or normative. About all that does *not* seem to become involved is formal logic. *See* p. 941 *infra;* Ely, *supra* note 28, at 1237-49.

91. Even this statement of the demands of "substantive due process" is too strong for many Justices and commentators, who deny that any such doctrine should exist. *See, e.g.,* pp. 937-38 *infra.*

92. *See* **Branzburg v. Hayes,** 408 U.S. 665 (1972).

93. *See* pp. 928-33 *supra.* Necessarily, a claim of this sort can never be established beyond doubt; one can only proceed by examining the claims of those values he thinks, or others have suggested, are traceable to the Constitution. It is always possible, however, that someone will develop a general theory of entitlements that encompasses a given case and plausibly demonstrate its constitutional connections. It is also possible that had the constitutional right to an abortion been developed as constitutional doctrines usually are—that is incrementally, rather than by the quantum jump of **Roe**—the connection of the first step with the Constitution, and that of each succeeding step with its predecessor,

would have seemed more plausible. I cannot bring myself to believe, however, that any amount of gradualism could serve to make anything approaching the entire inference convincing.

94. The thing about permitting disparity among state laws regulating abortion that *I* find most troubling is not mentioned by the Court, and that is that some people can afford the fare to a neighboring state and others cannot. Of course this situation prevails with respect to divorce and a host of other sorts of laws as well. I wish someone could develop a theory that would enable the Court to take account of this concern without implying a complete obliteration of the federal system that is so obviously at the heart of the Constitution's plan. I have not been able to do so. *See* note 87 *supra.*

95. *See* pp. 943-45 *infra.*

96. *See, e.g., Abortion,* The New Republic, Feb. 10, 1973, at 9; Stone, *supra* note 22.

97. Of course one can disagree with the lengths to which inferences have been taken; my point is that the prior decisions, including those that have drawn the most fire, at least started from a value singled out by, or fairly inferable from, the Constitution as entitled to special protection. Whatever one may think of the code of conduct laid down in **Miranda v. Arizona,** 384 U.S. 436 (1966), the Constitution does talk about the right to counsel and the privilege against self-incrimination. Whatever one may think of the strictness of the scrutiny exercised in **Furman v. Georgia,** 408 U.S. 238 (1972), the Eighth Amendment surely does indicate in a general way that punishments are to be scrutinized for erratic imposition ("unusual") and severity disproportionate to any good they can be expected to accomplish ("cruel").

Note that the claim in the text has to do with the capacity of the earlier decisions to be *rationalized* in terms of some value highlighted by the Constitution, not with the skill which they were in fact rendered. It is now pretty generally recognized, for example, that the various "wealth discrimination" cases could better have been defended in terms of the constitutional attention paid explicitly to the "goods" whose distribution was in issue—the right to vote and the assurance of fair judicial procedures. *See, e.g.,* Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 **Harv. L. Rev.** 7 (1969). **Reynolds v. Sims,** 377 U.S. (1964), is a badly articulated opinion. Its only response to the argument made by Justice Stewart— that since an equal protection claim was involved, a rational defense of a disparity among the "weights" of votes should suffice—was simply to announce that the goals Justice Stewart had in mind were off limits. *See* Ely, *supra* note 28, at 1226-27. But even Justice Stewart could not take the equal protection mold too seriously, for he added he would not approve a plan that permitted "the systematic frustration of the will of a majority of the electorate of the State." **Lucas v. Colorado Gen. Assembly,** 377 U.S. 713, 753-54 (1964) (footnote omitted). Such a plan, however, could be quite "rational" in terms of the sort of goals Justice Stewart had in mind, goals that in other contexts would count as legitimate. Obviously Justice Stewart was moved to some extent by the motion that a system whereby a minority could perpetuate its control of the government was out of accord with the government envisioned by the framers. *See also* **Kramer v. Union Free School District No. 15,** 395 U.S. 621, 628 (1969) (Warren, C.J., for the Court). This was what moved the Court too, though much further. And though the Court did not give the reason, there is one: a fear that by attempting to apply Justice Stewart's "in between" standard it would become embroiled in unseemly "political" inquiries into the power alignments prevalent in the various states. *See* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science,* 20 **Stan. L. Rev.** 169, 246-47 (1968); *cf.* note 89 *supra; but cf.* **Mahan v. Howell,** 41 U.S.L.W. 4277 (U.S. Feb. 20, 1973). Though the point is surely debatable, the impulse is understandable, and the fight in **Reynolds,** like that in **Miranda,** turns out to be not so much over the underlying values as over the need for a "clean" prophylactic rule that will keep the courts out of messy factual disputes.

In his concurrence in **Roe,** Justice Stewart lists ten cases to prove that "the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights." 93 S. Ct. at 734. His point is obviously that the freedoms involved were given protection above and beyond the ordinary demand for a "rational" defense and therefore **Roe** is just more of the same. It is not. **Schware v. Bd. of Bar Examiners,** 353 U.S. 232 (1957); **Aptheker v. Secretary of State,** 378 U.S. 500 (1964); and **Kent v. Dulles,** 357 U.S. 116 (1958), are all obviously rationalizable as First Amend-

ment cases and indeed have since been so rationalized. Concerning **Schware,** see **Griswold v. Connecticut,** 381 U.S. 479, 483 (1965); *cf.* **United States v. Brown,** 381 U.S. 437, 456 (1965). As to **Aptheker and Kent,** see **Zemel v. Rusk,** 381 U.S. 1, 16 (1965); **United States v. Brown,** 381 at 456. Concerning **Pierce v. Society of Sisters** and **Meyer v. Nebraska,** see note 79 *supra.* As to **Shapiro v. Thompson,** 394 U.S. 618 (1969), and **United States v. Guest,** 383 745 (1966), see p. 927 *supra.* With respect to **Carrington v. Rash,** 380 U.S. 89 (1956), see the preceding paragraph of this footnote and C. Black, *supra* note 56. Concerning **Bolling v. Sharpe,** 347 U.S. 497 (1954), see note 79 *supra; but cf.* Linde, *Judges, Critics, and the Realist Tradition,* 82 **Yale L.J.** 227, 233-35 (1972). And *compare* **Truax v. Raich,** 239 U.S. 33 (1915), *with* **Graham v. Richardson,** 403 U.S. 365 (1971), *and* note 85 *supra.*

98. 198 U.S. 45 (1905).

99. **Ferguson v. Skrupa,** 372 U.S. 726, 729-30 (1963) (footnotes omitted), *See also* **Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.,** 335 U.S. 525, 533-37 (1949).

100. *See* **Pierce v. Society of Sisters,** 268 U.S. 510 (1925); **Meyer v. Nebraska,** 262 U.S. 390 (1923).

101. *E.g.,* **Adkins v. Children's Hospital,** 261 U.S. 525, 542-43 (1923). *See also* **Adair v. United States,** 208 U.S. 161, 172-73 (1908). *Cf.* **Hammer v. Dagenhart,** 247 U.S. 251 (1918).

102. 397 U.S. 471 (1970).

103. *See, e.g.,* **San Antonio Independent School Dist. v. Rodriguez,** 41 U.S.L.W. 4407, 4417 (U.S. March 21, 1973); **Ortwein v. Schwab,** 41 U.S.L.W. 3473, 3474 (U.S. March 5, 1973); **United States v. Kras,** 93 S. Ct. 631, 638 (1973).

104. *But cf.* note 109 *infra.*

105. 397 U.S. at 484-86.

106. **Karst & Horowitz, Reitman v. Mulkey:** *A Teleophase of Substantive Equal Protection,* 1967 Sup. Ct. Rev. 39, 57-58; *cf.* 2 L. Pollak, **The Constitution and the Supreme Court: A Documentary History** 266-67 (1966).

107. *But see* U.S. Const. art. I, § 10; **Calder v. Bull,** 3 U.S. (3 Dall.) 386 (1798).

108. *See* note 103 *supra.*

109. 93 S. Ct. at 734. The only "**Lochner** era" cases Justice Stewart cites are **Meyer** and **Pierce.** It therefore may be he intends to pursue some sort of "economic-noneconomic" line in selecting rights entitled to special protection. *But see* text at note 105 *supra.* The general philosophy of constitutional adjudication, however, is the same. *See* text at notes 106-07 *supra.* Justice Stewart rather clearly intends his **Roe** opinion as a repudiation of his **Griswold** dissent, and not simply as an acquiescence in what the Court did in the earlier case. *See* 93 S. Ct. at 735.

Having established to his present satisfaction that the Due Process Clause extends unusual substantive protection to interests the Constitution nowhere marks as special, *but see* note 97 *supra,* he provides no further assistance respecting the difficult questions before the Court, but rather defers to the Court's "thorough demonstration" that the interests in protecting the mother and preserving the fetus cannot support the legislation involved. *But see* pp. 922-26 *supra.*

110. **Adair v. United States,** 208 U.S. 161, 172 (1908). *See also id.* at 174.

111. **Jay Burns Baking Co. v. Bryan,** 264 U.S. 504, 513 (1924). *See also id.* at 517; **Meyer v. Nebraska,** 262 U.S. 390, 399-400 (1923); **Adkins v. Children's Hospital,** 261 U.S. 525, 529 (1923); **Coppage v. Kansas,** 236 U.S. 1, 14 (1915); **Lochner v. New York,** 198 U.S. 45, 53, 54, 56, 57 (1905); *id.* at 68 (Harlan, J., dissenting).

112. *But cf.* note 91 *supra.*

113. **Coppage v. Kansas,** 236 U.S. 1, 16-17, 17-18 (1915). *See also* **Meyer v. Nebraska,** 262 U.S. 390, 403 (1923); **Adair v. United States,** 208 U.S. 161, 174-75 (1908); **Lochner v. New York,** 198 U.S. 45, 57-58 (1905).

114. **Lochner v. New York,** 198 U.S. 45, 62 (1905). *See also id.* at 57, 58, 59, 64.

115. **Jay Burns Baking Co. v. Bryan,** 264 U.S. 504, 517 (1924). *See also* **Coppage v. Kansas,** 236 U.S. 1, 15-16 (1915).

116. Note 8 *supra.*

117. The **Lochner** approach to factual claims is, however, suggested by the Court's ready acceptance—by way of nullifying the State's health interest during the first trimester —of the data adduced by appellants and certain *amici* to the effect that abortions per-

formed during the first trimester are safer than childbirth. 93 S. Ct. at 725. This is not in fact agreed to by all doctors—the data are of course severely limited—and the Court's view of the matter is plainly not the only one that is "rational" under the usual standards. *See* **San Antonio Independent School Dist. v. Rodriguez**, 41 U.S.L.W. 4407, 4420 (U.S. March 21, 1973); **Eisenstadt v. Baird**, 405 U.S. 438, 470 (1972) (Burger, C.J., dissenting):

> The actual hazards of introducing a particular foreign substance into the human body are frequently controverted, and I cannot believe the unanimity of expert opinion is a prerequisite to a State's exercise of its police power, no matter what the subject matter of the regulation. Even assuming no present dispute among medical authorities, we cannot ignore that it has become commonplace for a drug or food additive to be universally regarded as harmless on one day and to be condemned as perilous the next. It is inappropriate for this Court to overrule a legislative classification by relying on the present consensus among leading authorities. The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion.

I suppose the Court's defense of its unusual reaction to the scientific data would be that the case is unusual, in that it involves a "fundamental" interest. It should be noted, however, that even a sure sense that abortion during the first trimester is safer than childbirth would serve only to blunt a state's claim that it is, for reasons relating to maternal health, entitled to *proscribe* abortion; it would not support the inference the Court draws, that *regulations designed to make the abortion procedure safer* during the first trimester are impermissible. *See* 93 S. Ct. at 732.

118. *Cf.* **Meyer v. Nebraska**, 262 U.S. 390 (1923); **Adkins v. Children's Hospital**, 261 U.S. 525, 546 (1923), **Lochner v. New York**, 198 U.S. 45, 53-54, 57 (1905).

119. And even those cases that interlaced such claims with indications of a balancing test, *see* note 118 *supra*, sowed the seeds of their own reversal. *See* text at notes 120-21 *infra*. A claim that X weighs more than Y will have little persuasive or precedential value if it is bracketed with an indefensible assertion that Y is nothing.

120. **Adair v. United States**, 208 U.S. 161, 172 (1908), quoted more fully at p. 932 *supra*. *See also, e.g.*, **Lochner v. New York**, 198 U.S. 45, 54 (1905).

121. Wrong, that is, if one assigns to the words anything resembling their ordinary meanings. *See, e.g.*, **Daniel v. Family Insurance Co.**, 336 U.S. 220, 224 (1949). One can of course argue that States should also have governments of few and defined powers, that they should not be vested with broad authority to go after whatever they regard as evils. But the Federal Constitution imposes no such restraint, and according to the test accepted even at the time of **Lochner** such authority, at least as a matter of federal constitutional law, does exist.

122. It is possible, of course, that I am here time-bound, and that the wrongness of **Lochner** *et al.* is obvious only because a half century of commentary has made it so. While I cannot rebut this, I am inclined to doubt it. In those decisions the Court stated the applicable tests in language much the same as would be used today—language the dissents cogently demonstrated could not be reconciled with the results. That views with which one disagrees can be reasonable nonetheless was a concept hardly new to lawyers even in 1900.

123. *But compare* 93 S. Ct. at 732 *with* **Doe v. Bolton**, 93 S. Ct. 739 (1973). *See also* pp. 922-26 *supra*.

124. With respect to the Equal Protection Clause, by way of contrast, the Court has taken to claiming it is simply applying the traditional rationality standard, whether it is or not. For a more optimistic view of the development, *see* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

125. *See* note 97 *supra*. The "footnote 4" argument suggested in note 85 *supra* responds not so much to any clear constitutional concern with equality for women (*but see* U.S. Const. amend. XIX) as to the unavoidable obligation to give "principled" content to the facially inscrutable Equal Protection Clause. *See* pp. 948-49 *infra*. Virtually everyone agrees that classifications by race were intended to be and should be tested by a higher than usual standard, and that at least some others—though the nature and length of the list are seriously disputed—are sufficiently "racelike" to merit comparable treatment. *See, e.g.*, **Graham v. Richardson**, 403 U.S. 365 (1971). The problem thus becomes one of identifying those features of racial classifications that validly compel the deviation from the usual standard, and in turn those classifications that share those features.

126. *See, e.g.*, Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government,* 78 **Harv. L. Rev.** 143, 144-45, 149, 163, 175 (1964).

127. *See, e.g.*, A. Bickell, *supra* note 89, at 84-92; A Bickel, **The Supreme Court and the Idea of Progress** 177 (1970); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance,* 50 **Calif. L. Rev.** 821 (1962).

128. Linde, *supra* note 97, at 254.

129. The Court will continue to play the role of the omniscient and strive toward omnipotence. And the law reviews will continue to play the game of evaluating the Court's work in light of the fictions of the law, legal reasoning, and legal history rather than deal with the realities of politics and statesmanship.

130. 7 Weekly Comp. of Presidential Documents 1431 (Oct. 25, 1971).

131. *Id.* at 1432.

132. *See generally* A. Bickel, **The Supreme Court and the Idea of Progress** (1970). Professor Bickel's thought is of course much richer than it is here reported. But the catchier aspects of a person's work have a tendency to develop a life of their own and on occasion to function, particularly in the thinking of others and perhaps to an extent even in the author's own, without the background against which they were originally presented. *Cf.* note 138 *infra.*

133. *See* Hart, *Foreword: The Time Chart of the Justices,* 73 **Harv. L. Rev.** 84, 99 (1959). *See also* A. Bickel, *supra* note 127, at 99; Kurland, *Earl Warren, the "Warren Court," and the Warren Myths,* 67 **Mich. L. Rev.** 353, 357 (1968). *Cf.* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law—Due-Process" Formula,* 16 U.C.L.A.L. **Rev.** 716, 746-48 (1969); Karst & Horowitz, *supra* note 106, at 79.

134. *E.g.*, A. Bickel, *supra* note 127, at 95; Kurland, *Toward a Political Supreme Court,* 32 **U. Chi. L. Rev.** 19, 20, 22 (1969).

135. *See generally* W. Murphy, Congress and the Court (1962); C. Warren, The Supreme Court in United States History (rev. ed. 1932).

136. In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the states of less stringent laws, most of them patterned after the ALI Model Penal Code . . . .
93 S. Ct. at 720.
By the end of 1970, four other states had appealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Hawaii Rev. Stat. § 453-16 (Supp. 1971); N.Y. Penal Code § 125.05 (McKinney Supp. 1972-1973); Wash. Rev. Code §§ 9.02.060 to 9.02.080 (Supp. 1972) . . . .
Id. at 720 n.37.

137. As opposed to the invalidation of a police practice. *Cf.* **Miranda v. Arizona,** 384 U.S. 436 (1966). *See also, e.g.*, **Engel v. Vitale,** 370 U.S. 421 (1962).

138. Even the headline in The New York **Times** announced: "High Court Rules Abortions Legal [sic] the First 3 Months." N.Y. **Times,** January 23, 1973, p. 1, cols. 1-8.

139. *See* pp. 926-27 *supra.* Of course there are some possible uses of the decision that scare me, particularly when it is considered in conjunction (a) with some of this Court's motions relating to a mother's "waiver" of AFDC assistance, *see* **Wyman v. James,** 400 U.S. 309 (1971), and (b) with **Buck v. Bell,** 274 U.S. 200 (1927), which was indeed relied on by the Court in **Roe,** 93 S. Ct. at 727, and cited without apparent disapproval in Justice Douglas's concurrence, *id.* at 759. But those are quite different cases I'm conjuring up.

140. *See* note 136 *supra. But cf. Abortion,* **The New Republic,** Feb. 10, 1973, at 9: [I]f the Court's guess concerning the probable and desirable direction of progress is wrong, it will nevertheless have been improved on all 50 states, and imposed permanently, unless the Court itself should in the future change its mind. Normal legislation, enacted by legislatures rather than judges, is happily not so rigid, and not so presumptuous in its claims to universality and permanence.

141. In judicial review, the line between the "juridical" and the "legislative" mode does not run between "strict constructionists" and competing theorists of constitutional interpretation. Rather, it divides constructionists and non-constructionists, those who do and those who do not see judicial review as a task of construing the living meaning of past political decisions—a division in which the alternating libertarianism and conservatism

of the late Justices Black and Harlan were on the same side.
Linde, *supra* note 97, at 254-55 (footnote omitted).

142. United States v. Butler, 297 U.S. 1, 62 (1936).

143. Poe v. Ullman, 367 U.S. 497, 539-40 (1961) (Harlan, J., dissenting).

144. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court,* 84 Harv. L. Rev. 769, 785 (1971) (footnote omitted).

145. *See generally* Ely, *supra* note 28.
Starting from a clearly unconstitutional course of action—and I have trouble seeing the unconstitutionality of a tax exemption for only Caucasian children as a controversial assumption—and attempting to explain why it is unconstitutional in terms of a theory capable of acceptable and consistent application to other areas, is a perfectly sensible way of developing constitutional doctrine.
Id. at 1262. I might have made (even more) explicit that the action around which the search for the "principled' approach is to be centered should be one—and, to paraphrase myself, I have trouble seeing the example as controversial in this regard—whose impermissibility is established by values traceable to the Constitution.

146. *But see, e.g.,* Hart, *supra* note 133, at 99, *quoted* in part in Bickel, *Foreword: The Passive Virtues,* 75 Harv. L. Rev. 40, 41 (1961).
[T]he Court is predestined . . . to be a voice of reason, charged with the creative function of discerning afresh and articulating and developing impersonal and durable principles . . . . But discerning constitutional principles afresh is one thing: Developing them, no matter how neutral and durable, is quite another. An institution charged with looking after a set of values the rest of us have entrusted to it is significantly different from one with authority to amend the set.

147. *But see, e.g.,* Linde, *supra* note 97. *Cf.* Bork, *Neutral Principles and Some First Amendment Problems,* 47 Ind. L.J. 1, 6-11 (1971), espousing the general view of constitutional adjudication espoused here, but characterizing **Griswold** as a typical Warren Court product, *id.* at 7, in order to buttress the more general claim—equally unfair in my view—that one cannot accept that general view and at the same time generally approve the work of that Court. *Id.* at 6. *See* Griswold v. **Connecticut,** 381 U.S. 479, 527 n.23 (1965) (Black, J., dissenting).

Jewish Views on Abortion

Rabbi Dr. Immanuel Jakobovits

IN RECENT years, no medico-moral subject has undergone a more revolutionary change of public attitudes than abortion. What was previously either a therapeutic measure for the safety of the mother or else an actionable criminal offense is now widely and legally performed not only as a means to prevent the birth of possibly defective children or to curb the sordid indignities and hazards endured by women resorting to clandestine operators, but simply for convenience to augment other birth-control devices. Under the mounting pressure of this shift in public opinion, generated by intense agitation and skillful propaganda campaigns, the abortion laws have been liberalized in many countries, starting with the British Abortion Act of 1967 and culminating in the decisions of the United States Supreme Court of January 22, 1973. In effect, abortion is now—or, pending anticipated changes in existing laws, will soon be—available in most parts of the Western world virtually on request, or at least at the discretion of doctors within some general guide-lines.

Many physicians have, of course, always claimed that the decision whether or not to terminate a pregnancy should be left to their judgment—a claim already for some time asserted on a wide scale through the establishment at many hospitals of "abortion boards", composed solely of physicians, charged with the responsibility of sanctioning all such operations.

In the Jewish view, this line of argument cannot be upheld.

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The judgment that is here required, while it may be based on medical evidence, is clearly of a moral nature. The decision whether, and under what circumstances, it is right to destroy a germinating human life, depends on the assessment and weighing of *values*, on determining the title to life in any given case. Such value judgments are entirely outside the province of medical science. No amount of training or experience in medicine can help in ascertaining the criteria necessary for reaching such capital verdicts, for making such life-and-death decisions. Such judgments pose essentially a moral, not a medical problem. Hence they call for the judgment of moral, not medical specialists.

Physicians, by demanding that as the practitioners in this field they should have the right to determine or adjudicate the laws governing their practice, are making an altogether unprecedented claim not advanced by any other profession. Lawyers do not argue that, because law is their specialty, the decision on what is legal should be left to their conscience. And teachers do not claim that, as the profession competent in education, the laws governing their work, such as on prayers at public schools, should be administered or defined at their discretion. Such claims are patently absurd, for they would demand jurisdiction on matters completely beyond their professional competence.

There is no more justice or logic in advancing similar claims for the medical profession. A physician, in performing an abortion or any other procedure involving moral considerations, such as artificial insemination or euthanasia, is merely a technical expert; but he is no more qualified than any other layman to pronounce on the rights or legality of such acts, let alone to determine what these rights should be, relying merely on the whims or dictates of his conscience. The decision on whether a human life, once conceived, is to be or not to be, therefore, properly belongs to moral experts, or to legislatures guided by such experts.

Jewish Law

The Claims of Judaism

Every monotheistic religion embodies within its philosophy and legislation a system of ethics—a definition of moral values. None does so with greater precision and comprehensiveness than Judaism. It emphatically insists that the norms of moral conduct can be governed neither by the accepted notions of public opinion nor by the individual conscience. In the Jewish view, the human conscience is meant

to enforce laws, not to make them. Right and wrong, good and evil, are absolute values which transcend the capricious variations of time, place, and environment, just as they defy definition by relation to human intuition or expediency. These values, Judaism teaches, derive their validity from the Divine revelation at Mount Sinai, as expounded and developed by sages faithful to, and authorized by, its writ.

The Sources of Jewish Law

For a definition of these values, one must look to the vast and complex corpus of Jewish law, the authentic expression of all Jewish religious and moral thought. The literary depositories of Jewish law extend over nearly four thousand years, from the Bible and the Talmud, serving as the immutable basis of the main principles, to the great medieval codes and the voluminous rabbinical *responsa* writings recording practical verdicts founded on these principles, right up to the present day.

These sources spell out a very distinct attitude on all aspects of the abortion problem. They clearly indicate that Judaism, while it does not share the rigid stand of the Roman Catholic Church which unconditionally proscribes any direct destruction of the fetus from the moment of conception, refuses to endorse the far more permissive views of many Protestant denominations. The traditional Jewish position is somewhere between these two extremes.

The Rulings of Jewish Law

While the destruction of an unborn child is never regarded as a capital act of murder (unless and until the head or the greater part of the child has emerged from the birth canal), it does constitute a heinous offense except when indicated by the most urgent medical considerations. The foremost concern is the safety of the mother. Hence, in Jewish law an abortion is mandatory whenever there is a genuine fear that a continued pregnancy might involve a grave hazard to the life of the mother, whether physical or psychiatric (such as the risk of suicide, following previous experiences of mental breakdown).

More difficult to determine—and still widely debated in recent rabbinic writings—is the judgment on abortions in cases of risks to the mother's health rather than to her life; of rape or incest; and of fears of physical or mental defects in children born to mothers who had German measles (rubella) or took certain teratogenic drugs (e.g. thalidomide) during the first months of pregnancy. Quite recently, several leading authorities have reaffirmed the Jewish opposi-

tion to abortion even in these cases, branding it as an "appurtenance of murder." But some others have lately given more lenient rulings in these circumstances, provided the operation is carried out within the first forty days following conception, or at least within the first three months. However, whatever the verdict in these particular cases, they are of course exceptional, and Jewish law would never countenance abortions for purely social or economic reasons.

Moral and Social Considerations

These conclusions, though deduced from ancient principles and precedents by legal reasoning, must be viewed in the context of Judaism's moral philosophy and against the background of contemporary social conditions. In Jewish thought the law, while legalistically constructed, is always but the concrete expression of abstract ideas, the vehicle to convey, as well as to implement, moral and religious concepts. Judaism uses the medium of law much as an artist presents the genius of his inspiration in colours on canvas, in sounds of music or in the building-blocks of sculptured and architectural designs. Accordingly, neither the rationale nor the significance of the Jewish rules on abortion—as indeed on any other subject with social ramifications—can be properly understood except by enucleating the spirit, the moral ethos, from the somatic letter of the law.

The moral thinking set out in the rest of this article, especially insofar as it concerns abnormal births and the products of rape or incest, reflects in particular the majority view of the stricter school of thought which sanctions abortions only for the safety of the mother.

The "Cruelty" of the Abortion Laws

At the outset, it is essential, in order to arrive at an objective judgment, to disabuse one's mind of the often one-sided, if not grossly partisan, arguments in the popular (and sometimes medical) presentations of the issues involved. A hue and cry is raised about the "cruelty" of restrictive abortion laws. Harrowing scenes are depicted, in the most lurid colors, of girls and married women selling their honor and their fortunes, exposing themselves to mayhem and death at the hands of some greedy and ill-qualified abortionist in a dark, unhygienic back-alley, and facing the prospect of being hunted and haunted like criminals for the rest of their lives—all because safe, honorable, and reasonably-priced methods to achieve the same ends are or were, barred from hospitals and licensed physicians' offices by "barbaric" statutes. Equally distressing are the accounts and pictures of pitifully deformed children born because "antiquated" abortion

laws did not permit us to forestall their and their parents' misfortune. And then there are, of course, always heart-strings or sympathy to be pulled by the sight of "unwanted" children taxing the patience and resources of parents already "burdened" with too large a brood, not to mention the embarrassing encumbrance of children "accidentally" born to unwed girls.

There is, inevitably, some element of cruelty in most laws. For a person who has spent his last cent before the tax-bill arrives, the income tax laws are unquestionably "cruel;" and to a man passionately in love with a married woman the adultery laws must appear "barbaric." Even more universally "harsh" are the military draft regulations which expose young men to acute danger and their families to great anguish and hardship.

Moral Standards in Society

All these resultant "cruelties" are surely no valid reason for changing those laws. No civilized society could survive without laws which occasionally spell some suffering for individuals. Nor can any public moral standards be maintained without strictly enforced regulations calling for extreme restraints and sacrifices in some cases. If the criterion for the legitimacy of laws were to be the complete absence of "cruel" effects, we should abolish or drastically liberalize not only our abortion laws, but our statutes on marriage, narcotics, homosexuality, suicide, euthanasia, and numerous other laws which inevitably result in personal anguish from time to time.

So far our reasoning, which could be supported by any number of references to Jewish tradition, has merely sought to demolish the "cruelty" factor as a valid argument *per se* by which to judge the justice or injustice of any law. It still has to be demonstrated that restrictions on abortion are morally sound enough and sufficiently important to the public welfare to outweigh the consequential hardships in individual cases.

The Hidden Side of the Problem

What the fuming editorials and harrowing documentaries on the abortion problem do not show are pictures of radiant mothers fondling perfectly healthy children who would never have been alive if their parents had been permitted to resort to abortion in moments of despair. There are no statistics on the contributions to society of outstanding men and women who would never have been born had the abortion laws been more liberal. Nor is it known how many "un-

wanted" children eventually turn out to be the sunshine of their families.

A Jewish moralistic work of the twelfth century relates the following deeply significant story:

> A person constantly said that, having already a son and a daughter, he was anxious lest his wife become pregnant again. For he was not rich and asked how would he find sufficient sustenance. Said a sage to him: "When a child is born, the Holy One, blessed be He, provides the milk beforehand in the mother's breast; therefore, do not worry." But he did not accept the wise man's words, and he continued to fret. Then a son was born to him. After a while, the child became ill, and the father turned to the sage: "Pray for my son that he shall live." Exclaimed the sage: "To you applies the biblical verse: 'Suffer not thy mouth to bring thy flesh into guilt.' "

Some children may be born unwanted, but there are scarcely unwanted children aged five or ten years.

Abortion Statistics

There are, then—even from the purely utilitarian viewpoint of "cruelty" *versus* "happiness" or "usefulness"—two sides to this problem, and not just one as pretended by the pro-abortion lobby. There are the admittedly tragic cases of maternal indignities and deaths as well as of congenital deformities resulting from restrictive abortion laws. But, on the other hand, there are the countless happy children and useful citizens whose births equally result from these laws. What is the ratio between these two categories?

Clearly, any relaxation of the abortion laws is bound greatly to increase the rate of abortions, which was already high even under rigid laws. In England, for example, the figure shot up from a rate of 25,000 *per annum* in 1967 to 90,000 by 1971. On the apparently realistic assumption that the demand for abortions, in the absence of restrictive legislation, might be 500 or more per thousand live-births, it is estimated that the figure will approach three million in the United States by 1980.

Out of this staggering number of annual abortions only a minute proportion would be fully justified for the principal reasons advanced by the advocates of liberalization. Based on the approximate rate of 30,000 abnormal births annually (as reliably estimated), and making allowance for the number of women whose hazards would be reduced if they did not resort to clandestine operations, well over 95% of all abortions would eliminate normal children of healthy mothers.

In fact, as for the mothers, the increased recourse to abortion (even if performed by qualified physicians), far from reducing hazards, would increase them, since such operations leave at least five per cent of the women sterile, not to mention the rise in the resultant mortality rate. One can certainly ask if the extremely limited reduction in the number of malformed children and maternal mortality risks really justifies the annual wholesale destruction of three million germinating, healthy lives, most of them potentially happy and useful citizens, especially in a country as under-populated as America (compared to Europe, for instance, which commands far fewer natural resources).

The Individual's Claim to Life

These numerical facts alone make nonsense of the argument for more and easier abortions. But moral norms cannot be determined by numbers. In the Jewish view, "he who saves one life is as if he saved an entire world"; one human life is as precious as a million lives, for each is infinite in value. Hence, even if the ratio were reversed, and there was only a one per cent chance that the child to be aborted would be normal—in fact the chances invariably exceed 50% in any given case—the consideration for that one child in favor of life would outweigh any counter-indication for the other 99 per cent.

But, in truth, such a counter-indication, too, is founded on fallacious premises. Assuming one were 100 per cent certain (perhaps by radiological evidence or by amniotic fluid tests) that a child would be born deformed, could this affect its claim to life? Any line to be drawn between normal and abnormal beings determining their right to live would have to be altogether arbitrary. Would a grave defect in one limb or in two limbs, or an anticipated sub-normal intelligence quotient of seventy-five or fifty make the capital difference between one who is entitled to live and one who is not? And if the absence of two limbs deprives a person of his claim to life, what about one who loses two limbs in an accident? By what moral reasoning can such a defect be a lesser cause for denying the right to live than a similar congenital abnormality? Surely life-and-death verdicts cannot be based on such tenuous distinctions. The only cases possibly excluded by this argument might be to prevent the birth of children who would in any event not be viable, such as Tay-Sachs babies, if their foetal affliction is definitely established by amniocentesis.

The Obligations of Society

The birth of a physically or mentally maldeveloped child may be

an immense tragedy in a family, just as a crippling accident or a lingering illness striking a family later in life may be. But one cannot purchase the relief from such misfortunes at the cost of life itself. Once any innocent person can be sacrificed because he has lost his absolute value, the work of every human life would become relative —to his state of health, his usefulness to society or any other arbitrary criterion—and no two human beings would have an equal claim to life, thus destroying the only foundation of the moral order. So long as the sanctity of life is recognized as inviolable, the cure to suffering cannot be abortion before birth, any more than murder (whether in the form of infanticide, euthanasia or suicide) after birth. The only legitimate relief in such cases is for society to assume the burdens which the individual family can no longer bear. Since society is the main beneficiary of restrictive public laws on abortion (or homicide), it must in turn also pay the price sometimes exacted by these laws in the isolated cases demanding such a price.

Just as the state holds itself responsible for the support of families bereaved by the death of soldiers fallen in the defense of their country, it ought to provide for incapacitated people born and kept alive in the defense of public moral standards. The community is morally bound to relieve affected families of any financial or emotional stress they cannot reasonably bear, either by accepting the complete care of defective children in public institutions, or by supplying medical and educational subsidies to ensure that such families do not suffer any unfair economic disadvantages from their misfortune.

Illegitimate Children

Similar considerations may apply to children conceived by rape. The circumstances of such a conception hardly have bearing on the child's title to life, and in the absence of any well-grounded challenge to this title there cannot be any moral justification for an abortion. Once again, the burden rests with society to relieve an innocent mother (if she so desires) from the consequences of an unprovoked assault upon her virtue if the assailant cannot be found and forced to discharge this responsibility to his child.

In the case of pregnancies resulting from incestuous, adulterous, or otherwise illegitimate relations (which the mother did not resist), there are additional considerations militating against any sanction of abortion. Jewish law not only puts an extreme penalty on incest and adultery, but also imposes fearful disabilities on the products of such unions. It treats relations as capital crimes, and it debars children

born under these conditions from marriage with anyone except their like (*Deut.* 23:3).

(1) *The Deterrent Effect.*

Why exact such a price from innocent children for the sins of their parents? The answer is simple: to serve as a powerful deterrent to such hideous crimes. The would-be partners to any such illicit sexual relations are to be taught that their momentary pleasure would be fraught with the most disastrous consequences for any children they might conceive. Through this knowledge they are to recoil from the very thought of incest or adultery with the same horror as they would from contemplating murder as a means to enjoyment or personal benefit. Murder is comparatively rare in civilized society for the very reason that the dreadful consequences have evoked this horror of the crime in the public conscience. Incest and adultery, in the Jewish view, are no lesser crimes; hence the juxtaposition of murder and adultery in the Ten Commandments, for it makes little difference whether one kills a person or a marriage. Both crimes therefore require the same horror as an effective deterrent.

(2) *Parental Responsibility*

Why create this deterrent by visiting the sins of the parents on their innocent children? First, because there is no other way to expose an offense committed in private and usually beyond the chance of detection. But, above all, this responsibility of parents for the fate of their children is an inexorable necessity in the generation of human life; it is dictated by the law of nature no less than by the moral law. If a careless mother drops her baby and thereby causes a permanent brain injury to the child, or if a syphilitic father irresponsibly transmits his disease to his offspring before birth, or if parents are negligent in the education of their children, all these children may innocently suffer and for the rest of their lives expiate the sins of their parents. This is what must be if parental responsibility is to be taken seriously. The fear that such catastrophic consequences ensue from a surrender to temptation or from carelessness will help prevent the conception of grossly disadvantaged children or their physical or mental mutilation after birth.

Public Standard v. Individual Aberration

In line with this reasoning, Jewish law never condones the relaxation of public moral standards for the sake of saving recalcitrant individuals from even moral offenses. A celebrated Jewish sage and philosopher of the fifteenth century, in connection with a question submitted to his judgment, averred that it was always wrong for a community to acquiesce in the slightest evil, however much it was hoped thereby to prevent far worse excesses by individuals. The problem he faced arose out of a suggestion that brothels for single people be tolerated as long as such publicly controlled institutions would reduce or eliminate the capital crime of marital faithlessness then

rampant. His unequivocal answer was, "It is surely far better that individuals should commit the worst offenses and expose themselves to the gravest penalties than publicly to promote the slightest compromise with the moral law."

Rigid abortion laws, ruling out the *post facto* "correction" of rash acts, compel people to think twice *before* they recklessly embark on illicit or irresponsible adventures liable to inflict lifelong suffering or infamy on their progeny. To eliminate the scourge of illegitimate children more self-discipline to prevent their conception is required, not more freedom to destroy them in the womb. For each illegitimate child born because the abortion laws are strict, there may be ten or more such children *not* conceived because these laws are strict.

The exercise of man's procreative faculties, making him (in the phrase of the Talmud) "a partner with God in creation," is man's greatest privilege and gravest responsibility. The rights and obligations implicit in the generation of human life must be evenly balanced if man is not to degenerate into an addict of lust and a moral parasite infesting the moral organism of society. Liberal abortion laws would upset that balance by facilitating sexual indulgences without insisting on corresponding responsibilities.

Therapeutic Abortions

This leaves primarily the concern for the mother's safety as a valid argument in favor of abortions. In the view of Judaism, all human rights, and their priorities, derive solely from their conferment upon man by his Creator. By this criterion, as defined in the Bible, the rights of the mother and her unborn child are distinctly unequal, since the capital guilt of murder takes effect only if the victim was a born and viable person. "He that smites a *man*, so that he dies, shall surely be put to death" (*Exodus* 21:12); this excludes a foetus, according to the Jewish interpretation. This recognition does not imply that the destruction of a foetus is not a very grave offense against the sanctity of human life, but only that it is not technically murder. Jewish law makes a similar distinction in regard to the killing of inviable adults. While the killing of a person who already suffered from a fatal injury (from other than natural causes) is not actionable as murder, the killer is nevertheless morally guilty of a moral offense.

This inequality, then, is weighty enough only to warrant the sacrifice of the unborn child if the pregnancy otherwise poses a threat to the mother's life. Indeed, the Jewish concern for the mother is so great that a gravid woman sentenced to death must not be subjected to the ordeal of suspense to await the delivery of her child. (Jewish

sources brand any delay in the execution, once it is finally decreed, as "the perversion of justice" *par excellence,* since the criminal is sentenced to die, not to suffer. It should be added, however, that in practice Jewish law abolished the death penalty to all intent and purposes thousands of years ago, by insisting on virtually impossible conditions, such as the presence of and prior warning by two eye-witnesses.)

Such a threat to the mother need not be either immediate or absolutely certain. Even a remote risk of life invokes all the life-saving concessions of Jewish law, provided the fear of such a risk is genuine and confirmed by the most competent medical opinions. Hence, Jewish law would regard it as an indefensible desecration of human life to allow a mother to perish in order to save her unborn child.

This review may be fittingly concluded with a reference to the very first Jewish statement on *deliberate* abortion. Commenting on the *Septuagint* version (itself a misrepresentation) of the only Biblical reference, or at least allusion, to abortion in *Exodus* 21:22-23, the Alexandrian-Jewish philosopher, Philo, at the beginning of the Current Era declared that the attacker of a pregnant woman must die if the fruit he caused to be lost was already "shaped and all the limbs had their proper qualities, for that which answers to this description is a human being . . . like a statue lying in a studio requiring nothing more than to be conveyed outside." The legal conclusion of this statement, reflecting Hellenistic rather than Jewish influence, may vary from the letter of Jewish law; but its reasoning certainly echoes the spirit of Jewish law. The analogy may be more meaningful than Philo could have intended or foreseen. A classic statue by a supreme master is no less priceless for being made defective, even with an arm or a leg missing. The destruction of such a treasure *in utero* can be warranted only by the superior worth of preserving a living human being.

Abortion: Rhetoric and Cultural War

M. J. Sobran

THE New York *Times* recently carried a story about two gentlemen by the name of Spear, father and son, who run a small newspaper in upstate New York. They had decided not to accept advertising from, or even to give news coverage to, any political candidate who favored permissive abortion. They gave as their reason their conviction that "people are killing people." "The Spears," ran the *Times'* next sentence, "are Roman Catholics."

"The Spears are Roman Catholics." Taken in abstraction, those words comprise a bald statement of fact. But placed beside the Spears' urgent protestation, they must be taken in another sense, of which the *Times'* writers and editors can hardly be ignorant, and to which its readership is so well attuned as not to need it spelled out any further. It may be made explicit to the naive reader: "The Spears only talk about abortion this way because they are Roman Catholics." Which to many readers will carry further suggestion: "Whatever they say about the subject, therefore, may be to some extent, or altogether, discounted as reflecting the influence of that imperious faith, which holds captive the reason of its votaries."

"The Spears are Roman Catholics." How ironic that this appeal to prejudice should occur in a newspaper that so vigorously protests appeals to prejudice; that this plain *argumentum ad hominem* should appear in a journal that prides itself on (and is widely revered for) setting the standard of civil public discourse. It is as if Roy Wilkins should speak out for human dignity and its commensurate civil rights, and the Times, reporting it, should add at once, "Mr. Wilkins is a Negro"; as if his concern for moral values could be referred so summarily to his own interest and position. Or, to take another example, it is as if the *Times* were to call for a special national policy for the Middle East, and a rival newspaper, reporting the fact, added, "The *Times* is owned by Jews." The incivility would shock even many who suspected a grain of truth in the insinuation.

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The potency of such cynical observations, it must be admitted, derives from a kind of probability in them. In a broad sense, public opinion does have sociological correlatives; this is almost too obvious to state. Catholics do tend to favor the prohibition of abortion, Negroes to desire civil rights legislation, Jews to call for guarantees for the safety of Israel. Yet to ascribe to any man a state of intellectual servility that reduces his opinion to an index of his social place and affiliation, is, quite simply, a breach of good manners and good taste. It is to suggest that no man can have an honest and intelligent opinion on any issue that touches him closely. Beyond being rude, it is deeply anti-intellectual. We owe the Spears the presumption that their opinions spring from motives as pure, and minds as clear, as the next citizen's.

There are further objections, only one of which is worth bringing up here: that Catholics themselves are not exclusively, or specially, favored by anti-abortion legislation. The charge used to be that Catholics wanted to overpopulate the rest of us; hence their hierarchs' opposition to birth control. Now they must contend with a new form of the prejudice, which complains that they would prevent non-Catholics from destroying their own offspring; in defending the rights of unborn children not their own, Catholics are said to be "imposing" their "views" on the rest of society. If they had any cunning, one would think, they would silently relish the self-extermination of their neighbors.

It makes no obvious sense, then, this particularly anti-Catholic resentment. Nobody suggests that the Negro has no right to speak about racial injustice, or that his opinion when he does speak is suspect. Nor is anything of the sort said openly of the Jew who speaks on Israel. Yet the Catholic who speaks on abortion is excommunicated from the majority by a multitude of *cui bono* men, who however do not directly face the question that the Catholic Church stands to gain by the prohibition it urges. The normal rules of pluralistic fair play are suspended on this matter, ignored alike by many liberals and by others who, though not liberal in their own attitudes, sense that this is one case where open bigotry, if expressed in softened terms, will not face the usual powerful rebuke of the *Times*. The magistrates of manners will wink at these violations.

One would think it absurd if only white people were permitted to express opinions on civil rights, or if only gentiles were allowed to prescribe Mideast policy. Yet the case is vastly different for the abortion debate. An age that professes to have abolished appeals to dogmatic authority, so that ideas may be freely judged on their merits,

has established certain forms of negative authority, so that ideas are not so much sanctioned as discredited by association. That the Catholic Church opposes abortion stamps anti-abortionism, in the minds of many, as a "Catholic" position, in a narrow and sectarian sense.

One result of this form of intellectual guilt by association deserves more attention than it receives. Protestants and other non-Catholics feel the less free, as a result of the anti-Catholic campaign of pro-abortionists, to express their own reservations about abortion. Note how many of them begin their utterances bashfully, "I'm not Catholic, but. . ." The simple fact of not being Catholic gives them some authority to oppose abortion; or, to put it another way, they feel, or sense that others feel, that a Catholic by virtue of his faith forfeits standing to oppose it.

Now this anti-Catholicism has several forms. In some it is merely, as I have suggested, bigotry, an ineradicable prejudice against those who are sharply different, like xenophobia. But in others it is quite rational. There may be a sense in which anyone who is not a *Catholic* should be an anti-Catholic, and the hatred of many secularists, not for all Catholics, but for the Catholic Church as such, represents no more than the sensible recognition of a natural enmity. If they suggest that Catholicism is un-American, it is often because that is true — according to their definitions of Americanism, which in turn spring from a peculiar metaphysical position as regards human nature. Dogma, tradition, worship, sacraments, self-abnegation, resignation: such things have no place in their schemes.

Now this latter type of anti-Catholic must work with caution. He cannot attack frontally, and he is shrewd enough to know this. He does not encourage the more unreasoning bigotry in a direct way; he does so subtly, usually by failing to rebuke it, as I say, in the way he rebukes other bigotries; and he turns it to his own purposes. If the anti-Catholic Protestant realized how he was being used, and for what ends, his wrath would quickly turn against the secularist himself. The secularist, therefore, recognizing in Catholicism the weightiest embodiment of those things he hates in Protestants too, attacks the Catholic Church first, sensing that when it falls, the rest of the process of destroying reactionary institutions will follow naturally enough. But the generalized attack is oblique, by the technique of joining an institution, or at least seeming to acknowledge its legitimacy, and, while leaving its forms generally intact, working to transform its effective content.

This turning of an old symbol to new purposes is, of course, natural and inevitable, and can only be called "subversive," in the strict

sense of that much-abused word, if one considers an original purpose governing the symbols and their relations as being somehow binding upon, and normative for, succeeding generations. We may find in American history examples of the process which are also, as it happens, relevant to the abortion debate. If the reader will tolerate what may seem at first a digression, I would like to consider a couple of them at some length.

What Is America's Constitutional Understanding?

The Constitution's ratification amounted, originally, to an extension of the confederation that preceded it. The parties to the new compact were not the individual citizens of the nation (the word "nation" would have sounded strange and misleading to those who sat at the Philadelphia convention), but the states. These parties signed only with certain assurances, both in the body of the Constitution, where the powers of Congress—the branch of the Federal government that enjoyed the initiative in Federal action—were specifically named, and in the Bill of Rights, where rights and prerogatives not explicitly given to the Federal government were reserved to the states and the citizens.

As Willmoore Kendall remarked, the language of the First Amendment is loosely construed by most people: for it does not say, "*There shall be* freedom of religion, and separation of church and state," as many seem to assume; but "*Congress shall make no law respecting* an establishment of religion, or prohibiting the free exercise thereof." Which means, Kendall goes on to say, that *deciding whether* to establish a religion and *whether* to restrict the free exercise of other religions shall be a *monopoly of the states*. The Federal government is to stay clear of the whole area; as indeed it did for many years, as several states established churches, thereby giving their citizens an official religion. The First Amendment, therefore, was not a declaration of principle, a la Milton or Mill, but a practical compromise, a promise that if the states subscribed to the Constitution, the Federal government would not interfere in religious matters in any way, leaving it to the states and their citizens to settle them.

With the passage of time, America's self-understanding changed radically. One crucial moment, Kendall suggests, was the Gettysburg Address, in which Lincoln spoke of our "nation" as having been "dedicated" to the "proposition" that "all men are created equal." As a purported statement of fact, this is false. It is gross revisionism. Neither the Declaration of Independence nor the Constitution uses this idiom; the Declaration, for instance, speaks of the colonies as

"free and independent states," not as "a free and independent nation." The statement that "all men are created equal" was merely an appeal to a convenient principle for the purpose of affirming the colonies' right to quit the British Empire, not at all an announcement of a newly assumed mission by all the states together, or each separately. The Constitution, in the three-fifths compromise, effectively denied the principle of equality. Yet the equalitarian reading ignores all these readily ascertainable facts, making equality a national commitment and the Constitution, in retrospect, a sort of device to lure the slave states into the Union by means of a false promise that the free states would revoke when it became opportune for them to do so. After the Civil War, the nature of the Federal government changed profoundly when the rights the Federal government had promised to *respect,* by staying *out* of the states, became guarantees, not to the states but to individual citizens, which it now became the Federal government's business to *enforce,* by moving *into* the states. The Fourteenth Amendment, says Kendall, is taken to have repealed the Tenth. The change in the American system was both subtle and, in time, thorough, and most Americans have no sense of the discontinuity, simply because of the specious continuity of their national symbols. Whether this change is to the good is not my concern here; I merely say that in terms of the limited purposes of the Constitution, it seems likely that the Framers would have regarded it as very remote from their intention. They would have thought the Fourteenth Amendment, which gives the Federal government immense leverage over areas it had never been permitted to enter, a real *subversion* of the system they had so carefully constructed.

In a similar way, the First Amendment has been reread to mean, not that the Federal government shall respect the whole area of religion as beyond its authority, but that it shall guarantee freedom of religion against the encroachment of the states. In practice this has come to mean that the Federal government, through its courts, can deny the right of a community, as against a single individual, to pass any law thought to be based on a view of things that can be termed "religious." No religious doctrine, presumably, can be invoked to justify public policy, so long as a federal court may find this an imposition on the occasional unbeliever. That is, we cannot establish a religion, but we can establish a non-religion; a kind of methodological atheism, based on the doctrine that no state may affirm more than the lowest common religious denominator of its citizens, which is little enough. The good citizen is, *qua* citizen, an atheist or agnostic.

This is far from consistently acted on, but the courts have been

militant enough that religious people have found their will considerably sapped, themselves politically and morally isolated from their less religious fellow citizens, and even unable to support each other. Many of the least hardy of them get into the spirit of the thing by pusillanimously ingratiating themselves with the enlightened, often announcing (if they are Catholics) that they disagree with their church, or that though they agree, "privately" of course, they will not "impose" upon, or even try to persuade, their fellow citizens. In order to demonstrate their "tolerance," they implicitly accept the notion that the good Catholic is the bad American, unless he can be a good sport and adopt a secularist stance while he acts in his capacity as citizen. God is an hypothesis of which good Americans have no need. They are multifariously encouraged in this attitude, and such encouragement by secularists is a form of subversion, strengthening as it does every element of secularist tendency within the church. Perhaps the secularist cannot be fairly blamed for doing this, except in the sense that one blames him for being a secularist; but at least we ought to be clear about what he is up to.

I have spoken ironically of the establishment of a non-religion, which was clearly not the intention of the Founding Fathers. But the non-religion is itself a sort of religion, in the sense that it—practically, if not explicitly—elevates certain values to the top of an ethical hierarchy, at the expense of other values. And the denial of transcendent values in effect divinizes temporal ones. The secularist is in the habit of giving pre-eminence to what he calls "Progress," the improvement of general social and economic conditions, which he tends to see as the highest collective purpose available to men, a purpose of such overriding importance that the separate concerns of individuals must give way to it. (It will be observed that freedom of religion to him means freedom *from* religion; he envokes the First Amendment only on behalf of unbelievers as against believers and his complaints about foreign despotisms seldom have to do with their suppression of religion. Progress, in fact, tends to become his own kind of religion, and history becomes, in retrospect, a vast process of self-improvement. He reads the Constitution not as the practical compact it was, but as Holy Writ, a charter of liberal Progress, groping (with the assistance of the Supreme Court) toward democracy, equality, and other subsequently elaborated ideologies of which its text contains no mention. The Court's authority is quasi-papal and -conciliar: when it pronounces, the original *depositum fidei* is unfolded for us. It is clearly absurd, this conversion of practical conventions into substantive principles; yet there has been no

effective public response to the elevation of the Supreme Court to a quasi-conciliar status, no clear and ringing insistence on the distinction between its legal authority to interpret meaning, and its human fallibility in doing so. We watch the six-thirty news, and learn that the court has made another "historic" decision, in tones that suggest (without, of course, the reporter's saying so) a providential inexorability.

And here we come back to the problem of the citizen who objects to abortion. He finds himself stifled, because his moral sense cannot, apparently, hope to find expression in the shape of the laws. His vote, like the original Constitution, is subject to unforeseeable—and what is worse, arbitrary—limitations. If the Union was not a limited and conditional bond, based on mutual convenience, but an end in itself, superior to the purpose of the several signatories and even to the common purposes of which they were *all* conscious when they signed, then it would seem that none of us can ever know quite what we are agreeing to. We must wait for the future to read us the fine print of even our (apparently) plainest contracts. But who represents "the future?" Again, in effect, the exegete of Progress, who discerns a simple and continuous pattern in a succession of discrete political acts. In a word, the secularist prophet—the professor and the Supreme Court Justice who in saying it *was* so, makes the rest of us act, however grumblingly, as if it *were* so. The Court tells us it has no authority to decide whether an unborn child has the right to live; and how unwontedly modest this seems, until it goes on to say that the rest of us may not decide either, except as individuals, not as a community. Thus the Fourteenth Amendment becomes an instrument of social dissolution.

Purifying our public life of religion turns out to mean purifying it of any moral substance at all. This—we are to understand—is history, Progress. Policies that look as if they were directed against "overweening sectarianism" finally appear in their true light as assaults on human dignity and any transcendent perspective on life. Again and again we find "constitutional"—i.e., methodological—obstacles thrown in the way of any affirmation by the community of its shared metaphysical values. Abortion is the classic instance. School prayer was another. There are others, too, but the narrowness of even a victory for majority sentiment—the Court's five to four ruling in the Detroit school busing case—best shows, I believe, how far much of the Court is still prepared to go in defying the community consensus for locality and family and, by extension, all tra-

ditional ties that impede the realization of the egalitarian and secularist program that it has read into the Constitution.

How Semantics Confuse the Issue

I believe, then, that the abortion controversy must be understood as part of a generalized assault on traditional ways of life. But the assault, as I say, generally takes a subtle form of subversion. And those I term "subverters" would be shocked and amused at my terming them so; they see themselves as "reformers," and from their point of view that is all they are. Since things have no fixed nature and carry no transcendent weight of obligation, they may change anything to suit their purposes, including language. And I submit that language is the place to begin a counterattack.

The process of subverting often means, in practice, sending support to one side at the expense of another. When a New York Times editorial praised the ordination of eleven women as a "progressive" step for the Episcopal Church, it was judging the parties to the dispute by a standard extrinsic to that church itself. No doubt the editorial gave encouragement to the liberal elements therein, and in some sense strengthened them. The question is whether it had any business to do so. How may an unbeliever enter a discussion of the order and meaning of the shared symbols of the believing community? His interference can only distort their attempt at self-definition. It is as if a man who knew nothing of the English language were to try, after listening to a reading of some English verse, to pronounce one of the other of two poets the more euphonious. The real decision must be made by those who share the idiom, without regard to the opinion of such a presumptuous outsider. Those who welcome the participation of the outsider call into doubt whether they are truly insiders.

It seems to me that Catholics must now insist on their common ground with Protestants, Jews, and other traditionalists, and that the way to begin doing this is to speak plain English. They must refuse, as they have thus far failed to do, to acquiesce in the strange and neutered *ligua franca* of the man who stands outside the shared tradition and the moral law.

One of the most dangerous mistakes the enemy of abortion can make is to adopt the phraseology of the pro-abortionist. "Fetus" and "abortion" are obvious examples. They should be used only among those who agree on their moral meaning; otherwise, they work in favor of him who would deny the humanity of the unborn child, simply by putting the burden of proof on him who asserts that hu-

manity. Such "neutral" words are convenient for promoting that psychological ooze in which it is possible for judgment to be suspended: suspended not provisionally, but *in principle.* They fit nicely into the scheme of Progress according to which our civilization is supposed to improve in proportion as it dogmatizes its own uncertainties. It is interesting to note that our secular saints are "skeptics," "dissenters," and "heretics" like John Dewey, Bertrand Russell, and George Bernard Shaw. "Dogma" itself is a bad word nowadays, not conceded any place in the scheme of things; and new books are praised for being "irreverent," often without reference to what they are irreverent toward. "Pious" is of course almost always used ironically. But as Chesterton says, the heretic of old took no pride in being a heretic: "The man was proud of being orthodox, was proud of being right. If he stood alone in a howling wilderness he was more than a man; he was a church."

Proud of being *right.* But how can one be "right," morally speaking, about a "fetus"? The very word is an abstraction, a eunuched word, designed precisely for those situations in which moral considerations are to be banished, as in the laboratory. It is, to put it another way, a methodological rather than a substantive term; its function is to describe rather than to identify. To say that a woman is "with child" is to affirm that what she carries in her womb is a member of the human family, akin to all of us: it is to speak not with the forceps of analysis, but with the embrace of metaphor. But to call the child a "fetus" is to pickle it in a kind of rhetorical formaldehyde, and to accept the burden of proving what cannot be proved by empiricist methodology: that the pickled thing had a right to live.

Practically all language is tendentious, and we defeat ourselves in the effort to neutralize it of tendency in order to be "fair" to an opponent in debate. You cannot empty your language of value-judgments, and *then* reason to values. In trying to put yourself on an equal footing with your negating adversary, you almost inevitably give him the advantage. "It is always easy to be on the negative side," says Dr. Johnson. "If a man were now to deny that there is salt upon the table, you could not reduce him to an absurdity." You cannot prove to a determined solipsist that you exist; the intellect can only infer, it cannot affirm. It is the imagination, which intuits likenesses through metaphor and analogy, and not any chain of strict reasoning from sense-data, that convinces us with unshakable certainty that other people do exist and that it is false to say they are hallucinations, or that they are automata, even though those latter propositions are, *qua* propositions, equally plausible to abstract logic. But

logic deals *only* in the formal relations of propositions, and the proposition "I see such-and-such shapes and colors existing is such-and-such relations to other shapes and colors" can never in itself justify the indispensable conclusion "there is a substance there that is manifested to me through what I see."

The argumentative technique of the skeptic, (whose skepticism is, in reality, highly choosy about its object), and specifically of the abortionist, is to reduce or to trick *us* into reducing, our positive affirmation of substance to bare hypothetical propositions. When we talk of "aborting fetuses" instead of "killing children" we have given him a good edge, simply by emptying our language of substance. We should not blush to insist on charging our language with prejudice, which is a sort of presumption of substance. If he tries to challenge our terminology directly, which he must do if we don't save him the trouble by adopting *his* dialect, we can proceed to demand that he be consistent. "Since," we may say to him, "you do not admit the humanity of the unborn child, who is manifestly living and growing, at what point, and on what grounds (and given your metaphysics, how can you affirm *any* grounds), do you admit the humanity and the moral claims, of *any* human organism?" For we must always remember that we are debating not in order to persuade him, which we will never do, but, through persuading the audience that is "overhearing" the debate, in order to save lives. And we must therefore put *him* on the defensive in *their* eyes. We must make him justify, to an audience of normal, responsible human beings who already live in a concrete world charged with moral realities, the claim that it is his desiccating negations, rather than our assertions, that are unreasonable. He has on his side the great power of cliché and confusion; but we have the constitution of the human mind itself, which, as Dr. Johnson, John Henry Newman, Chesterton, Santayana, and all the poets keep reminding us, can only act with reference to and find its repose in, positive realities. We need not be strident; we can address him quietly and with the assurance that as long as we speak the language of being, of true and false, right and wrong, real and unreal, he can run, as prizefighters say, but he can't hide. If he wants to deny our affirmation, let us make him spell out the consequences of his denial. Does he believe in infanticide? No? Good; we thought not. But on what grounds would he oppose it? What basis, in other words, does he have for affirming human dignity? Oh, we know he will *say* he believes in it; but why should he? How will his methodology admit it? In other words, what right has he to use *our* language for *his* purposes? How can a woman with

child have *any* right, let alone the "right" to destroy it, when the child has *none*?

But note that it is not logic alone that embarrasses our opponent here, but the sense that we are appealing directly to the imagination of our audience, to their shared sense of the wholeness and continuity of life, to the powerful sense that some things that are not easy to justify logically are nevertheless overwhelmingly probable—so probable that even to question them is to betray a deficient humanity, and "excommunicates" the doubter. There is no such thing as a community of solipsists, nor are men united by syllogisms. We are tied to one another by symbols, songs, manners, rituals, analogies, allusions, traditions, jokes, metaphors, myths, idioms, even taboos and reticences, and a thousand other pregnant intimations of the metaphysical element we inhabit together.

And the imagination, abhorring a vacuum, will prefer absurdity to nothing at all. After every negation, it must fall back on a positive affirmation of some kind. If there is no God above history, then history will be God. If all ideals are empty, then nihilism will become an ideal; if values are "unscientific," then "science" will assume the supreme value. If there is no "ought," then you ought not to say "ought." The human impulse to integrate, to harmonize, to make whole, will not down. Commanded not to moralize, it will moralize against morality itself. Even the nihilist, who denies that any act need be justified, will appeal to nihilism as his justification.

Therefore there can be no anti-traditional tradition, no "public truth that there is no public truth," as Kendall puts it. We can win the abortion argument simply by speaking the plain English of custom and our countrymen, and by avoiding the assumption that we must somehow justify ourselves in the gelded pseudo-language of the doctrinaire. *Call* the unborn child a child, and *dare* the abortionist to deny it. He will find that if he does, he ruptures that inarticulate consensus that underlies and animates the speech of ordinary people, the piety and realism that recognize the magical kinship between the man in the street and the man in the womb. Then it will be he, and not we enemies of prenatal murder, who will be up against all the might of poetry, opposing the cant of Progress, Individual Choice, and a Woman's Right over her Own Body to the supreme power in human affairs. When the tables are thus turned rhetorically we can proceed to systematize all the relevant considerations with due philosophical exactitude. But first we must insist on keeping the terms of the discussion close to the earth, so that the abortionist can't get away with feigning blindness to moral realities that every human

heart knows. We must destroy the phony air of abstraction that surrounds the matter. Then, in due course, the Supreme Court will fall naturally into its proper place.

Why We Should Speak Plainly

Most people do after all, object to abortion, however confusedly: they would hate to choose it for themselves. It is not necessary (it is self-defeating) to assault their sensibilities with pictures of bloody unborn babies. It is not necessary to raise our voices or to employ a special and peculiar vocabulary: to say for instance that "abortion is murder." It is not murder as most of us commonly use the term; I think that it is, objectively speaking, an especially heinous kind of homicide, worse than those kinds of things we usually refer to when we speak of murder. But to insist on using words in unaccustomed ways gives the audience the feeling that the common vehicle of speech is being commandeered by some alien force.

Most people are conservative in sentiment. Any wise governor knows that the most potent force he can enlist in his support is the support of habit and inertia. We have the habits of common speech on our side. We will lose them if we do not insist on them, and by insisting I mean only quietly reaffirming them, and calling on our opponents to justify their own deviation from them.

Again, we may appeal to such ordinary forms of speech as (to repeat my example) "with child." That is now a little quaint, but it still expresses the general view of what pregnancy is. We often say "when my mother was carrying me . . ." and "I can't remember being born," and such things. They imply the continuity of the tiny "conceptus" with the grown man. It is fair to ask the abortionist, "Would you say that before you were born, your mother had the right to kill you? If that is an unfair statement of your position, would you be so kind as to explain why?" If the objection is raised that we are "emotionalizing" the issue—a potent objection it behooves us to be wary of—we may say that it is, after all, a vital issue, and that we only want to make it clear what we are talking about, just as our opponents want to make it *un*clear what we are talking about. It is an emotional issue, and it ought to be: not in the sense that we should get everybody yelling, but in the sense that we ought not to depersonalize it with muffing acoustic techniques, abstractions like "pregnancy," "terminate," "fetus," and the rest. We are talking about life and death, and to consider them philosophically we need not hide from ourselves what we are discussing by bureaucratizing our speech. Let us therefore call attention to the special

sound effects of the pro-abortionist and *never* let him get away with the suggestion that his own tendentiously "objective" terminology is the "right" one, the dialect of enlightened people.

There are further non-semantic questions to be pressed. Abortion as a principle threatens the structure of the family, since by reducing the fetus to the status of a tumor within the woman it denies the interest and, especially, the authority of the man who begot it. And if he has no say in whether she decides to abort, how can he be held responsible for her decision? For instance, why may not the defendant in a paternity suit argue: "Look, this sort of action made sense when the consequences of impregnation were inexorable. But law and science are now so advanced as to make them optional—and her option, not mine. She could have gotten an abortion; she chose not to; I had no say in the matter, and was not even consulted. The most she could plausibly ask would be that I go Dutch treat on the cost of terminating her pregnancy and even this is doubtful. She alone decided to bear this child; she alone is responsible. Let her therefore support it by herself." And if an explicit mutual commitment to the (prospective) child is necessary to establish paternal responsibility, why may not even a married man refuse to support his wife's child? If abortion is simply and solely a feminine prerogative, it would seem difficult to hold a man responsible. The institution of fatherhood, biologically remote from birth and socially tenuous except where there is a strong ethic of reverence for life, appears to be in for some undermining. It follows from the reduction of the unborn child to a mere extension of his mother's body and as such destructible at her whim that man and wife are no longer two in one flesh; and many of our laws and customs must perish if that principle perishes. Let the abortion advocate face up to the full force of his position; and make him define that position so precisely that its implications will be clear to everyone.

And even if he forthrightly admits that men have the right to renounce paternity, there remain human problems beyond the merely legalistic and theoretical. What about the possibility that the availability of abortion will serve as a weapon with which one spouse may tyrannize the other? If the woman has the right to abort the child right up to the moment of birth, why may not her husband torture her with the threat of renunciation all the way through her pregnancy? It is hardly necessary to tell anyone who knows how perversely spouses may act that stranger things have happened. A man may in effect — carrying through the abortion logic — desert his children without leaving the house. That is done anyway, but why

make it more feasible? The woman may decide, six months into her pregnancy, that she is "not ready to be a mother;" similarly, it would seem, the man may abruptly conclude that he is not ready to be a father; etcetera, etcetera. This is only one of many ways in which it is obvious that abortion will tend to rupture ordinary human ties and obligations. They must not be exaggerated; but they must not be shirked either.

How to handle the charge that we are "emotionalizing" the issue? Like this, I think: "In a sense, that is true. I don't want to make the issue so emotional that we can't think clearly, but I confess that I want to bring the discussion down to earth, where people often do get emotional when they realize what is being talked about. I think, for instance, that there are circumstances when a woman may rightfully kill her own unborn child, just as there are instances when a man might be justified in killing his aged father. But we ought never to lose sight of the essential horror of such acts even when they are called for. And I think your abstract vocabulary makes us lose sight of that horror. What is more, I think your vocabulary is *intended* to make us lose sight of it. Big words do tend to numb us, as George Orwell has complained, and we can then quote as much as we like of "Politics and the English Language," by which time the humane and generous sentiments of our audience will have recognized the pro-abortionist for the moral idiot he is. As Mark Twain wrote, "I know that I am prejudiced in this matter, but I would be ashamed of myself if I were not." There are matters on which neutrality is unthinkable. The sanctity of life is one. The "prejudice" in favor of life is so deep, so much in our speech, in our bones, that its suspension is an unnatural act. The burden of proof must be put on the neutralizers, and it can be done without any strain on our part. Our audience—the American public—is on our side, often without knowing it.

APPENDIX A

(The following is the full, original text of the remarks delivered by Senator Birch Bayh (Democrat, Indiana) to the Indiana Right to Life convention in Indianapolis on September 22, 1974.)

I want to thank you for inviting me to appear at your convention. I would like to use this opportunity to set forth my views on a question which I know is of particular concern to you, and to me. That is the proposed amendments to our federal Constitution which are generally termed the "right-to-life" amendments.

Let me begin with a personal note. I have been and continue to be strongly opposed to the unlimited right of a pregnant woman to destroy a potential life because she may happen to find it "inconvenient" to have a child at a particular time. I believe that children are, without question, life's greatest blessing. With this in mind, let me explain to you how I became involved at the center of this controversy, and how I have tried to meet what I see as my responsibilities on this important question.

On January 22, 1973, the Supreme Court of the United States decided two companion cases, one from Texas, and one from Georgia. The effect of these two cases was to rule unconstitutional every one of the 50 state laws regulating the practice of abortion. The Court held on a vote of 7 to 2 that, as a matter of law, an unborn child was not a "person" within the Constitutional definition of that term and that the Constitutional "right to privacy" of a prospective mother barred any government, be it state or federal, from interfering with the absolute right of the woman to terminate her pregnancy up to the time of "viability," or the ability of the fetus to exist outside the mother's womb, which the Court arbitrarily defined as occurring only in the last three months of pregnancy.

The Court's decision came as a shock to many legal scholars. It is interesting to note that of the four justices former President Nixon appointed to the Court, only one, Justice Rehnquist, voted against the decision. Professor *John Ely,* of the Harvard Law School, for example, who has noted that he personally favors abortion, nevertheless directed a devastating criticism at the Court for its departure from what had been understood to be the prior Constitutional law in this area. Professor Ely said:

"Even assuming the Court ought generally to get into the business of second-guessing legislative balances, it has picked a strange case with which to begin. Its purported evaluation of the balance that produced anti-abortion legislation simply does not meet the issue: that the life plans of the mother must, not simply may, prevail over the State's decision to protect the fetus simply does not follow from that judgment that the fetus is not a person. Beyond all that, however, the Court has no business getting into that business."

Suddenly a question which history and tradition had, I believe, properly left to the people of each state to decide as a matter of criminal law, was removed by the courts from the prerogatives of the several states and made a federal and Constitutional question.

When I first came to the Senate, the first important subcommittee which I, as a junior member, was asked to chair, was that of Constitutional Amendments. I am proud of the work that I have accomplished with this subcommittee over the past 11 years. We successfully achieved congressional approval and state ratification of

the 25th Amendment which provides for an orderly succession in the office of the Vice-President and establishes a procedure for dealing with Presidential disability.

We were similarly successful with the 26th Amendment which lowered the voting age to 18 and gave to our younger citizens a voice in their government. We are well on the way to state ratification of the proposed 27th Amendment which will provide an equal opportunity for all our citizens regardless of sex. Now the question of abortion is before us.

Recognizing the fact that once the Court had decided the cases, the only way that the law could be changed was by the process of a Constitutional Amendment requiring approval by two-thirds of each House of the Congress and three-fourths of the State Legislatures, several members of Congress introduced such amendments for consideration.

In the Senate two slightly differing amendments have been introduced. One by Senator Buckley of New York and another by Senator Jesse Helms of North Carolina.

Let me add a word at this point about the process of Constitutional Amendments. In the 184 years since the Constitution and the Bill of Rights, which closely accompanied it, were ratified, we found it necessary to amend this document only sixteen times. In the last fifty years this process has been utilized only six times. While Congress enacts over an average of some 396 new laws every year, most sessions of Congress propose no Constitutional Amendments to the states.

So the process itself is rarely used. This, I believe, is as it should be, for the great genius of the American system lies in our continuing ability to adhere to the basic tenets of a democracy which are as vital and as important today as when they were first set forth in that document almost two centuries ago. Thus, this process of Constitutional Amendment, because it involves a change in our ultimate governing document, must, of necessity, require a deliberative and exhaustive examination of all aspects of a problem before resorting to it. To give you an example, for over six years now I have attempted to guide through the Congress an amendment to abolish the anachronistic electoral college system and to provide for the direct popular election of the President and Vice-President—a proposal which, it is safe to say, is much less controversial than that of abortion. The House has approved this proposal once and the full Senate debated it at length in 1970. Yet the Senate decided that the idea required further study and reflection before it should be acted upon and hearings were begun once again. Similarly, the Equal Rights Amendment, which was finally approved by Congress in 1972, had been first introduced almost fifty years before. The 26th Amendment lowering the voting age was proposed in the 1940's.

Having given you this thumbnail sketch of the process of amending the Constitution, let me explain to you what actions I took when I was suddenly given a primary public responsibility for dealing with the problem of abortion. I should first note, that although as I have pointed out, a successful amendment to the Constitution is a relatively rare occurrence, that does not, of course, prevent many members of Congress from thinking that they have a good idea for one. In this, the 93rd Congress, some 38 different amendments have been introduced and referred to my subcommittee. If I thought it would serve the public interest, I could spend seven days a week holding hearings on all these amendments and still not have the time to consider each fully. So the first decision I must make as chairman of my subcommittee is which few of these many amendments involve questions of sufficient public concern to warrant taking the first step in the amending process—the convening of

public hearings. Following the Supreme Court's decision, it became clear to me that the question of abortion was of sufficient public importance to require me to take this first step, and hearings were begun. I might note that the equivalent subcommittee to mine in the House has reached a different conclusion on the importance of this question, and has thus far refused to conduct any hearings on the amendments which have been introduced by the members of that body.

In the Senate we commenced our hearings on the Buckley and Helms amendments early this year. Thus far we have heard testimony from 60 witnesses. I have personally spent almost 100 hours listening to this testimony. Among the most distinguished of our witnesses were four Cardinal-Archbishops of the Church—Cardinal Krol of Philadelphia, Cardinal Cody of Chicago, Cardinal Manning of Los Angeles, and Cardinal Medeiros of Boston. I would like to read to you a few words from a letter I received from Cardinal Medeiros shortly after he testified:

"I was well aware," he noted, "from the very beginning of the session that you are deeply concerned with protecting unborn human life and have anxieties concerning the problems attendant upon abortion. I certainly understand the tremendous responsibility which your subcommittee has assumed by your decision to hold public hearings and am sympathetic with the difficult problems in the formulation of a Constitutional Amendment. While your questions and those of your colleagues were very probing, I really realize their necessity if you and your colleagues are to obtain the most complete information and knowledge which is so essential and so useful in the drafting of a Constitutional Amendment."

Unfortunately, however, many people who are concerned about abortion on both sides are not as charitable and understanding of the difficulties and complexities of this issue as the Cardinal. And their words demonstrate the understandable degree of emotionalism which surrounds this issue and which makes sober, reflective deliberation doubly difficult. Let me give you a few examples. From a publication called "Life-Line" put out in Fort Wayne in June: "It is definitely in the best interest of the pro-life cause to have Senator Bayh defeated in 1974." Since I have not terminated the hearings and pushed the amendments to an immediate vote, I am, in their words, "dragging my feet."

On the other side, I recently received a telegram signed by Shirley MacLaine, Gloria Steinem, and Barbara Walters among others which said: "It is appalling that you are even considering Constitutional Amendments designed to overturn the U.S. Supreme Court abortion decision." Another woman sent me a telegram in which she termed me a "genocidal prospermist" for conducting these hearings. I am not certain what the term "genocidal prospermist" means, but I am quite sure it was not intended as a compliment.

What, then, are my responsibilities and where do I stand at this point? My first job is to try to cut through the emotionalism surrounding the issue and examine through the hearing process, all aspects of the problem. This we are doing. I regret to see such an important issue politicized. But unfortunately, it appears that some politicians are trying to do just that, to win votes in this issue of great importance to all Americans.

As I said at the outset, I do not believe that pregnancy should be terminated at the whim of the mother. This is my strongly held personal belief. I am personally opposed to abortion. Under certain circumstances, the question of imposing my personal belief against abortion upon those who have differing views becomes a difficult one. The amendment proposed by Senator Helms would bar therapeutic abor-

tions under any and all circumstances. That of Senator Buckley would carve out a narrow exception when there was a "reasonable and real certainty" of the death of the mother in the absence of a therapeutic abortion. In my opinion, the difficult choice permitted under the Buckley Amendment should be left to the mother, father, and family physician.

But what about the case of a twelve-year-old girl who is brutally raped and becomes pregnant?

What about the case of parents who are afflicted with a genetic defect like Tay Sachs disease, for example, which is detectable in the early stages of pregnancy and where the child dies an excruciatingly slow and inevitable death by age four or five.

From what I have heard and read about my distinguished opponent's position on the issue of abortion, he has expressed reservations similar to those raised by these questions and apparently he does not support either the Helms or the Buckley amendments.

What about the 4 to 5 million American families who are now using birth control methods which could be interpreted as abortive under the language of the proposed amendments?

Questions such as these go to the heart of the problem for me. Should we attempt to draft an amendment to make exceptions in cases like these? If so, how should this be done? Is a provision regulating in detail the practice of abortion something that properly belongs in our Constitution? Or are there other vehicles which can better serve the goal of preserving life?

In the history of the United States Constitution no other amendment has involved the deep moral conviction and infinite medical, scientific, and legal detail contained in the abortion amendments. This is why we are conducting our hearings—we are making a good-faith effort to determine what is the right way to handle this critical issue.

This is how I see my responsibilities and how I have acted to meet them. I will not be pushed into precipitous action by election-year politics, by either side, though some might argue that this would be the expedient thing to do. If we have learned anything about the conduct of our government from the political events of the last two years, it should be that the public good is not served by placing expediency before principle. In the end, all I can do is ask that you have faith in the sincerity of my intentions and actions as I move to meet what I see as my responsibilities to you, the people of my state, and to the nation.

Thank you.

APPENDIX B

(The following is the complete text of the editorial in California Medicine, *the official journal of the California Medical Association (Sept., 1970; Vol. 113, No. 3) to which Sen. James L. Buckley refers in his remarks.)*

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

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

What is not yet so clearly perceived is that in order to bring this about hard choices will have to be made with respect to what is to be preserved and strengthened and what is not, and that this will of necessity violate and ultimately destroy the traditional Western ethic with all that this portends. It will become necessary and acceptable to place relative rather than absolute values on such things as human lives, the use of scarce resources and the various elements which are to make up the quality of life or of living which is to be sought. This is quite distinctly at variance with the Judeo-Christian ethic and carries serious philosophical, social, economic, and political implications for Western society and perhaps for world society.

The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition, or status, abortion is becoming accepted by society as moral, right, and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws, and public policy rather than the reverse. Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone

really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.

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

The part which medicine will play as all this develops is not yet entirely clear. That it will be deeply involved is certain. Medicine's role with respect to changing attitudes toward abortion may well be a prototype of what is to occur. Another precedent may be found in the part physicians have played in evaluating who is and who is not to be given costly long-term renal dialysis. Certainly this has required placing relative values on human lives and the impact of the physician to this decision process has been considerable. One may anticipate further development of these roles as the problems of birth control and birth selection are extended inevitably to death selection and death control whether by the individual or by society, and further public and professional determinations of when and when not to use scarce resources.

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

APPENDIX C

(The following is excerpted from the testimony given on May 7, 1974, to the U.S. Senate Judiciary Committee's subcommittee on Constitutional Amendments, by Dr. Jerome Lejeune. Dr. Lejeune's practice includes care of disabled children at the Hospital des Enfants Malades (Sick Children's Hospital) in Paris. He is currently Professor of Fundamental Genetics at the Univerité Rene Descartes in Paris; he is the recipient of the Kennedy Award (for his work with mongoloid children) and the William Allen Memorial Medal from the American Society of Human Genetics.)

Human Genetics and the Unborn Child

The transmission of life is quite paradoxical. We know with certainty that the link which relates parents to children is at every moment a material link, for we know it is from the encounter of the female cell (the ovum) and the male cell (the spermatozoa), that a new individual will emerge. But we know with the same degree of certitude that no molecule, no individual particle of matter enclosed in the fertilized egg, has the slightest chance of being transmitted to the next generation. Hence, what is really transmitted is not the matter as such, but a specified conformation of the matter, or more precisely, an "information."

Without receiving the complex machinery of coded molecules like DNA, RNA, proteins, and so on, which are the vehicle of heredity, we can see that this paradox is common to all the processes of reproduction, whether natural or man-made. For example, a statue must be built out of some material, and could not exist if made of pure void. During the casting process, there exists at every moment a contiguity of molecules between the statue and the cast, and later, between the cast and the replica. But, obviously, no matter is reproduced, for the replica could be plaster, or bronze, or anything else. What is indeed reproduced is not the matter of the statue, but the form imprinted in the matter by the genius of the sculptor.

Indeed, the reproduction of living beings is infinitely more delicate than the reproduction of an inanimate form, but the process follows a very similar path, as we will see by another familiar example. On the magnetic tape of a tape recorder, it is possible to inscribe by minute alterations of local magnetism, a series of signals corresponding, for example, to the execution of a symphony. Such a tape, if introduced in the appropriate machine, will play the symphony, although there are no musicians in the machine and even no notes written on the tape. That's the way existence is played!

But, in this analogy, the magnetic tape is incredibly thin, for it is reduced to the size of a DNA molecule, the miniaturization of which is bewildering. To give an idea of this minuteness, we should remember that in this thread every character of each of us is exactly described. Thou shalt have blond hair, hazel eyes; thou shall be six feet tall, and thou shall live some eighty years, if no road accidents intervene! All these instructions giving a full description of a man, are written in a thread one yard long. But the thread is so thin and so carefully packed inside the nucleus of the cell, that it would stay at ease on the point of a needle.

To give another impression, if we were to reassemble on this table all these threads which will specify each and every quality of the next three thousand million men who will replace us on the surface of this planet, this quantity of matter would fit nicely in an aspirin tablet. The fertilized egg is comparable to a tape recorder loaded.

As soon as the mechanism is triggered, the human work is lived, in strict conformity to its program.

The very fact that we have to develop ourselves during nine months inside the bodily protection of our mother does not change anything, as you can easily observe by looking at the egg of the hen, from which the chicken will emerge. It makes no difference whether he was incubated by the fowl, or by an electrical heating device! The chicken is still a chicken. If one day a child can be entirely grown in a test tube, the test tube will never believe that the child is its property!

Such a reduction of the human being to its very nature may not be very palatable or intuitively satisfactory, but it accurately reflects the present state of our scientific knowledge. When a new student hears for the first time a symphony, let us say the Little Night Music by Mozart, he must listen to the whole in order to know it. But if he is a music lover, he will recognize Mozart at the first bars, and could tell the title at the second or third bar. It's the same with the human symphony. The specialist can recognize it at its first accents, even if a great number of various movements are required so that its general form becomes evident to everyone.

The infinitesimal threads of the genetic information are carefully coiled in little rods, the chromosomes, easily visible with an ordinary microscope. They are something like the magnetic tape inside the cartridge of a minicassette. Some twenty years ago, nobody could have told the cell of a man from the cell of a chimpanzee. Ten years ago, a simple counting of the chromosomes would have given the answer, 46 if a man, 48 if a chimp. Since last year, if a student looking at a dividing fertilized egg or at the dividing cell of a blastocyst, could not tell them apart saying, "This one is a chimpanzee being, this one is a human being," he would fail the examination for his license. . . .

These facts of human genetics can appear a little too theoretical, and the question must be asked whether common sense can recognize as such a tiny human being. If very early, only the scientist aided by refined techniques, can tell. If, let us say, at two months everybody knows, and has known for thousands of years.

At two months of age, the human being is less than one thumb's length from the head to the rump. He would fit neatly into a nutshell, but everything is there—hands, feet, head, organs, brain—all are in place. If you look very closely, you would see the palm creases, and if you were a fortune teller, you could read the good adventure of that person. Looking still closer with a microscope, you could detect the fingerprints like Sherlock Holmes—every document is available to give him his national identity card! The incredible Tom Thumb really does exist. Not the one of the fairy tale, but the one each of us has been. For it is from this true story that the fairy tales were invented. If Tom Thumb's adventures have always enchanted the children, if they can still evoke emotion in grown-ups, it is because all the children of the world, all the grown-ups they have turned into, were one day a Tom Thumb in their mother's womb.

But can we scientists accept these fairy tales? The truth is indeed that Nature itself does. For instance, abortion is a normal process in imperfect mammals called marsupials. They have a special pouch on the abdomen, conveniently accommodated to nurture the little. In the giant kangaroo, the abortion occurs at the same stage as the little Tom Thumb in man, and is roughly the same size. The aborted fetus then climbs into the fur of its mother to reach the pouch. The bewildering fact is that the kangaroo mother will let him do so, although she would not allow any other kind of animal to drop in! If the poor brain of a female kangaroo can recognize

the tiny creature as a kangaroo being, there is no wonder that geneticists can safely assure you that Tom Thumb is indeed a true human being.

From molecular genetics to comparative reproduction, nature has taught us that from its very being the "thing" we started with is a member of our kin. Being its own, human by its nature, never a tumor, never an amoeba, fish or quadruped, it is the same human being from fecundation to death. He will develop himself if the surrounding world is not too hostile. And the sole role of medicine is to protect the individual from accidents as much as possible during the long and dangerous road of life.

APPENDIX D

(The following is excerpted from the testimony given on May 7, 1974, to the U.S. Senate Judiciary Committee's subcommittee on Constitutional Amendments, by Dr. Albert W. Liley. Dr. Liley *is Research Professor in Perinatal Physiology in the post-graduate school of obstetrics and gynecology at the University of Auckland, New Zealand; his clinical work includes some 17 years as a fetal pediatrician, and he has contributed articles to a number of medical and scientific journals.)*

The Unborn Child as Patient

Several important points emerge from the experience I have had in the field of perinatal medicine. Firstly, it is obvious that the fetus can need and receive diagnosis and treatment just like any other patient. As one who has to look after babies before birth, I would find it extraordinarily arbitrary to be asked to consider that one baby was important and should be cared for properly, and that another was unimportant and that his existence should be denied. Secondly, physiological observations and investigations demonstrate that the fetus is not a placid, dependent, fragile, nerveless vegetable, but very much in command of his own environment and destiny with a tenacious purpose. It is the fetus who is responsible for the endocrine success of pregnancy, who solves the homograft problem in pregnancy, who determines how he will lie in pregnancy and present in labor, and who determines the duration of the pregnancy. Normally, the onset of labor is a unilateral decision by the fetus. Thirdly, it is apparent that the classical picture of fetal life as a time of quiescence, of quietly and blindly developing structures in anticipation of a life and function to begin at birth is completely erroneous. Development of structure and development of function go hand-in-hand; the fetal environment is not a dark and silent world, and the fetus does not live in a state of sensory deprivation. . . .

My own practice in medicine makes it very clear that in modern obstetrics, we are caring for two individuals, mother and baby. Indeed, it may be more than two individuals, as in a multiple pregnancy, and in this situation, we have found it clinically necessary to identify unmistakably and keep track of each of the babies in a multiple pregnancy before birth. Not only is it apparent that an illness such as Rh disease may represent the same problem for the same patient before and after birth, but a similar continuity is demonstrable for behavior traits. For instance, measurement of fetal swallowing rate in utero shows considerable variation from one baby to another, but these rates correlate closely with the independently-assessed feeding performance of the newborn in the nursery. Further, some babies suck their thumbs in utero and some do not; but we have never observed a baby who sucked his thumb in utero who was not also a thumb-sucker after birth. We have x-ray evidence of thumb-sucking in utero at 24-weeks gestation, but thumb-sucking has also been photographed in the 9-week abortus.

The fetus is also responsive to experimental modification of the taste of amniotic fluid. Injection of oily contrast media (a foul-tasting iodinated poppy seed oil) causes the fetus to quit drinking or swallowing; conversely, artificially sweetening the amniotic fluid with saccharine usually causes an approximate double of fetal swallowing rate. . . .

The fetus is responsive to touch and pressure, and sustained pressure will produce evasive action which in fact can be utilized when we wish to modify fetal position

for diagnostic or therapeutic purposes. The fetus responds violently to painful stimuli, for instance, needle puncture and the intrafetal injection of cold or concentrated solutions. Our observations of many of these aspects of fetal behavior have been made after 18-weeks gestation for two reasons: 1) this has been the timespan when the clinical problems with which we deal have permitted us to invade fetal privacy; and 2) many of our diagnostic techniques, for instance, x-ray and fetal electrocardiography, are applicable only in later pregnancy. However, new techniques such as the use of ultra-sound are enabling us to push these observations back into the first half of fetal life. In any case, the fact that these fetal responses were already intact by the time our former techniques of observation were applicable shows that these responses must have developed earlier, and indeed from brief observations on the early miscarried fetus, such as the classical studies in the United States by Davenport Hooker, we know that early fetal responsiveness was only quantitatively, and not qualitatively different, from the early to the later stages of pregnancy.

APPENDIX E

(The following is the complete text of a Constitutional Amendment proposed by Dr. John T. Noonan Jr., along with his commentary on what he expects the amendment would accomplish.)

AMENDMENT XXVIII

The Congress within federal jurisdictions and the several States within their respective jurisdictions shall have power to protect life from the beginning of new life and at every stage of biological development irrespective of age, health, or condition of physical dependency

What the Amendment Accomplishes

1. The Amendment negates the holdings of the Supreme Court of the United States in *Roe v. Wade* and *Doe v. Bolton* that the Constitution of the United States is violated by law which penalizes the killing of unborn life. Under the Amendment, Congress in all places particularly governed by federal law, and the States within their own borders, are empowered by the Constitution to protect life, born or unborn.

2. The Amendment negates the teaching of the Supreme Court in *Roe v. Wade* that life in the womb, prior to viability, is no more than "a theory of life," incapable of protection of law. Under the Amendment, Congress and the States within their respective jurisdictions may protect life from the beginning of new life.

3. The Amendment negates the teaching of the Supreme Court in *Doe v. Bolton* that the law must always prefer a physician's prescription for the well-being of a mother to the life itself of her child. Under the Amendment, the law may protect the child, although he or she is within the womb and physically dependent on the mother.

4. The Amendment negates the teaching of the Supreme Court in *Roe v. Wade* that "capability of meaningful life" is a criterion by which the protectability of life is to be determined. The Amendment assures that federal or state legislation protecting the life of the aged, the mentally-afflicted, or the chronically ill cannot be declared unconstitutional by application of such a criterion. Under the Amendment, life may be protected irrespective of the health, physical or psychological, of the life being protected

Why the Amendment does not Attempt More

1. The Amendment does not make abortion murder. In Anglo-American legal tradition, discrimination has always been made between the crime of murder and the crime of abortion. No good reason exists to end the traditional distinction.

2. The Amendment does not outlaw any particular acts of abortion. In the federal structure of the United States, it has been the responsibility of the States to design the protection of life within their borders, and the responsibility of Congress to protect life in federal areas. No good reason exists to alter the traditional allocation of responsibilities.

3. The Amendment does not mandate a particular or uniform degree, level, or kind of protection. A Constitution is not a criminal statute. If an Amendment is to act at a Constitutional level, it is not the appropriate place to incorporate the detail and qualifications of a specific criminal law.

4. The Amendment does not make contraception an act which Congress or the States may prohibit under the Amendment; it does not overturn *Griswold v. Connecticut*. Contraception is directed to the prevention of life. The Amendment authorizes the law to act from the beginning of new life.

The Advantages of the Amendment

The Amendment is modeled on the Sixteenth Amendment, overturning the decision of the Supreme Court in *Pollock v. Farmers' Loan and Trust Company*. The Amendment, therefore, conforms to an established pattern in which a decision of the Supreme Court is negated by Constitutional correction.

The Amendment is pro-life. Empowering the law to protect new life from the beginning, it creates the expectation that life will be protected.

The Amendment is pro States' Rights. Restoring to the States the power taken from them by the Supreme Court, it gives the state legislatures the opportunity to shape the protection of life.

The Amendment is pro-People. Returning to the People what was taken from them by the decision of the Supreme Court, it gives the People power to safeguard the lives of future generations.

The Amendment is general enough to have the breadth, dignity, and freedom of detail appropriate for the Constitution.

The Amendment is specific enough to restore the protectability of life within the womb.

The Amendment is moderate enough not to permit *ad terrorem* arguments by advocates of abortion who will try to stretch the language of any proposed Amendment to make it appear mischievous or monstrous.

The Amendment is strong enough to withstand interpretation by a judiciary likely to be initially unsympathetic to its purpose.

The Amendment is conservative enough to satisfy not only the defenders of life but the proponents of States' rights and the critics of judicial radicalism.

The Amendment is bold enough to win the enthusiasm of everyone dedicated to the elimination of the holdings and teachings of *Roe v. Wade* and *Doe v. Bolton*.

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