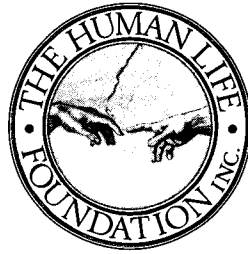


the HUMAN LIFE REVIEW



SPRING 1984

Featured in this issue:

Joseph Sobran on The Averted Gaze:
Liberalism and Fetal Pain

Allan Carlson on Our Children as Enemies

John T. Noonan, Jr. on ... The ERA and Abortion

Michael Novak on A Family Welfare Policy

Thomas Molnar on .. Fetus Selection, French Style

Special Supplement

Nat Hentoff on The Babies Doe

Also in this issue:

Adrian Lee • Steven Valentine

plus "The Experience of Pain by the Unborn"

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... FROM THE PUBLISHER

It has become our custom to do something out of the ordinary in our Spring issues (last year we featured an article by President Ronald Reagan). This issue we have, for the first time, printed a special section highlighted on a colored stock. We've done this with the series by Mr. Nat Hentoff because we feel that the issues he raises may represent the "new future" for the anti-abortion movement. Jim McFadden explains why in his introduction.

The article by Joseph Sobran, "The Averted Gaze: Liberalism and Fetal Pain," is also being published in pamphlet form and may be obtained from the Foundation for one dollar per copy (bulk prices on request). "Must Our Children Be Our Enemy?" by Allan C. Carlson first appeared in *Persuasion at Work*, a monthly publication of the Rockford Institute, 934 North Main St., Rockford, Illinois 61103. Subscriptions are \$10 per year. In Thomas Molnar's article, "Fetus Selection: the French Perspective," he mentions the good work of the "Association Internationale contre l'exploitation des Foetus humains." Anyone interested in contacting the Association should write to its director, Monsieur Claude Jacquinet, 17 Rue Bonvin, 75015 Paris, France.

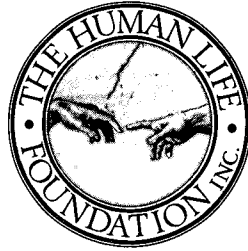
Finally, but most important, the Human Life Foundation proudly announces the publication of the book *Abortion and the Conscience of the Nation* by President Ronald Reagan. This essay which, as noted, first appeared in the Spring, 1983 *Human Life Review*, has been handsomely produced in a hardcover edition. Along with the President's piece, the book also contains articles by Malcolm Muggeridge ("The Humane Holocaust") and U.S. Surgeon General C. Everett Koop ("The Slide to Auschwitz"), both of which were also first published in our Review. You may obtain copies of the book by sending \$7.95 to the Human Life Foundation, Attn: Dept RR, 150 East 35th Street, New York, New York 10016.

Copies of Ellen Wilson's *An Even Dozen* (\$10.00), Joseph Sobran's *Single Issues* (\$12.95), and Prof. John T. Noonan, Jr.'s *A Private Choice* (\$11.95) are also still available from the Foundation.

The Human Life Review is available in microform from both University Microfilm International (300 N. Zeeb Road, Ann Arbor, Michigan 48106) and Bell and Howell (Micro-Photo Division, Old Mansfield Road, Wooster, Ohio 44691).

EDWARD A. CAPANO
Publisher

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INTRODUCTION

ON JANUARY 30, President Ronald Reagan addressed a convention of religious broadcasters in Washington. He spoke of many things, among them abortion, which, as readers of this journal know, he opposes with both passion and eloquence.* On this occasion, the President stated that “when the lives of the unborn are snuffed out, they often feel pain—pain that is long and agonizing.”

It seems hard to imagine that these words could cause an uproar. On the contrary, many have wondered why those opposed to abortion have not made a greater outcry against the agonizing pain abortion must inflict on its victims. For instance, it is well-known that, in the case of so-called saline abortion (in which a salt solution scalds the baby before inducing birth), the woman feels the death-agony of her child, who kicks and thrashes in self-defense, sometimes for hours. It is of course no wonder that those who support abortion have averted their gaze from such painful realities.

Yet the President’s words caused an instant sensation in the media. Reporters scrambled to query medical “experts” for comment on Mr. Reagan’s assertion. They quickly found several officials of major medical associations (including, curiously, those representing doctors most concerned with the birth and care of babies) anxious to refute Mr. Reagan’s statement, although in rather ambiguous terms. For example, Dr. Ervin Nichols, spokesman for the American College of Obstetricians and Gynecologists, said “We are unaware of any evidence of any kind that would substantiate a claim that pain is perceived by a fetus.” (Surely that begs the question, which is: Is the *child* aware?)

Such “official” denials were vigorously denounced by doctors usually associated with the anti-abortion movement, such as Dr. William Hogan, himself a member of the same Academy, who expressed “dismay” at Dr. Nichols’ claim (see the *New York Times*, Feb. 26) and cited numerous fetology texts (some over 20 years old) supporting the President’s fetal-pain statement.

Indeed, the whole controversy soon became part of the larger abortion question. This was nowhere more obvious than in the media itself: pro-abortion columnists and commentators were quick to pour scorn on Mr. Reagan’s words, along with the usual charges that he had “raised” the pain issue only for political

*The finest example, as it happens, is his article “Abortion and the Conscience of the Nation,” which first appeared in the Spring, 1983, issue of *The Human Life Review*.

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reasons. A notable example was Miss Ellen Goodman, a widely-syndicated columnist who wrote (see the *Washington Post*, Feb. 4) that the President's "notion" merely "turned out to be a 'fact' his speechwriters culled from an anti-abortion journal, the Human Life Review."** But in a later column (see the *Post*, Feb. 28), Miss Goodman in effect took back her words, admitting the evidence showed that at "some midpoint in pregnancy, a fetus undoubtedly experiences what anyone would fairly describe as pain."

This synopsis of the controversy and its origins will, we hope, provide the reader with the background for our lead article. Mr. Joseph Sobran has written a great deal over the past decade about abortion and its penumbra (as the High Court might put it), always forcefully, and with a cool passion. This journal alone has published more than thirty of his finely-crafted essays; each one has seemed to us his best ever, and what follows here is no exception to that rule—it is Sobran at his best, which is high praise indeed.

It's amazing (and often amusing) how *economical* Sobran's arguments are: he can make his point, and demolish its opposition, with a handful of lucid images. Here, *inter alia*, he renders the Religion of Evolution instantly ridiculous. But illusions die hard, especially among those who have never really examined the evidence used to support their faiths and beliefs. Mr. Allan Carlson demonstrates this by demolishing yet another "modern" cult, Malthusianism.

His article was intended for "the business world," but, as you will see, it has enormous relevance to the whole question of population control (i.e., "achieving" fewer humans) and thus to that abortion mentality which the Reverend Mr. Malthus willy-nilly helped spawn. Like Sobran, Mr. Carlson makes his point vividly. And he does more than demolish what he calls "the Malthusian credo"—he points out a simple, obvious alternative which "offers an optimistic vision for the American future" (you know, *want* kids again).

Next, that formidable scholar, Professor John T. Noonan, Jr., testifies on the Equal Rights Amendment, which would, he concludes, put an end to virtually any attempt to restrict legalized abortion. Noonan wrote *before* the recent Pennsylvania case in which a judge ruled that abortion-funding bans were "unconstitutional" under the state's ERA—a decision that would seem to confirm precisely Noonan's arguments. Case closed. But you get more here, for we have reprinted (in *Appendix A*) Professor Noonan's now-famous article on fetal pain, for those who (unlike President Reagan) may have missed it the first time.

We follow with more expert testimony, from Mr. Michael Novak, who outlined his views on family policy to a recent conference on Catholic social teach-

** The White House agreed, saying the President's statement was based in part on the article "The Experience of Pain by the Unborn," by Prof. John T. Noonan, Jr., published in the Fall, 1981, issue of this review.

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ing at Notre Dame. As usual, Mr. Novak provides well-reasoned arguments, supported by a wealth of fact. Regular readers will note that his proposals complement much that Mr. George Gilder said in our previous (Winter, 1984) issue. Certainly his crucial point—that “the role of the state is to *empower* people, not to make them dependent”—begs for the emphasis he gives it here.

Then our old friend Professor Thomas Molnar returns with commentary on what’s been happening in France (where he spends much time) *in re* abortion and some ghastly “related issues” such as using the unborn for “spare parts”—legalized abortion everywhere, it seems, leads to the same barbaric “advances” that have become all too familiar in our own nation.

Which brings us directly to the special supplement in this issue: a series of seven articles by Mr. Nat Hentoff, which first appeared in New York’s *Village Voice*. We have never before published anything like it—indeed, we’ve rarely seen anything quite like it. The reader will find (on page 73) a special introduction, but here several additional points should perhaps be made. Clearly, Mr. Hentoff’s remarkable series covers much that has previously appeared in our pages. For instance, he quotes Dr. Anne Bannon on the Bloomington Baby, Dr. C. Everett Koop on infanticide, and so on. He cites Prof. Yale Kamisar’s classic treatment of euthanasia, first published in 1958, and re-printed in full here in our Spring and Summer, 1976, issues. And, inevitably, the famous (infamous?) *California Medicine* editorial, which we have reprinted four times. In short, you will note much that is familiar as Mr. Hentoff guides you through his powerful indictment of the killing of fellow citizens, born in these United States, but denied those rights and privileges due them.

The reasons for this horror are also familiar: such citizens are “unwanted” by their own, and by medical persons who advise that they cannot live “meaningful” lives. Well, by virtue (just the right word) of this series alone, Mr. Hentoff may have made the lives of the Babies Doe more meaningful than those granted to many of the rest of us, for their deaths could *save* the lives of the many who follow after them.

Finally, in addition to Professor Noonan’s fetal-pain article (*Appendix A*), we add (*Appendix B*) an appropriate newspaper commentary by Mr. Adrian Lee, and another by Mr. Steven Valentine (*Appendix C*) on what has caused all the slaughter, namely the Supreme Court’s *Roe v. Wade* decision.

There is a great deal of powerful stuff in this issue, we’d say, and of course we hope you’ll agree, and be looking forward to the next one, coming soon.

J. P. McFADDEN
Editor

The Averted Gaze: Liberalism and Fetal Pain

Joseph Sobran

OVER THE LAST dozen years I have found that the hardest thing about debating the issue of legal abortion is that its advocates keep changing their minds—not about their position, alas, but about the *reasons* for their position. They have argued at various times that nobody can know when life begins, that the issue is essentially religious, that the fetus is merely part of the mother's body, and so on. When any of these assertions is refuted, they never reconsider their position; they merely find a new prop for their predilection.

I have thought for a long time that opponents of abortion ought to emphasize the pain abortion causes its victim. The pain issue, quite simply, strips away the claim of the pro-abortion side to a monopoly of compassion. Besides, it puts the shoe on the other foot: while the anti-abortion side has borne the burden of proving that a fetus is “fully human,” whatever that means, the sheer fact of pain, even in a putatively subhuman creature, implies that it is more than just nothing. The suffering of even a semihuman creature ought to count for something.

But the main reason is that pain speaks to our intuition in a certain way. A woman can say, “My stomach hurts.” She can't say, “My fetus hurts.” The fetus feels its own pain. It has its own identity, its own nervous system, and therefore its own separate claim on our attention. Some abortion advocates say we must balance the rights of the mother against those of the fetus; and even though they are up to no good when they say that, they have at least come to acknowledge that the fetus *does* have rights of its own. The very admission that two parties are involved is a significant victory for opponents of abortion.

When President Reagan spoke of the “agonizing pain” suffered by the aborted child, he forced the issue on the country at last. It caused evident discomfort to liberal opinion—what I like to call “the Party of Compassion.” Liberals quickly recognized a topic that could explode their

Joseph Sobran, a well-known author and columnist, has been a contributing editor to this journal from its inception in 1975.

humanitarian pretensions. So the New York *Times* immediately quoted the spokesman of the American College of Obstetricians and Gynecologists, Dr. Ervin E. Nichols, to the effect that he (and presumably medical science itself) was “unaware” of any pain a fetus suffered.

The remark was disingenuous. It was not a *denial* that unborn children have sensations, including sensations of pain; it was an evasion, a “no comment,” an “I have no recollection of that.” Clearly medical science has taken a thorough interest in fetal development and has learned something about the capacity for pain in the unborn. So Dr. Nichols said carefully that he knew of no proof that the fetus has sensations it can “interpret” as pain—a grotesque way of avoiding the simple admission that fetuses suffer, an admission that could cost the medical profession many millions of dollars.

But this evasion satisfied a number of liberal pundits, who cited it as triumphant proof that Ronald Reagan was once more feeding the country apocryphal anecdotes he had picked up and misremembered. Science had spoken! No fetus suffers! Case closed!

This reaction eloquently bespoke the liberal desire to drop the subject. A moment’s communion with common sense, however, would suggest that so highly complex an organism as a human fetus must be able to feel pain at some point before the end of a nine-month gestation period. Some children are able to survive premature birth at between six and seven months. This in turns suggests that the capacity for pain is present even earlier, maybe much earlier.

And other doctors spoke up in support of President Reagan. So even those people who know nothing about embryology and fetology could reasonably wonder whether legal abortion—legal, that is, up to the ninth month—wasn’t inflicting a good deal of searing pain, at least, on aborted children. It stood to reason.

But the Party of Compassion was clearly uninterested in even exploring the possibility that this was so. This was odd: as a rule, liberal opinion is obsessed with piteous hard cases, and is willing to upset the settled presumptions of society in order to accommodate the suffering. Private property, the work ethic, and of course the sanctity of life itself have all been forced to yield to the liberal imperative of relieving pain and misery of various kinds—most of them far more bearable than what an aborted child, scalded, dismembered, or simply expelled from the womb before its

time, might be suffering.

Is there a double standard here? Of course there is. But I make it a maxim to look behind every double standard for an unconfessed single standard. Put briefly, the liberal is interested in suffering only insofar as it can be exploited to force “social change” and produce a social order liberalism aspires to. Put even more briefly, what the liberal really wants is secularist socialism. Permitting abortion is part of the scheme. Limiting abortion would disrupt the scheme. Therefore the pain of the aborted fetus is ineligible for the liberal’s selective, but purposeful, “compassion.”

Not that the President’s words had no effect. Far from it. And two of the positive responses to his moral appeal came from outspoken liberals. Colman McCarthy, the *Washington Post* columnist, praised the President for his “courageous opposition to abortion” and in particular for raising the fetal pain issue. And the syndicated columnist Ellen Goodman, who had at first dismissed the President’s remarks, abruptly reversed herself and agreed that “at some midpoint in pregnancy, a fetus undoubtedly experiences what anyone would fairly describe as pain.”

It begins to look as if the pain issue is finally forcing concessions from the pro-abortion side. Not that I think it is accurate to call McCarthy an advocate of legal abortion; he has at least been morally severe in speaking of it. But the President moved him to break ranks openly with his fellow liberals. And while Miss Goodman didn’t retract her support for legal abortion, she did speak of imposing a time limit of some sort in order to minimize fetal suffering. What is even more important, though, is that the subject is finally on the agenda. If pressed, it has the power to subvert the whole case for legal abortion, because, I repeat, *it forces us to imagine the unborn child as a living creature absolutely distinct from its mother.*

In other words, the anti-abortion movement has at last found a “winning issue,” an issue that can’t be ducked or dismissed as “theological,” an issue that *does* appear to have some purchase on the liberal conscience, of all things. But it has to be pressed.

At the same time it would be a mistake to allow the sheer fact of pain to become the only consideration. Pain is important not only because it is undesirable, as nobody will deny, but especially because it is an emblem of identity. The goal is to abolish, as far as possible, legal abortion, not just to insist on prenatal euthanasia. In other words, we want society to assert the intrinsic wrongness of abortion, pain or no pain.

Here Miss Goodman gives us a clue to what we are up against. Though she admits that a fetus may suffer at some “midpoint” of pregnancy, she also says that “in the early stages of development, a fetus has the automatic response of a plant or an amoeba.” Set aside the factual truth of this statement. What interests me is the comparison of the fetus at its embryonic stage to lower forms of life.

I think that what she imagines is that the human embryo undergoes something like the whole process of evolution, as in the old adage that “ontogeny recapitulates phylogeny.” The adage has been discredited, of course, but this does not mean it has lost its power over the imagination of many modern people. They still suppose that the human fetus is in the early stages of development a “lower” form of life, and this is probably what they mean when they say it isn’t “fully human.” It begins as something virtually amoebic, proceeds to become something like a shrimp, then a puppy, then an ape, and finally a human. Reasoning in more or less this way, the philosopher Peter Singer argues it is morally worse to kill a mature dog than an infant. (Singer, be it noted, explicitly makes the capacity for suffering a paramount criterion for the right to life.)

Compare the way a Christian thinks of a fetus. Believing in the Incarnation, he always bears in mind that it began at the very moment of conception. Jesus Christ, the Son of God, was an embryo before he was an infant. He was “True Man” even when he was microscopic. This has powerful implications for all other men, and they extend to the care of the unborn, for “inasmuch as you have done it to these, the least of my brethren, you have done it to me.” The injunction that protects the poor, the weak, and the despised, protects the child in the womb. He is fully human even though he isn’t fully developed, because his nature is defined by his destiny, not by his current capacities at any point along the way, not even his capacity for pain.

So the abortion debate has its roots in two alternative ways of imagining the unborn. Our civilization, until recently, agreed in imagining the unborn child on the pattern of the Incarnation, which maximizes his dignity; but many people now imagine him on the pattern of evolution, as popularly understood, which minimizes his dignity.

Every culture, Richard Weaver observes, has its own “tyrannizing image,” an all-dominating conception of man that determines social and moral codes. In today’s civil war of culture, so to speak, we see a constant

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interplay of rival tyrannizing images. One is the Christian. The other is what I will call the Evolutionist image. I stress that by this term I refer to a popularly shared understanding of evolution, leaving aside the question of whether this is the scientist's understanding, or of whether the scientific understanding itself is correct.

Now everyone knows the difficulties involved in the Christian view. Though it is intelligible and makes sense of everything once accepted, you do have to accept it first; and this means believing in the miracle of the Incarnation. Some people simply lack the faith this requires. The Christian understands this and doesn't condemn it, because he regards faith as God's gift.

The Evolutionist view presents different problems. It doesn't ask us to believe in miracles. It professes to appeal to universal human reason. It offers to explain human existence in purely natural terms.

Briefly, it says this. Life in its simplest form began by accident. Gradually, over millions of years, life-forms became more complex and various. Mutations that helped certain organisms in the struggle for survival finally established themselves. Other organisms perished. The mutations themselves were accidental; there was no mind or purpose directing them. Some happened to work; the vast majority didn't. Man, far from having been made in the image of God with an immortal soul, is merely the most complicated of mutants.

In essence this is the story of the monkey and the typewriter. If a monkey were to peck randomly at a typewriter for hundreds of millions of years, he would eventually write *Hamlet* by sheer chance (assuming he didn't evolve into a journalist first, in which case there would perhaps be a falling off in the quality of his copy). And so, by sheer chance, evolution produced man. The author of *Hamlet*, failing, it seems, to appreciate the sheer happenstance of it, wrote ecstatically: "What a piece of work is a man! How noble in reason! How infinite in faculty! In form and moving, how express and admirable! In action, how like an angel! In apprehension, how like a god!"

At this point a certain difficulty presents itself. If the Evolutionist view is correct, we have to explain the nearly total disappearance of all the "rough drafts" of man. A monkey typing over millions of years would have produced quite a heap of nonsense before he made his masterpiece. What is more, he wouldn't stop when he wrote *Hamlet*; in fact he

wouldn't realize he'd written it. According to the Evolutionist account, as we meet it in (say) the Science section of *Time* or *Newsweek*, we should expect a nearly infinite mass of mutants that failed to survive, a colossal fossil record. Moreover, since there would be no reason for the evolutionary process to stop when it had generated us, we should expect a large number of contemporary creatures with random bulges, appendages, and organs serving no useful function, such that the poor creatures would be pretty obviously doomed to extinction.

No, on second thought, there would be no particular reason why the apparently useless mutations should cause their owners to disappear. After all, those mutations in simpler creatures that eventually became eyes, ears, and elbows must have lingered on for eons before they developed (by blind chance, remember) into anything useful. So at any point in time, there would inevitably be plenty of evidence of the blind process eternally going on. There would be at least many thousands of inanities for every species as economically and, if I may use the word, *purposefully* constructed as the shark, the spider, and us men.

And why not speak of "purpose"? The concept, supposedly banished by the idea of blind competition for survival, has been smuggled back into Evolutionist rhetoric. On any day we may read that "the incest-taboo served the evolutionary purpose of survival by insuring that sexual rivalry would not tear the family unit apart"; which is sheer nonsense. "Evolutionary purpose" is a contradiction in terms. So is the notion that creatures driven by selfish appetite would subordinate themselves to the survival of the species by imposing a vague "taboo" on themselves. Yet we read this sort of thing constantly.

Moreover, many believers in Evolutionism, a process supposedly not only blind but protracted over billions upon billions of years, seem to confuse the imperceptible process of species development with what they take to be the visible process of historical development. Men of the ancient world and the Dark Ages, who are biologically our next of kin, are discussed as if they were actually a lower form of life. In the cult of the Superman earlier in this century we saw this odd fusion of the ideas of Evolution and Progress, and it continues in our own day in only slightly subtler form. We see books with titles like *Man Makes Himself* and *The Next Development in Man*, heralding imminent changes in the

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species itself. I sometimes wonder: did nature make men out of monkeys, or is it merely that the naturalists are making monkeys out of men?

C.S. Lewis remarks that Darwin actually explained the elimination, not the origin, of species, and Hilaire Belloc said tartly that we didn't need Darwin to tell us that in a flood cows drown and the fish survive. But the incantatory and mythic power of the very word "evolution" seems to blind people to overwhelmingly *prima facie* objections to the idea it stands for. I don't say that no scientist can meet these objections; I do say that many unscientific people ignore objections in a most unscientific way. They believe in evolution on faith, on what they take to be the authority of science, without going over the hurdles that face the scientist, or any rational mind.

Now you don't become scientific by accepting the conclusions of science, even if they happen to be true; any more than you become a logician by assenting to the conclusion of a syllogism, without comparing the major and minor premises. The plain fact is that the number who believe in evolution can be accounted for only by their own will to believe, not the scientific cogency of the theory of evolution itself.

What is the vulgar appeal of the theory to unscientific people? How can so many people who know so little of actual history be so confident about the prehistoric, which is by definition the past nobody can know? My guess is that the popular theory of evolution appeals precisely as an alternative to the Christian view of man, which not only demands faith but imposes moral obligations. People who adopt Evolutionism are not driven to it by consideration of the evidence; they like it without respect to the evidence, because they are passionate creatures, and it offers no moral impediment to their passions. Jonathon Swift describes a yokel who listens keenly to a freethinker's long, intricate argument against Christianity, and finally replies, "Why, if it be as you say, I can drink, and whore, and defy the parson!" That is what is now referred to as the bottom line. If the theory of evolution is true, we can defy the parson, all right. We can even traffic in abortion.

Dostoyevsky warned darkly that if God does not exist, everything is permitted. That too is the bottom line. But for every Jean-Paul Sartre who affirms it wholeheartedly, there are thousands of people edging furtively toward it without wanting to admit or even face what they are

doing. So every departure from the Christian tradition is rationalized in the moral terminology of that tradition: love, conscience, not casting the first stone, judging not.

Even abortion is sometimes justified for the sake of the child aborted: it will spare him a miserable life! In this way hedonism and selfishness assume the mask of charity. We may not really love each other, but we can avoid causing each other pain. That is the social contract of liberalism, in which pain is the only indubitable evil. Of course the contract collapses with respect to abortion the moment it is admitted that the aborted child suffers.

This is why the issue of fetal pain may be crucial: it subverts the subverters. One way to subvert a culture is to turn its own values against it, as Communists turn the American Constitution against the American Republic, as liberals use Christian values against Christianity. This is one of the hardest forms of attack to defend against, and sometimes the subversive really finds a fatal flaw in the system he is subverting, an un-stanchable leak. But the systems of the subverters themselves are not immune to attack.

Liberalism, as Kenneth Minogue has written, has organized itself historically around a series of "suffering situations": slavery, child labor, racial discrimination, poverty. Liberalism's claim to power and authority was that it relieved pain. It was an anesthetic politics, forever in search of victims to succor.

Of course it framed its appeal in terms of Christian values like compassion, but it was not itself Christian. It couldn't promise sanctity, salvation, bliss: what did it know of such things? It didn't even admit the loftier pagan virtues, like beauty and honor. Its entire claim to legitimacy was that it could *make things stop hurting*. Like an Alka-Seltzer commercial, it promised little more than that.

I think it implicitly promised one more thing. It would remove painful reminders of pain. Now it is generally unpleasant to see people suffering, because we know it could happen to us, it reminds us of our own vulnerability, it makes us imagine ourselves in the same situation. The strictly aversive feeling, be it noted, is quite distinct from compassion, which is an identification of oneself with the sufferer and a desire to help him for his own sake. And I believe we have confused liberalism's appeals to compassion with its appeals to this aversion to the spectacle of pain.

Compassion, obviously, requires action. It requires sacrifice, if necessary, to relieve or comfort the sufferer. Christian compassion is ordered to the salvation of the one who suffers, so the Christian may even have to share the pain of the object of his charity.

But this is altogether different from the mere aversion to pain and to the sight of pain. You can sometimes get rid of these by simple avoidance. And though liberalism often boasts, not without reason, of its compassion, I think its other component of sheer evasion has been greatly underrated. It has seen that by reconstructing society in a certain way, it could reduce or even eliminate certain kinds of pain. But what about the great residue? Obviously not even liberalism can claim to mend the broken heart, but it is still important to look hard for a moment at the limits of liberal compassion.

Liberalism is interested in those kinds of suffering that can be defined as "social problems" susceptible to collectively organized "solutions." This leads it to adopt a circular form of compassion, available only to the kinds of suffering amenable to liberal technique. And is this so bad? After all, medical science too is interested only in specific kinds of suffering; no doctor can pluck from the memory a rooted sorrow; none pretends to.

I can think of two answers. One is that liberal compassion does need to be carefully distinguished from Christian compassion, which is not pain-averse. In fact some forms of compassion deliberately increase the suffering of the giver with no assurance of commensurately relieving the suffering of the receiver, as when a nun sits all night with a delirious dying man. This is not in the liberal mode, though of course some people who favor a liberal politics are fully capable of it.

The second is that liberalism does claim to be a more or less comprehensive world-view, and unlike medical science it invests its projects with moral passion. Now it is unbecoming for a world-view of this kind to exclude certain objects from its vision. And liberalism has been distinguished by its almost total inattention to some of the largest categories of needless suffering, like the suffering systematically inflicted by Communist regimes. Though liberalism speaks volubly about "victims of Nazism," it would strike us as actually odd to hear a liberal speak of "victims of Communism." To put it slightly differently, the very use of the phrase "victims of Communism" would immediately identify the speaker as a non-liberal. When liberals speak of "religious freedom," we almost invari-

ably find out what they have in mind, and what they are complaining about, is school prayer. They almost never use the phrase to introduce the subject of Communist persecution of Christians, because they almost never bring the subject up. That is why the word “selective” pops up so often in the rhetoric of liberalism’s critics: because it is sensed that liberalism’s concrete practice and its real motives are in tension with its universalist rhetoric.

Liberalism, that is, claims to be more than a mere limited technique of dealing with certain forms of suffering which that technique can deal with: it claims to be a way of seeing the world that is fraught with moral urgency, and it claims to offer a way of improving the world totally—that is, morally *and* materially. We judge it by these claims.

It fails its own test. It fails at a hundred points, but nowhere more shamefully than in the case of abortion. Here we see how liberal opinion exalts its chosen categories of victims—poor black women, teenage girls raped by their fathers, and the like—while totally devaluing the obvious victims, the unborn. The issue was “viability,” all right: liberal groups didn’t see the fetus as politically viable, while they saw great possibilities in enlarging the political rights of women. It was a case of interest-group politics, and a pretty seamy interest at that: drinking, whoring, and defying the parson. The liberal community as a whole—the Party of Compassion—has never frankly faced the issue of the fetus’s death agony, not even when the subject was forced on it. The fifteen million children killed in the womb since 1973 deserve to be called the victims of liberalism.

Far from inquiring into the subject honestly, liberals have dodged the problem of pain by flippantly invoking epistemological difficulties and letting it go at that: we can’t *prove* fetuses suffer, they jeer. For all we know, the early reaction to stimuli may be, as Miss Goodman says, “automatic,” like those of a plant or an amoeba. But we are entitled to a skepticism of our own when people are so eager to snap shut a deep and serious subject by declaring the available evidence inconclusive or inadmissible. We all know, after all, that fetuses can’t talk: the consequences for them are only too obvious. All the more reason why we should carefully weigh the mute testimony of their visible reactions to what would be, for us, painful stimuli.

It helps at this point to have some sophistication about how liberals

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pick and choose among various sorts of witnesses, testimony, and evidence. They accord a ready hearing and a presumption of authority to people who have fled from, say, South Africa or Argentina. Refugees from Communism, on the other hand, are received skeptically: far from giving them authority as witnesses, their experience under Communism has made them “embittered” and “unbalanced.” Likewise the liberal mind is ready to extend compassion to victims it has only imagined—the pregnant welfare mothers of stereotype, for instance—while refusing to look at its own victims, the small mangled bodies in the abortion clinics.

What the pro-abortion side really feels, though it stops short of saying so, is that the suffering a mother will endure in having an unwanted child is simply more important than the life of that child. That is the long and the short of it. There is no careful “balancing” of rights, of pain; abortion advocates don’t want to hear about the fetus’s end of the transaction at all. They are averse to the mother’s suffering and to the mere *awareness* of the child’s. In this there is far more evasion than compassion.

Liberals may have espoused compassion for the purpose of subverting the morals and institutions of traditional America. In a sense compassion was a good value to choose for the purpose. But having adopted it as their own, they are now vulnerable to a sort of countersubversion if it transpires that there are widespread forms of suffering they are not only cold to, but perfectly willing to sponsor. In raising the issue of fetal pain, the President performed a great service for the unborn, and for the moral tradition to which America by right belongs.

Must Our Children Be Our Enemy?

Allan C. Carlson

THE TRIUMPH and retreat of ideas affects the business world in fundamental, yet often barely understood, ways. Perhaps no shift in the influence of competing ideas has had a greater negative impact on the economic and business climate than the near-total victory of Malthusian doctrine in the United States during the 1960's. Indeed, at the philosophical roots of most antibusiness activism during the last 25 years lie Malthusian concepts. Yet by the early 1970's, the shift in intellectual fashion had proceeded so far that even a hefty portion of America's business leadership felt compelled to affirm these same economically crippling Malthusian principles. The story behind the origin of these ideas, their rise to power, and the recent emergence of a new, scientifically rigorous anti-Malthusianism serves as a fascinating parable of America's brush with self-immolation, and its more recent return to sanity.

What is Malthusianism?

The Rev. Thomas R. Malthus laid out his basic premise in 1798, citing "the constant tendency in all animated life to increase beyond the nourishment prepared for it."¹ From this bleak biological perspective, Malthus concluded that human numbers would invariably grow faster than food supplies; that each new baby generated a demand on resources which exceeded the benefits derived from the new source of labor. Social problems such as poverty, hunger and crowded housing, he added, could be directly traced to the constant pressure of population against the resource base. Eventually, Malthus concluded, famine, war, and pestilence would drive "over-populated" nations back into balance with their natural resources.

Malthus' theory of population generated a controversy that has not abated to this day. It is important to note that the debate had continually crossed and recrossed other ideological lines. During the early 19th century, for example, apologists for the emerging industrial order enthusiasti-

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cally endorsed Malthusian doctrine, arguing that the grinding poverty found in the new factory towns was the natural result of the workers' own excessive reproduction. Viewing the same situation, Karl Marx denounced Malthusianism as an intellectual fraud and an ideological prop to capitalism. Through sweat and intelligence, he argued, human beings could lift themselves and their children out of poverty.

Yet by the 1880's, attitudes on Malthus began to reverse. On the one hand, the exuberant economic growth and new wealth generated among the capitalist nations were clearly raising living standards among all social groups, even the working class. At the same time, populations in Britain, Germany, and the United States were soaring at unprecedented rates. The Malthusian threat, defenders of capitalism concluded, had been shattered. On the other hand, a distinctively socialist brand of Malthusianism was born in Germany under the influence of Karl Kautsky. While arguing that seizure of the means of production was still necessary to eliminate capitalist injustices fully, Kautsky added that the use of birth control to cut population growth could also reduce the working class's immediate suffering.

In our century, Malthusian doctrine evolved into a comprehensive world view or ideology, one wholly independent of traditional "left-versus-right" politics and one characterized by a universal preference for stability or the "is" over growth, change, and the "might be." As much an emotional state of mind as a rational argument, the modern Malthusian choir has taken four voices:

Demographic Malthusians see biology as the key factor in human history and cast excessive human reproduction as the primary source of poverty and misery. People, simply put, are the problem, a conviction held with emotional intensity. As one Malthusian activist wrote about a "stinking hot night" he had spent in Delhi, India: "The streets seemed alive with people. People eating, people washing, people sleeping. People visiting, arguing, and screaming. People thrusting their hands through the taxi window, begging. People defecating and urinating. People clinging to buses. People herding animals. People, people, people, people . . . [S]ince that night I've known the *feel* of overpopulation."²

Resource Malthusians stress that nature is finite, that basic "natural resources" are limited, and that the current consumption of "non-

renewable” resources represents a crime against future generations. From their perspective, Americans are particularly culpable, representing only 5% of the earth’s population but consuming anywhere from a third to a half of the planet’s resources.

Economic Malthusians fear unregulated or unplanned economic expansion: in other words, the free market. Indeed, history has repeatedly shown the logical and policy connection between a “planned population” and a “planned economy.” In his younger days, for example, John Maynard Keynes was a devout Malthusian, concluding that the stagnant populations found in the European nations during the 1920’s meant that the free market there was obsolete. In our time, distinctly Malthusian economic behavior includes: government-enforced destruction of goods or the limitation of output; maintenance of legal monopolies; fixing prices above the market price; protectionism; the suppression of a discovery or useful invention; policies that discourage double employment; rent control; and so on. Their common denominator is an aversion to growth and risk, a preference for predictability, and the purposeful intervention of government into economic decision-making.

Linguistic Malthusians focus their ire on acts of creation, be they material or biological. Recent American examples would include the loathing now often directed toward “developers” and the emotional devaluation suffered by the word “motherhood.” This orientation takes its strongest form in an animus directed toward children, symbols as they are of risk-taking, unpredictability, and growth.

Contemporary institutional expressions of the Malthusian spirit include population control groups like Zero Population Growth and their close environmental allies, the Sierra Club, Friends of the Earth, and so on. Their recent philosophical triumph in America’s cultural, policy, and economic spheres is a remarkable story.

Babies: From Boom to Bust

During the decade and a half after World War II, Americans were buoyantly anti-Malthusian. Sustained economic expansion and a rising birth rate during the 1950’s contrasted sharply with the economic and demographic stagnation experienced during the Great Depression and gave rise to widespread affirmations of a growth-oriented America. A

sign in the lobby of The U.S. Department of Commerce, for instance, declared: "More people mean more markets." *Engineering News Record* proposed that "the country's booming population growth spells money in the bank for the alert construction man." A public-service ad in a New York subway stated: "Your future is great in a growing America. Every day 11,000 babies are born in America. This means new business, new jobs, new opportunities."

Reflecting the same spirit, the June 16, 1958, issue of *Life* magazine ran a cover story on "KIDS: Built-in Recession Cure." "The number of U.S. small fry is rocketing upward at a phenomenal rate," the article read, "bringing sentimental delight to parents and totally unsentimental pleasure to the nation's economists." *Life* estimated that each newborn baby was a "potential market for \$800 worth of products" during its first year, while the juvenile market as a whole was worth "a staggering \$33 billion annually." The magazine also took a gleaming look at the burgeoning number of large families, their "own mass markets." Featuring one New York family of twelve, *Life* concluded that "the Powerses find so much pleasure in growing up together that they never think of themselves the way an economist might, as 10 more potential boom-breeding families."³

The dominant intellectual climate similarly affirmed the anti-Malthusian perspective. Writing in *Fortune*, for example, economist Colin Clark argued that "population growth is generally beneficial," often serving as "the only stimulus powerful enough to shake men out of their established ways and customs, and make them seek something better." A conscious effort aimed at population limitation, he argued, was both "bad economics and bad politics." Indeed, Malthusian ideas were the most "frequent and potent" source of claims by the State to regulate economic life, to raise taxation, to secure the dependence of the individual on state welfare services, and to erode the real value of the money supply.⁴

Even the political climate was conducive to growth-oriented, anti-Malthusian ideas. Asked in 1960 about the concept of government-supported efforts aimed at population control, President Dwight D. Eisenhower responded: "I cannot imagine anything more emphatically a subject that is not a proper political or governmental activity or function or responsibility."⁵

But by that year, the dominant flow of ideas was already turning: Malthusianism was in the ascendant. Since the publication in 1954 of the

Hugh Moore Fund's provocatively titled and widely circulated pamphlet, "The Population Bomb," attention had turned to the high population-growth rates being experienced in the less-developed areas of Asia, Africa, and Latin America. Nineteen-fifty-nine brought a flood of Federal bureaucratic activity on "the population problem." In July of that year, the U.S. Department of State released a report on world population trends which concluded that rapid population growth threatened the stability of underdeveloped lands. An October 1959 report issued by the Senate Foreign Relations Committee concluded that "some means of controlling population growth are inescapable." The President's Committee to Study the United States Military Assistance Program concluded the same year that: "The United States and other more advanced countries can and should be prepared to respond to requests for information and technical assistance in connection with population growth."⁶

Over the next few years, Malthusian verdicts extended from the underdeveloped world to America itself. It is important to note that the U.S. birth rate had started falling again in 1957 and by the early 1960's had clearly entered a period of accelerating decline. To objective observers standing in 1964, the "baby boom" was over.⁷ Yet curiously, the same year generated the first of a subsequent flood of books and articles in which American population growth was cast as a major part of "the problem." Writing in *Commentary*, sociologist Dennis Wrong sneered at those who argued for free-market solutions to the problems facing the underdeveloped countries: "[They] can no more afford to follow a *laissez-faire* policy with respect to population growth than they can with respect to capital accumulation and economic growth itself." In America, he added, population pressures threatened "the quality of life": recreation areas were destroyed, traffic jams and urban congestion were more common, air and water pollution worsened, and so on.⁸ In their 1964 book, *Too Many Americans*, demographers Lincoln and Alice Day blasted the "American Fertility Cult" which welcomed large families and population growth. They argued for a fundamental change in ideas about what constitutes social responsibility, so that "a large family can no longer in itself be viewed as a social contribution. . . . If the parents of three children decide to have a fourth, it should be with the full awareness that they are choosing to indulge their personal desires at the expense of the welfare of their society."⁹

'The Population Crisis' Unfolds

By mid-decade, Malthusian ideas were winning victory after victory within the U.S. government. In his June 1965 address before the United Nations, President Lyndon Johnson declared: "Let us in all our lands . . . including this land . . . face forthrightly the multiplying problems of our multiplying populations and seek the answers to this most profound challenge to the future of all the world. Let us act on the fact that five dollars invested in population control is worth one hundred dollars invested in economic growth." Several months later, U.S. delegate to the United Nations, James Roosevelt, cast American population growth as a danger to the Johnson Administration's efforts to build "a Great Society." The following year, the U.S. Department of Interior issued an overtly Malthusian document which labeled "overpopulation" the "greatest threat to quality living in this country," a danger to "America's noble goals of optimum education for all, universal abundance, enriched leisure, equal opportunity, quality, beauty, and creativity." Secretary of the Interior Stewart Udall "vigorously challenged" the myth that population growth was the key to prosperity and the good life: "Instead, it is more likely to lead to poverty, degradation, and despair." Indeed, the Department even agreed with biologist Julian Huxley that mankind itself threatened to become the "cancer of the planet."¹⁰

By the late 1960's and early '70's, the U.S. birthrate was tumbling toward a historic low, barely meeting by 1968 the so-called "replacement level" at which each generation just manages to reproduce itself. Yet the new wave of Malthusian tracts emerging in those years proved to be only more frantic in their prophecies of doom and more virulent in their denunciation of the U.S. population. "Catastrophe is foredoomed," wrote William and Paul Paddock in their global-oriented work *Famine 1975!* "[I]n the 1970's the world will undergo famines—hundreds of millions of people are going to starve to death in spite of any crash programs embarked on now," wrote Paul Ehrlich in his vastly popular work *The Population Bomb*. In the USA, he added, garbage in the environment, overcrowded highways, slums, poor schools, rising crime, and the epidemic of urban riots could all be explained by the birth rate. We "must" cut out "the cancer of population growth," Ehrlich concluded.¹¹

Nor were Ehrlich and his colleagues shy about the price that would

have to be paid. "Drastic policies" were necessary to get U.S. population size under control, Ehrlich wrote. "Coercion? Perhaps, but coercion in a good cause.... We must be relentless in pushing for population control..." Among his many proposals, Erlich urged the creation of a powerful U.S. Department of Population and Environment which would secure the right of any woman to abortion, promote sex education in the schools, give "responsibility prizes" to childless marriages, develop a "mass sterilization agent" to be placed in U.S. water supplies, and so on. He called for a taxation system that would penalize all families with children, but especially those "irresponsible" couples with more than two. He urged his followers to recognize the "glut, waste, pollution, and ugliness" embodied in the U.S. Gross National Product ("as *gross* a product as one could wish for") and to turn on "population-promoting tycoons" and "chambers of commerce" who were "especially 'black hat' on matters of population, and should be called down whenever they step out of line."¹²

Others were even more extreme, as the "our children as enemy" theme gained explicit treatment. Writing to American high-school biology teachers, Walter Howard labeled overpopulation "the erosion of civilization" and urged the mass mobilization of scientists "to help check this flood of human beings." The birth of a "surplus baby," he added, meant that another person somewhere else was "not going to be able to live a full life because of the resources consumed by the surplus baby."¹³ Bio-ethicist Garrett Hardin stated that "Every babe's birth diminishes me." He told a medical audience that obstetricians should discourage fertility among their patients, "in order to diminish the amount of adult stupidity, which itself is a form of social pollution, and a most dangerous one." A voluntary system of birth control, Hardin argued, could not achieve the goal of national population control: "some form of community coercion—gentle or severe, explicit or cryptic—will have to be employed."¹⁴

Toward a 'Controlled' America

Even with the change of administration, the Federal government kept in lock-step with the Malthusian surge. In his unprecedented July 1969 "Message to Congress on Population," President Richard Nixon labeled population growth "One of the most serious challenges to human destiny in the last third of our century." He urged the American people to

respond to “the population crisis” facing the United States and the world.

At Nixon’s request, Congress created the Commission on Population Growth and the American Future. Its 1972 report marked the final triumph of the Malthusian spirit in the halls of government. “After two years of concentrated effort,” the Commission declared, “we have concluded that no substantial benefits would result from continued growth of the nation’s population.” Informal pronatalist pressures, the document stated, were part of an “outmoded tradition.” The number of American children now born would negatively influence “our lives” in future decades. Significantly, the Commission added that the massive effort to solve “our population problem” necessitated basic changes in all our assumptions, including economic ones: “nothing less than a different set of values toward nature, *the transcendence of a laissez-faire market system, a redefinition of human identity in terms other than consumerism, and a radical change if not abandonment of the growth ethic, will suffice.*” The Commission thereupon recommended “that the nation welcome and plan for a stabilized population” and urged a vast array of policy changes designed to reach that goal.¹⁵

But by then, the public policy consequences of the Malthusian ascendancy were already numerous. Starting in 1965, Agency for International Development (AID) funds were increasingly diverted to population control work. In 1967, Congress allocated its first \$50 million for domestic population and family planning efforts. The Tax Reform Act of 1969 was the key step in a series of measures that shifted the relative income tax burden from the unmarried and the childless to families with two or more children. The Family Planning Services and Population Research Act of 1970 moved the Federal government into population control work in a big way, authorizing \$382 million for the period through 1973. In that latter year, the U.S. Supreme Court removed the suspense and legalized abortion-on-demand. With that act, the essential tools to limit the American population were in place.

Given the restrictive economic consequences of Malthusian ideas, it seems strange that a growing crowd of corporate leaders eagerly mounted the population-control bandwagon. In the mid-1960’s, for example, the president of E.I. duPont de Nemours & Co. lamented that “during the coming decade in the U.S. we will have to spend \$1,100.00 to provide basic public services for every person who represents a net increase in our

population,” and he endorsed efforts to reduce such numbers. The Chairman of the Board of Atlantic-Richfield suggested in 1971 that the business community’s old belief that population expansion was somehow essential to economic growth was flawed. He had not “the slightest doubt” that American business could meet the “zero growth” challenge. Corporate leaders sat on the Commission on Population Growth and affirmed its conclusions without dissent. A February 1970 Yankelovich survey of CEO’s in the *Fortune* 500 firms found that eight out of ten favored efforts that would curb American population growth.

Malthusian ideas also seeped into the major business journals. Writing in *Fortune*, for instance, Lawrence Mayer approvingly noted: “A sense that population growth is becoming a burden rather than a boom has taken hold in the U.S. with surprising swiftness.” Building his case for population restriction, he argued that such stability would lead to a reduction in poverty, less juvenile delinquency, and less government. He urged support for various antinatalist policies and he criticized “pro-natalist” incentives such as the customs and social arrangements that “operate to favor motherhood,” the tax exemption for children, and the FHA and VA mortgage insurance programs which had encouraged “the growth of all those child-centered suburbs.”

In sum, just as the American birthrate plummeted to an unprecedented level well below “replacement,” Malthusianism’s triumph was virtually complete.

The Death of Scientific Malthusianism

But some might ask, weren’t they right? What about those golf-tee-like charts showing the explosion in human numbers since 1800, and the continued reduction in the number of years it has taken for the world’s population to double: 200 years, 80 years, 37 years, 18 years . . . !? Aren’t we doomed to an ant-like existence unless we use all the tools available, including coercive ones, to control our reproduction?

The simple answer is “no.” At the very least, suspicions about the Malthusian arguments bantered about during the 1960’s should arise from the fact that all the dire predictions of that decade simply proved wrong. The mass famines *guaranteed* for the 1970’s and beyond have not occurred. There is, of course, great hunger in the world and many do die of starvation. But these deaths are attributable almost exclusively to wars,

political corruption, and the abject failure of government-run development schemes in the Marxist and Third worlds. Even in 1984, governments in the USA, Canada, Australia and parts of Europe are still trying to conjure up new ways of suppressing agricultural production.

More basic, though, are the fatal logical flaws in the whole Malthusian argument, ones that even Karl Marx understood. First, the birth of a baby not only represents the addition of a new mouth to the world, it also means the addition of a new mind capable of innovation and a new set of hands capable of work, provided they have the freedom to do so. Second, resources are not finite. Rather, it is the human mind which takes hitherto “worthless” materials—rocks and weeds, for example—and transforms them into something of value. Over the long run, human beings in this sense *create* new resources and thereby *reduce* scarcity; and the more minds added to that creative process, the *greater* the resource base. Third, even the maintenance of a quality environment has little relationship to human numbers, and *a strong linkage to human values and self-discipline*. This is why Holland (with a population density of 951 persons per square mile) is a delightful place to live, while Chad (with a density of only 8 persons per square mile) is a poor, starvation-racked pesthole.

Finally, the Malthusian credo blurred over the vital distinction between the long-term population problems faced, respectively, by developed and under-developed lands. Among the former, demographer Alfred Sauvy argues, a moderate *increase* in population size actually serves to *stimulate* industrial development. Indeed, such growth may be *necessary* for any social and economic progress. He points to the experience of France, which had a relatively stable—indeed, at points declining—population between 1850 and 1960 and which suffered from enormous economic troubles throughout the period. It was only during the 1960’s, after century-old obstacles to a free market—called “Malthusianisms” in the famed 1959 Rueff Report—were removed and population growth resumed, that the modern French economic boom began.

Concerning undeveloped countries, Sauvy admits that if the population challenge is too great, the result is negative. “Encourage an athlete to jump higher by moving a bar up a matter of inches each time,” he writes, “and he will improve his performance. [But] if the bar is moved up too fast he loses his motivation and jumps below it.” As Sauvy concludes:

“Some populations are stifled by their own vitality, like an overdeveloped tree.”¹⁷

Solid quantitative evidence affirming Sauvy’s argument came in 1977, with the publication of Julian Simon’s masterpiece, *The Economics of Population Growth*. Beginning his massive research project in 1968 as a committed Malthusian, Simon confessed to great confusion by 1970 as the available empirical data refused to confirm Malthus’ theory. After still further work, he converted to the anti-Malthusian side. Simon admits the obvious fact that “*any* additional person adds a burden to parents and society in the short run.” However, he proceeds to his major conclusion: “*Moderate population growth has positive effects on the standard of living in the long run (after, say, 30 to 100 years) in both more-developed and less-developed countries*—as compared to a stationary population and to a very fast population growth.” Recast in Malthus-like terms, Simon puts it: “If population has a tendency to increase geometrically, output has a tendency to increase geometrically and at least as fast—without apparent limit.” Simon acknowledges the theoretical point that population growth will stop *sometime*, “just as any other growth process will stop *sometime*.” But he denies that it “must” be “now.” Unlike “flies in a bottle or worms in a bucket,” he notes, people are capable of *foresight*. Humans, he insists, are not irrational slaves to their biological urges. Simon expresses confidence that—as in the past—people can be expected to reduce their fertility when they judge the negative consequences of having children to be greater than the positive consequences, both personally and collectively.¹⁸

In sum, Malthusianism as “science” is as dead today as it was a hundred years ago, vanquished by the human imagination and the resource-creating energy unleashed in a free society. Yet Malthusianism as “emotion” retains its grip on American public policy and American culture, discouraging population growth, financially punishing large families, and placing roadblocks in front of those innovators and entrepreneurs who would create new resources. As Frederic Werthman has succinctly put it: “every reactionary tendency of modern times . . . contains Malthusian elements.”¹⁹

The True Population Challenge

In retrospect, it is clear that the nation’s “population scare” was born out

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of the unique demographic conditions of the 1950's—the population surge in the underdeveloped world and the wholly unexpected “baby boom” in the United States following World War II—married to the pervasive irrationality and cultural disarray which characterized the Sixties. Indeed, century-long demographic trends suggest that if the Western democracies actually have a “population problem,” it lies in creating conditions whereby people are willing *and* allowed to reproduce and thereby maintain that moderately growing population necessary to economic and social progress. As Swedish social scientists Alva and Gunnar Myrdal argued back in 1934, the “catastrophic” fall in Western birth rates since 1890 has meant that *this* threatened stagnation “would come to dominate the whole complex of social and political questions” in the decades ahead.²⁰

The Myrdals' proposed solution was to socialize the child-rearing process, which was subsequently tried in Sweden—and failed. Yet the American experience between 1945 and 1960 suggests an alternative, noncoercive blueprint. It involves:

- Recreation of a cultural environment that affirms families and child-bearing as expressions of social responsibility;

- Restoring tax and public policies that give recognition to the special financial burdens of child-rearing and provide opportunities for home ownership;

- Rebuilding support for an economic system that encourages and rewards risk-taking, innovation, and growth;

- Emergence of national leadership that offers an optimistic vision for the American future.

This approach might undo much of the human and economic damage which two decades of Malthusian ascendancy have inflicted. More importantly, it would allow us to look to our own children with love, affection, and hope: not as the burden of, but as the true and necessary resources for the future.

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ERA: Equal Rights for Abortion?

John T. Noonan, Jr.

I AM PLEASED and honored to be here by invitation of this committee. I congratulate the chairman and the committee for their willingness to explore aspects and implications of the proposed Equal Rights Amendment not immediately obvious from a simple inspection of its words—for their willingness to try to understand how the ERA will work in practice.

I come as the representative of no organization and speak only as a law professor with some familiarity with how constitutional provisions are interpreted by courts in the United States. I come with no animus against the ERA. I am a believer in the equality of men and women and a defender of the rights of both sexes. My only concern—I admit it at the start—is that the terrible scourge of legalized abortion which now devastates our country not be wittingly or unwittingly given new strength by any formal amendment of the Constitution. It is plain beyond argument that the abortionists do not have the power to pass an amendment asserting, “Abortion is a constitutional right.” It would be a tragedy if the equivalent of such an amendment crept into the Constitution in disguise.

When I approached the examination of the ERA I did so alive to such a danger, but with an open mind as to whether in fact the ERA created such a danger. I should like to set before the committee the assumptions on which I have proceeded, the conclusions I have reached, and the reasons for these conclusions.

ASSUMPTIONS

1. I have assumed that when we seek the meaning of the ERA we are not looking at words abstracted from their context. We are looking at words as they would be understood in 1984 in the United States of America. We are not attempting the exegesis of words unfolded on some scroll set in the heavens. We are looking at a constitutional amendment which has had proponents and a legislative history. We are looking at an amendment which will, if enacted, be interpreted by

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a federal judiciary pretty nearly the same as it is today. We are trying to ascertain what *these* federal judges will make of *these* words with *this* legislative history.

2. I have assumed that everyone knows that the principal basis on which *Roe v. Wade* was decided, and on which its holdings were recently reaffirmed in *City of Akron v. Akron Center for Reproductive Rights*, was the court-created doctrine of privacy. No one argues that the ERA or equal rights was the basis for these decisions. The question is whether the ERA would provide a substitute rationale if the privacy doctrine should be abandoned as their basis.
3. I have assumed that cases decided under the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Fifth Amendment—in particular the Abortion Funding Cases—are not authoritative guidance as to what the Supreme Court would do under a constitutional amendment specifically banning discrimination “on account of sex.”
4. I have assumed that the course of the Court’s changing position on Title VII of the Civil Rights Act from *General Electric Company v. Gilbert* in 1976 to *Newport News Shipbuilding* in 1983 does give guidance as to how the present Court would construe a constitutional amendment (the ERA) which so closely parallels Title VII in respect to sex discrimination.

CONCLUSIONS

The conclusions I come to are as follows:

1. It is certain that the ERA would have a substantial impact on litigation involving abortion rights.
2. It is highly probable that the ERA would require the federal and state funding of elective abortions.
3. It is highly probable that the ERA would invalidate existing vestigial restrictions on abortion.
4. It is probable that the ERA would invalidate the exemption now accorded to doctors, nurses, and hospitals objecting on grounds of conscience to the performance of abortions.
5. It is probable that schools and colleges discouraging abortion among their students by disciplinary regulations would lose their status as pub-

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lic charities and their tax exemption under the Internal Revenue Code.

6. It is highly probable that if the Supreme Court abandoned the privacy doctrine as a basis for abortion rights, the ERA would provide a new basis for establishing those rights.
7. It is possible that the ERA would provide two checks on abortion by establishing a constitutional basis for statutes extending to fathers a share in the decision to abort and for statutes prohibiting abortion on the basis of the sex of the unborn child.
8. On balance, although the ERA could be a means of imposing certain limits on the right to an abortion, the net impact of the ERA would be a pro-abortion impact. It is not too much to say that a vote for the ERA as presently drafted is a vote for abortion. It is not too much to say that there is an ERA-abortion connection and that in interpretation and effect the ERA will mean "Equal Rights for Abortion" in the governmental funding of abortion, the elimination of conscientious objection to abortion, the denial of tax exemption to educational institutions discouraging abortion, and the grounding of the abortion right in the text of the Constitution.

REASONS

I reach these conclusions both by consideration of the ERA as explained by its legislative history and by consideration of the decisions of the present Supreme Court. I shall examine these guides to the ERA's meaning in turn.

1. "STRICT SCRUTINY" AND THE "UNIQUE PHYSICAL CHARACTERISTIC" TEST

"Equal Rights for Men and Women," the *Report* of the Senate Judiciary Committee on the ERA in 1972, adopted the views of Congressman Don Edwards and thirteen other members of the House Judiciary Committee as stating "concisely and accurately the understanding of the proponents of the Amendment." According to them, the ERA would make gender a prohibited classification with an important exception. Sex classification would be permitted if based on physical characteristics unique to one sex.¹ Under this exception the key question is whether abortion is a procedure so dependent on a unique physical characteristic of women that the ERA has no application to it because equality has no

meaning when applied to a unique characteristic. In other words, does the ERA simply bypass the whole heated area of the abortion controversy because only women can be pregnant and so only women can have abortions? Would legislation taking into account such a unique physical characteristic of women *qua* women still be valid if the ERA were passed?

The Senate Committee Report followed a significant article by proponents of the ERA published in the *Yale Law Journal* in 1971. This article by Barbara A. Brown, Thomas J. Emerson, Gail Falk, and Ann E. Freedman—I shall refer to it as the Brown-Freedman article—was not only a gloss on the proposed amendment by articulate supporters of the amendment. It was distributed to all members of Congress. It was made part of the legislative history of the ERA by the amendment's congressional sponsors—Congresswoman Martha Griffiths introduced it into the legislative history in the House; Senator Birch Bayh, the author of the *Senate Report*, introduced it into the legislative history in the Senate, observing that it was a “masterly piece of scholarship.” The article is authoritative as to what the *Senate Report*’s “unique physical characteristic” exception meant.²

According to the Brown-Freedman article, there could be, if the ERA were enacted, legislation which applied differently to one sex, which would not necessarily be invalid. If a law “takes into account” physical characteristics unique to one sex, the law, the authors say, could be valid.³ But the law would have to be reviewed for constitutionality by the criteria courts use, “when they are reviewing, under the doctrine of strict scrutiny, laws which may conflict with fundamental constitutional rights.”⁴ The usual example of strict scrutiny review is the review of laws discriminating on the basis of race. Very few statutes impinging on race survive strict scrutiny.

The Brown-Freedman article, and the *Senate Committee Report* following it, were silent—even though they were written at a time before *Roe v. Wade* when abortion was a debated right—as to whether or not abortion laws would survive strict scrutiny. The article did, however, give two examples of laws that would meet the test—laws giving medical leave for the delivery of a child and laws punishing one species of rape.⁵ The *Senate Committee Report* adopted the example of a law paying the medical costs of child bearing.⁶ The article also gave laws that would not withstand strict scrutiny—that would be unconstitutional if the ERA

were the law of the land. These laws included the White Slave Traffic Act (the Mann Act) protecting girls and women from being used as articles of commerce in “white slavery”;⁷ laws prohibiting the statutory rape of girls under the age of sixteen;⁸ laws prohibiting rape by instrument;⁹ and laws defining rape to include a man forcing a woman to have sodomitic intercourse.¹⁰ None of these laws, the authors said, protect a unique physical characteristic of women. They protect an assumed social weakness (the Mann Act, statutory rape laws); or they prohibit acts which could be forcibly performed on men. In either case they are not sexually neutral and so are bad under the ERA. They could not survive “strict scrutiny.” It is apparent from these examples that laws precisely and exclusively “taking into account” a physical feature not shared by the two sexes are few. Laws designed to protect women from sexual exploitation and assault are not sufficiently exclusive and precise to qualify.

The authors’ approval of a law giving leave for delivery of a child did suggest that if a statute directly related to a woman’s reproductive capacity it might survive strict scrutiny—that despite the severity of the test, abortion laws might pass. But this possible inference was dispelled by three of the authors themselves. In 1975 in *General Electric Company v. Gilbert*, Barbara A. Brown and Ann E. Freedman for the Women’s Law Project joined with Thomas I. Emerson and representatives of the American Civil Liberties Union to file an amicus curiae brief with the Supreme Court. The brief explained that the Women’s Law Project was “particularly concerned with the theory and implementation of the equal rights amendment” and that the ACLU wanted to end “gender-based discrimination.”¹¹ Jointly the authors of the brief stated how the ERA, if it had been in force, would have applied to General Electric’s disability plan which excluded coverage for pregnancy.

GE was defending its plan on the ground that as men had no coverage for pregnancy, there was no discrimination; the sexes were treated alike; what was omitted was medical treatment of a condition physically unique to women. The Brown-Emerson-Freedman brief was scornful of this rationale. Their article had shown that discrimination of this kind would be subject to “strict scrutiny” under the ERA. Strictly scrutinized, pregnancy soon lost its uniqueness.

Pregnancy—Brown, Emerson and Freedman observed—is a condition which “possesses a number of properties, some of them shared with other

conditions (need for medical care, period of disability) and some wholly unique (the birth of a child is the usual result). The uterus, too, shares some characteristics with other organs (subject to disease and malfunction) and has some functions wholly unique to it (reproductive function).” Only if the GE plan related “precisely and exclusively to the reproductive function” would it satisfy strict scrutiny. Obviously, it did not.¹²

By the Brown-Emerson-Freedman standard only a statute relating “precisely and exclusively” to a unique physical characteristic can survive strict scrutiny. Could an abortion statute meet this test? Abortion does have some special aspects. It also shares some characteristics with other medical procedures—it is an operation; it is dangerous to the patient; it results in temporary disability. Could a statute be so tailored that it did not bear on these “shared characteristics.” It is hard to imagine such a statute. Just as a plan not funding pregnancy as a disability neglected the characteristics which abortion shares with other medical procedures, so any law touching on abortion affects characteristics which abortion shares with other medical procedures. To regulate—or not to fund—a procedure with shared characteristics would violate the ERA by the Brown-Freedman test.

Moreover, by the Brown-Emerson-Freedman standard is there *anything* so special about abortion that it could be classified as relating to a unique physical feature of women? Abortion eliminates what they say is unique about pregnancy when they acknowledge that “the birth of a child is the usual result.” The usual result of an abortion is non-birth. Abortion reduces a woman to a non-childbearing condition. In this respect she becomes undifferentiated from a man. On the Brown-Emerson-Freeman analysis, a statute relating to abortion would not relate to a physical characteristic unique to women.

Suppose it is said that abortion relieves a woman of a burden which only a woman can bear—that is what is unique about it. But a man can have a tumor that is unwanted. The operation which removes the tumor is very like an abortion in the eyes of those sympathetic to the abortion liberty.¹³ Those sympathetic to the abortion liberty are the great majority of federal judges who have decided abortion cases and a clear majority of the Supreme Court. It would be hard for the present judiciary to acknowledge that there was something so special about the burden

relieved by abortion that the operation was not to be classified under the ERA with other operations destroying unwanted growths.

Reflection will convince us that what is to be classified as physically unique depends a great deal on the purposes of the classifier. Let us take some examples from Justice Brennan, another defender of strict scrutiny of sexual classifications, as he dissented in the eventual *Gilbert* judgement in favor of General Electric. He took note of GE's contention that there was no illegal discrimination because the risk of pregnancy was unique to women and observed that "risks such as prostatectomies, vasectomies, and circumcision . . . are specific to the reproductive systems of men."¹⁴ These risks were covered by GE's plan; hence, Justice Brennan argued, the plan discriminated against the reproductive systems of women. Here the classifier, wanting to prove discrimination, takes as a unit of comparison "the reproductive system." The uniqueness of childbearing disappears. By the same token, a judge sympathetic to abortion could take the reproductive system as the unit of comparison and find that a medical aid program which paid for prostate operations and vasectomies but not abortions failed the strict scrutiny test under the ERA.

Whether the category employed was "reproductive system" or "unwanted tumor" or "medical operation," it would not be difficult to find classifications which eliminated any uniqueness in abortion. By the Brown-Emerson-Freedman understanding of ERA, any denial then of abortion rights would be constitutionally improper. Existing vestigial restrictions on abortion and abortion funding would be swept away by the ERA along with the White Slave Traffic Act, statutory rape and sodomitic rape.

2. "STRICT SCRUTINY" AND THE "BUT FOR" TEST.

To this point I have explored the possibility that abortion would be an exception on the basis of the legislative history of the ERA. I now turn to the test developed by the Supreme Court in expounding a statute parallel to the ERA, Title VII of the Civil Rights Act. But as prelude to that test it must be noted that the Brown-Freedman exception on the basis of unique physical characteristics has not been adopted by all proponents of the ERA. Indeed, some interpreters of state ERAs take the opposite view—the more a distinction is based on a unique feature of gender the more likely is it to be discriminatory.

In 1978, for example, certified providers of Medicaid abortion services moved to intervene in a suit seeking to enjoin Hawaii from funding elective abortions. The intervenors declared, "Abortion is a medical procedure performed only for women; withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex."¹⁵ In 1980, the Civil Liberties Union of Massachusetts, an affiliate of the ACLU, attacked the Massachusetts restriction on abortion funding, stating in its complaint, "By singling out for special treatment and effectively excluding from coverage an operation which is unique to women, while including without comparable limitation a wide range of other operations, including those which are unique to men, the statutes constitute discrimination on the basis of sex, in violation of the Massachusetts Equal Rights Amendment."¹⁶ In 1982 the Women's Law Project, "particularly concerned with the theory and implementation of the equal rights amendment," filed a complaint against Pennsylvania's restriction on abortion funding. The complaint declared: "Pregnancy is unique to women. 62 P.S. sec. 453 and 18 Pa. C.S.A. sec. 3215(c), which expressly deny benefits for health problems arising out of pregnancy, discriminate against women recipients because of their sex."¹⁷

These interpreters of state ERAs were moving in the direction predicted for the Supreme Court by Ruth Bader Ginsburg (the director of the ACLU's Women's Rights Project, now Circuit Court Judge Ginsburg). She wrote in 1978, "Eventually the Court may take abortion, pregnancy, out-of-wedlock birth, and explicit gender-based differentials out of the separate cubbyholes in which they now rest, acknowledge the practical interrelationships, and treat these matters as part and parcel of a single, large, sex equality issue."¹⁸ In short, all the issues related to reproduction by women were to be handled under the rubric of equality. Judge Ginsburg was in fact prophetic. Her vision is, in fact, the one that the Court's recent decisions under Title VII make likely to be a reality if the ERA becomes the law of the land.

In the 1978 case of *Los Angeles Department of Water and Power v. Manhart*, the Supreme Court considered the lawfulness under Title VII of a city pension plan which made women contribute more than men on the ground that women live longer than men. The Court held the plan unlawful. Writing for the Court, Justice Stevens observed that the plan

was based not on a fictional nor a prejudicial stereotype of women. The plan was based on a reality. "As a class women live longer than men."¹⁹ Although the plan was based on a biological characteristic unique to American women as a class, it was an unlawful, gender-based discrimination. It was a discrimination which responded precisely to a physical characteristic of American women taken as a sex. In Justice Stevens' words, "Sex is exactly what it is based on."²⁰

Being based on sex made the discrimination unable to pass what Justice Stevens characterized as a "simple test." The test was whether the evidence showed "treatment of a person in a manner which but for that person's sex would be different."²¹ By this test, if "but for" a woman being a woman she would be treated differently, such treatment by anyone subject to Title VII violates federal law. There is reason to believe on the basis of two cases decided in the 1983 Term that the present Supreme Court would use the "but for" test in applying the ERA to abortion.

In *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, Arizona arranged for women employees of the state to be paid smaller monthly annuity benefits than men employees. The Court struck down the scheme as it had struck down the Los Angeles plan for the same reason. Writing for the Court, Justice Marshall reaffirmed the validity of the "but for" test. He did not dispute the actuarial basis for the Arizona scheme, that women do live longer. He equated the use of this biological characteristic of the class with the use of race in actuarial computations. Just as the use of race as a predictor might be actuarially sound but federally illegal, so was the use of sex.²² By the "but for" standard, a legal provision which was based on gender could not be the basis of state action.

Now it might be thought that both the Los Angeles and Arizona plans were unlawful because they discriminated against individual women who were shorter-lived than the average, and in fact in each case the Court laid stress on the statutory language of Title VII forbidding discrimination to "individuals." But as Justice Powell, dissenting, pointed out, all insurance is based on averages.²³ No individual as such is harmed by being made a member of a class on which the average is based. There is harm only if the class as a whole is one which the law will not permit to be established. In both the Los Angeles and Arizona cases, it is the whole

class which as a class possesses a unique, gender-based characteristic—longevity. It is this class constituted by a unique physical characteristic which fails the “but for” test of legality. As the class is unlawfully constituted, so every individual within the class who is harmed has a basis for objection. The same would hold of a class constituted by reproductive capacity.

It might still be argued that longevity as a physical characteristic is different from the capacity to bear children. Not every woman, it might be said, is long-lived, but every woman, *qua* woman, is capable of reproduction. Such an argument, it is obvious, appeals to fiction not fact. A substantial number of women are incapable of having children. The physical characteristic is true of the majority, as longevity is true of the majority, not of every individual. If classification by longevity is unlawful when the class is determined by sex, so is classification by reproductive capability.

We do not have to speculate about what the present Supreme Court thinks about the “but for” test applied to the reproductive capacity of women. In the same 1983 Term in which it decided the Arizona annuity case, the Court decided *Newport News Shipbuilding and Dry Dock Co. v. Equal Employment Opportunity Commission*. The issue was whether a disability plan which gave medical disability benefits to employees and their spouses was violative of Title VII because the plan covered the medical expenses of the spouses of female employees but omitted to cover the medical expenses for pregnancy of the spouses of male employees. The Court held the plan illegal. In form, the discrimination was against the male employees—they did not get the same coverage for their wives that female employees got for their husbands. In substance, the basis of the discrimination was the unique physical characteristic of women—only women could have a baby; only the medical treatment which childbearing required was denied coverage.²⁴

Writing for the Court, Justice Stevens rejected the test the Court had used in 1976 when in *General Electric Co. v. Gilbert* it upheld G.E.’s exclusion of pregnancy from its disability plan.²⁵ Then the Court had thought it enough to say that the company did not intend an invidious discrimination. *Gilbert* had been overridden by Congress enacting the Pregnancy Discrimination Act, but that act appeared to relate only to the pregnancy disability of female employees. In fact, in an exchange on the

Senate Floor, Senator Williams, the bill's sponsor, had so assured Senator Hatch.²⁶ Going beyond Congress' reversal of *Gilbert*, the Court found that the reasoning of that case had also been repudiated. *Gilbert*, Justice Stevens explained, had "concluded that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face, because only women can become pregnant."²⁷ Now the Court, following the line indicated by Congress, but going further, held that the plan discriminated because of "sex." The Court repeated, endorsed and applied what was again called "the simple test" of "but for."²⁸

It is widely recognized that Title VII sex discrimination cases are valuable precedent for knowing how the ERA will work: as Mary Dunlap put it, in these cases "the past is prologue" to the ERA.²⁹ It is also widely recognized that "but for" is a test not only of simplicity but power. In the field of torts if "but for" is used as a test for causation, "there is no place to stop."³⁰ Analogously, there is no place to stop when "but for" is made the test of sex discrimination. The Supreme Court in the "but for" Title VII cases has adopted a test that eliminates even such exceptions as Brown-Freedman once imagined to be compatible with the ERA.

A "but for" standard virtually makes certain that any time a person is denied a right because of a physical characteristic unique to his or her own sex, Title VII is violated. Distinctions based on unique gender characteristics become paradigm cases of unlawful discrimination. "But for" what is uniquely female or uniquely male, the person would be getting the same benefits as those of the opposite sex. What is true under the language of Title VII ("because of" sex and "on the basis of" sex), we have every reason to believe would be true under the parallel words of the ERA, "on account of sex." Strikingly, Congress has found it necessary to write into the law where "because of" sex and "on the basis of" sex are defined a specific exception stating that these definitions do not require an employer to pay for non-life endangering abortions.³¹ Without the statutory exception, elective abortion would be included. The ERA has no similar exception. Discrimination focusing on a unique feminine characteristic would be a paradigm case of unconstitutional discrimination.

It may be objected that the Court did not adopt this approach in interpreting the Equal Protection Clause in the cases involving a state's refusal to fund elective abortions—*Maher v. Roe* in 1977 and *Williams v.*

Zbaraz in 1980; and that similarly the Court avoided this approach in interpreting the equal protection component of the Fifth Amendment in *Harris v. McRae*, the federal abortion funding case. It has indeed been objected that the *Abortion Funding Cases* show that the Court still approaches abortion as a question relating to privacy and “summarily” dismisses the equal protection argument. The conclusion has been drawn that, as long as the privacy rationale for *Roe v. Wade* dominates the Court’s approach, the ERA will have an insignificant effect on abortion funding or abortion rights generally.³²

These objections and this conclusion result from attempting to answer the question, “What is the effect of the ERA?” and then assuming, contrary to the basis of the question, that the ERA is not in effect. Of course, as long as there is no ERA, abortion supporters and the Court will depend on the privacy rationale. But let it be enacted, how the situation would be changed!

Contrary to the objections, the Court in fact took very seriously the equal protection arguments the pro-abortion advocates were able to muster in *Maher*, *Williams*, and *McRae*. In *Maher* four pages are devoted by the Court to the equal protection claims; in *Harris* (which was also dispositive of *Williams*) five pages.³³ This is scarcely summary consideration. But the equal protection provisions of the Constitution do not use the language of Title VII or the ERA. There is no language in them referring to discrimination “because of sex,” “on the basis of sex,” or “on account of sex.” The Court was not prepared to bring its new Title VII approach to bear on the constitutional provisions on equal protection. Consequently what the Court did in interpreting two parts of the Constitution lacking the language of the ERA has little if any precedential value for interpreting the ERA itself. If the Equal Protection Clause were adequate for the objectives sought by the proponents of the ERA, there would be no need of the ERA. It is the new language of the ERA that is crucial. As to the new meaning of that language the recent Title VII cases are clear precedent.

In the light of these cases—*Los Angeles Water*, *Arizona Governing Committee*, *Newport News Shipbuilding*—we do have helpful guidance as to how the present Supreme Court would apply the ERA, if enacted, to legislation related to abortion:

1. If a state funded medical operations but did not fund abortions, would

a woman seeking an abortion be denied a right to medical treatment which, but for her sex, she could have? By the simple “but for” test, the Court’s answer would be a clear Yes.

2. If a statute permitted a doctor, nurse, or hospital to refuse to participate in an abortion on the ground of religious objection to the procedure, would a woman seeking an abortion be denied a right to medical treatment that, but for her sex, she would have. By the same simple test, the Court’s answer would be Yes. Reliance by the doctor, nurse or hospital on the exempting statute would constitute state action, bringing the ERA into play. The further question would then be presented whether the First Amendment freedom of religious exercise would prevail over the right conferred by the new constitutional amendment we have hypothesized as adopted. It seems probable that the new amendment would control. On this point the 1983 case of *Bob Jones University v. United States* is enlightening: here governmental policy, carrying out a constitutional principle of nondiscrimination on account of race, outweighed religious liberty.³⁴ It is likely that discrimination “on account of sex” under the ERA would be treated as discrimination on account of race is now treated under the Fourteenth Amendment.
3. If a college or even a school with a religious commitment enforced a policy denying abortion to its students or disciplining students who had abortions or expelling students who espoused, promoted and advocated abortion, it would under the ERA be in grave danger of losing its tax exemption. As *Bob Jones University* made clear, a charity ceases to be a public charity if it adopts disciplinary rules “at odds with the common community conscience” as that conscience is construed by the Supreme Court interpreting the Constitution.³⁵ Under the ERA and the “but for” test, any singling out of abortion in disciplinary measures or choice of students would be contrary to public policy. As religious commitment was subordinated to public policy in *Bob Jones University*, so it could be subordinated here in finding the committed schools and colleges to be no longer tax exempt and gifts to them no longer deductible as charitable contributions. It would be open to individual taxpayers to challenge the tax exemption of discriminating institutions as black taxpayers successfully challenged an exemption for certain discriminatory schools in Mississippi.³⁶ At a minimum the committed schools and colleges would face prolonged and dangerous litigation; at a maximum they would be stripped of their charitable status.

4. Could the state still require notice to a parent of their immature daughter's intention to have an abortion? Could the state still require parental or judicial consent to the abortion of a minor? Could the state still require a second physician in late term abortions?³⁷ By the simple "but for" test, a notice requirement, a "substitute consent" requirement and a second physician requirement would all be equally invalid. If a woman asked for an abortion at any time during pregnancy, could a state constitutionally deny her access to the medical treatment she sought? By the simple "but for" test she would be, if denied, denied because of her unique physical capacity as a woman to have an abortion. The law preventing such abortion would, under the ERA, be held constitutionally invalid if the "but for" criterion were used, with the possible exception of two situations set out in (5).
5. If a statute recognized a husband's right to consent to an abortion, it could, under the ERA, be upheld. To deny a husband the right to participate in the decision to kill a child he has participated in conceiving would, arguably, be to deny him a right on account of his sex. The Court would be faced with a choice between denying a woman a right to medical treatment on account of her sex or a man a right to participate in the abortion decision on account of his sex. Given the present Court's preferential treatment of the abortion right, it would probably decide in favor of the woman.

Suppose, however, a statute were enacted prohibiting abortion as a means of sex selection. If a strong demonstration was made of what is widely believed to be the case—that some abortions reflect a sex preference in favor of male babies and against girl babies—the Court could uphold the constitutionality of the statute. The Court would have to choose between discrimination "on account of sex" in the womb and discrimination "on account of sex" in supplying medical treatment. The argument that "but for" their being girls the girl babies would not be killed should have a strong reception under the ERA.

The preceding questions have dealt with the impact of the ERA on the assumption that *Roe v. Wade* remained the law. Suppose that the present Supreme Court heeded the contentions of numerous authorities on constitutional law that the Court-invented right of privacy has been stretched beyond reasonable limits in invalidating the laws regulating abortion. Suppose that the Court abandoned the privacy rationale of *Roe v. Wade*. Already in *Akron* Justice Powell has declared that Justice O'Connor's

dissenting opinion “rejects the basic premise of *Roe* and its progeny.”³⁸ Already the *Harvard Law Review* says that, in *Akron* itself, the Court “subtly evades women’s abortion rights even as it purports to affirm them.”³⁹ Suppose the Court recognized its error, and, as it has on numerous past occasions, decided to correct its interpretation of the Constitution. Would its path be blocked by an enacted ERA? Clearly, yes, by the “but for” test.

With the ERA in place, and “but for” the criterion, any statute regulating abortion, with the two possible exceptions just discussed, would be unconstitutional. When a woman is denied medical treatment of her reproductive system because it is a reproductive system, the discrimination is because she is a woman with a unique physical feature, but for which she would be treated. In Justice Steven’s words, “Sex is precisely what it [the discrimination] is based on.”⁴⁰ With “but for” the test, the ERA unless overridden by another express constitutional amendment would lock the abortion liberty into the Constitution.

The Dilemma of Proponents of the ERA

The proponents of the ERA in formal testimony before the Congress have been remarkably reticent in speaking of the relation between the ERA and abortion. The famous Brown-Freedman article, which was so informative about the many criminal laws which the ERA would invalidate, was silent about abortion. Application of the privacy doctrine to abortion had not yet been attempted by the Supreme Court. The ERA was either applicable or it was not applicable to the criminal statutes regulating abortion. Brown-Freedman said nothing. Was the silence the result of confusion or of doubt or of prudence?

Senator Bayh’s *Report* for the Judiciary Committee also said nothing. *Roe v. Wade* was still undecided; Senator Bayh was later to be a strong defender of the abortion liberty. Did Senator Bayh have no views, one way or the other, on how the ERA would affect abortion law?

One prominent proponent of the ERA, Professor Thomas I. Emerson, has abandoned this coyness and described the ERA-abortion connection as “pure red herring.”⁴¹ But he has not shown why either by his own test or by that of the Court interpreting Title VII there is not a close connection. The contrary opinion that the ERA would decisively affect abortion law has been authoritatively stated by the chairman of this committee,

Senator Orrin Hatch; by Senator Sam Ervin; and by Rex E. Lee, the present Solicitor General of the United States.⁴² The red herring is really *Roe* and its primary rationale which the ERA would effectively supersede and surpass.

With so much legislative history and such clear Supreme Court precedents to the contrary, it is difficult to believe that any informed proponents of the ERA can now maintain that abortion is a red herring when the effects of the ERA are considered. If the proponents do not want the ERA to be affected by the abortion controversy they have an easy option: to agree to an amendment of the ERA specifying explicitly that nothing in the ERA confers a right to abortion or the funding of abortion. They appear to be unwilling to agree to such an amendment.

The dilemma that the proponents of the ERA face is this: If they acknowledge that the ERA will have an enormous impact on abortion legislation, abortion litigation, and schools, colleges, and hospitals opposed to abortion, they will lose crucial votes in the Congress and in the state legislatures. They will be in effect sponsoring an amendment rejected by the seventy percent of the country that rejects abortion on demand.⁴³ But if they disclaim any effect of the ERA on abortion they will abandon the legislative history of the amendment and the Supreme Court's interpretation of Title VII. They will also offend, perhaps mortally, that small, unrepresentative but militant band which rejoices that ERA means Equal Rights for Abortion.

NOTES

1. Committee on the Judiciary, "Equal Rights for Men and Women," *Senate Report* No. 92-689, 92nd Cong., 2d Sess. (1972) pp. 11-12.

2. See Brief Amici Curiae of the Women's Law Project and the American Civil Liberties Union, December 23, 1975 in *General Electric Company v. Gilbert*, United States Supreme Court, Docket No. 74-1589, [hereafter *Women's Law Project Brief*] p. 14 (on the use of the article in Congress); Minority Views of Mr. Ervin in *Senate Report* No. 92-689, p. 36 (Senator Bayh's tribute).

3. Barbara A. Brown, Gail Falk, Thomas I. Emerson, and Ann Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 *Yale Law Journal* 871 (1971) at 893.

4. *Ibid.* at 894.

5. *Ibid.* at 894.

6. *Senate Committee Report* at 12.

7. Brown-Freedman, "The Equal Rights Amendment" at 964.

8. *Ibid.* at 957.

9. *Ibid.* at 955, note 205.

10. *Ibid.* at 956. The *Senate Report* authored by Senator Bayh says broadly at p. 12 that "rape" could still be a crime but fails to take up the examples given by Brown-Freedman. Elsewhere the *Report* at p. 16 suggests that statutes void for being "under-inclusive" under ERA could be amended by the courts. Clearly no court has the power to amend a criminal statute to embrace a new class. The courts would simply have to declare the laws unconstitutional.

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11. *Women's Law Project Brief* 1, 2.
12. *Ibid.* 16-19.
13. Note such respectable federal judges as Frank Coffin of the First Circuit Court of Appeals comparing the termination of childbearing capacity by sterilization to "excisions of benign tumors which could cause subsequent neurological problems," *Hathaway v. Worcester City Hospital* 475 F.2d 701 (1st Cir. 1973) at 705; Judge Jon O. Newman of the Second Circuit declaring *Roe v. Wade* conveyed the teaching that basically abortion and childbirth "are simply two alternative medical methods of dealing with pregnancy," *Roe v. Norton* 408 F. Supp. 660 (D. Conn. 1975) at 663, n. 3; and Judge Clement Haynsworth of the Fourth Circuit reading *Roe* to mean that "the fetus in the womb is neither alive nor a person," *Floyd v. Anders* 440 F. Supp. 535 (D. So. Car. 1977) at 539.
14. *General Electric Co. v. Gilbert* 429 U.S. 125 (1976) at 152 (dissenting opinion). Justice Brennan's examples are particularly appropriate because his approach "illustrates the approach contemplated by the ERA," Ann E. Freedman, *Statement Concerning H. J. Res. 1*, November 3, 1983, before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee. Freedman's comments relate to Justice Brennan's position in *Geduldig v. Aiello* 417 U.S. 484 (1974), a position which he carried over into *Gilbert* and that has now become the position of the Court, see *infra* at notes 24-25.
15. *Hawaii Right to Life, Inc. v. Chang, Director of Department of Social Services and Housing*, Civ. No. 53656, Hawaii First Circuit Court, 1978, cited in Karen J. Lewis, "A Legal Analysis of the Potential Impact of the Proposed Equal Rights Amendment (ERA) on the Right to an Abortion or the Funding of an Abortion." (Congressional Research Service, October 20, 1983) p. 10.
16. Complaint, *Moe v. King*, Supreme Judicial Court of Massachusetts, Civil No. 80-286, filed July 9, 1980, cited in Lincoln C. Oliphant, "ERA and the Abortion Connection," 7 *Human Life Review* (Spring 1981) 43.
17. *Joanne Fischer et al v. Department of Public Welfare*, Commonwealth Court of Pennsylvania, No. 283 C.D. 1981, filed December 15, 1981, p. 24 (unpublished).
18. Ruth Bader Ginsburg, "Sex Equality and the Constitution" (the 1978 George Abel Dreyfous Lecture at Tulane University), 52 *Tulane Law Review* 451 (1978) at 462. The difference should be noted between this approach and Kenneth M. Davidson, Ruth Bader Ginsburg and Herma Hill Kay, *Text, Cases and Materials on Sex-Based Discrimination* (St. Paul: West Publishing Co., 1974) 108 where "physical characteristics unique to one sex" are seen as an exception to the ERA.
19. *Los Angeles Department of Water and Power v. Manhart* 435 U.S. 702 (1978).
20. *Ibid.* at 713.
21. *Ibid.* at 711.
22. *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983) at 3498.
23. *Ibid.* at 3509 (dissenting opinion).
24. *Newport News Shipbuilding and Dry Dock Company v. EEOC* 103 S. Ct. 2622 (1983).
25. *Ibid.* 2628.
26. 123 *Cong. Rec.* S 15, 038-39 (September 16, 1977), also quoted by Justice Rehnquist in *ibid.* at 2635-2636 (dissenting opinion).
27. *Ibid.* at 2631.
28. *Ibid.* at 2630-2631.
29. Mary C. Dunlap, "The Equal Rights Amendment and the Courts," 3 *Pepperdine Law Review* 42 at 63 (1975), a study commissioned by the Equal Rights Amendment Project, California Commission on the Status of Women.
30. *Prosser on Torts* (4th ed., 1971) 239.
31. 42 *U.S. Code* sec. 2000e(k).
32. Ann E. Freedman to Congressman Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights, House Judiciary Committee, November 7, 1983.
33. *Maher v. Roe* 432 U.S. 464 (1977); *Harris v. McRae* 448 U.S. 297 (1980); cf. *Williams v. Zbaraz* 448 U.S. 358 (1980).
34. *Bob Jones University v. United States* 103 Ct. 2017 (1983).
35. *Ibid.* at 2029.
36. *Green v. Kennedy* 309 F. Supp. 1127 (D. D.C.) *app. dismissed sub nom. Cannon v. Green* 398 U.S. 956 (1970).
37. See *Planned Parenthood of Missouri v. Ashcroft* 103 S. Ct. 2517 (1983) (second physician and substitute consent requirements upheld); *H.L. v. Matheson* 450 U.S. 398, 406 (1981) (notice to parent for immature minor upheld).
38. *City of Akron v. Akron Center for Reproductive Health* 103 S. Ct. 2481 (1983) at 2847, n. 1.

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39. "The Supreme Court, 1982 Term," 97 *Harvard Law Review* 1 (1983) at 86.

40. *Supra* at n. 21.

41. Thomas I. Emerson, "Statement on Proposed Resolution to Rescind Connecticut's Ratification of the Equal Rights Amendment," *Hearings on S.J. Res. 134 before the Sub-Committee on the Constitution of the Senate Judiciary Committee*, 95th Cong., 2nd Sess. (1978) at 138.

42. Orrin G. Hatch, *The Equal Rights Amendment. Myths and Realities* (Savant Press, 1983) 48; Sam to the Eagle Forum, September 22, 1975, quoted in *ibid.* 48; Rex E. Lee, *A Lawyer Looks at the Equal Rights Amendment* (Provo: Brigham Young University Press, 1980) 128 n. 27.

43. See John T. Noonan, Jr., *A Private Choice* (New York: The Free Press, 1979) 73-74.

Toward a Family Welfare Policy

Michael Novak

The goals of our public welfare program must be positive and constructive. . . . It must stress the integrity and preservation of the family unit. It must contribute to the attack on dependency, juvenile delinquency, family breakdown, illegitimacy, ill health, and disability. It must reduce the incidence of these problems, prevent their occurrence and recurrence, and strengthen and protect the vulnerable in a highly competitive world.

—JOHN F. KENNEDY
Budget Message
February 1, 1962

President Kennedy's welfare message to Congress yesterday stems from a recognition that no lasting solution to the problem can be bought with a welfare check. The initial cost will actually be higher than the mere continuation of handouts. The dividends will come in the restoration of individual dignity and in the long-term reduction of the need for government help.

—EDITORIAL
The New York Times
February 2, 1962

IN AMERICAN POLITICS, there is no longer any argument of principle between the major parties concerning two propositions: 1) Every citizen of the United States is entitled to the opportunity to improve his or her condition; and 2) There must be a floor or safety net providing at least the rudiments of decent living conditions under every citizen.

In this respect, basic Catholic social teaching has been in principle vindicated within the American system. This is not to say that important debates do not remain or that the agenda for action has been fulfilled. It is only to say that, on these two propositions at least, agreement in principle has been reached. Debate now centers on the *design* of actual programs and the probable consequences of alternative designs, not on the matter of principle.

Furthermore, a capitalist economy, a democratic political system, and a

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pluralistic Jewish-Christian moral-cultural system—the three-systems-in-one which constitutes democratic capitalism—properly provides for the welfare of dependent and needy persons. It is not only consistent with, but incumbent upon, a democratic capitalist society to “promote the general welfare” through care for the less fortunate. Those on the left tend to turn for such care to the state; those on the right tend to turn for such care to the private sector. Such differences afford much controversy and political struggle. But the disputes center on the means, not on the goal. The view is almost universal that something is desperately wrong with the present design. The so-called Tarrytown Group of black scholars recently declared, e.g., that welfare programs for poor mothers particularly “need to be completely reconceptualized and redesigned.”¹

The Catholic bishops of the United States, therefore, have an opportunity to help imagine a better future. Which principles of the Catholic tradition offer light to guide future public welfare policy? Three such principles seem especially promising: the building of intact families; what the Vatican calls “self-reliance”; and subsidiarity. Such principles could establish a new course for U.S. public policy.

A new course is surely needed. In 1959, 23 percent of poor families were headed by females. In 1982, after billions of dollars of welfare programs and the massive efforts of the War on Poverty, and after welfare expenditures in 1980 *twenty-one times* the levels of expenditures in 1950,² the proportion of female-headed households in poverty had increased to 48 percent.³ This destruction of families is unprecedented. The Catholic tradition cannot possibly be used to defend it. What is wrong? What needs to be changed in the *design* of public policy?

Furthermore, despite immense and unprecedented expenditures to eliminate poverty, the poverty level in the U.S. hit its lowest historical plateau at 11 percent in 1973, climbed back up to 13 percent in 1980, and to 15 percent in 1982.⁴ The sums of money being spent to eliminate poverty exceed by far the sums necessary to lift every man, woman and child in the U.S. above the poverty line. Something clearly absurd is going on.

It might be well, then, to look closely at the official description of the poor in the United States to gauge the nature and dimensions of the problem. Then we shall turn to the Catholic traditions for light on how problems of need and dependency might be susceptible of social solution.

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It is my intention, above all, to stress the importance of *family* welfare policy. This primary strength of Catholic social teaching has never, so far, been utilized in U.S. social policy.

1. The Poor and the Disadvantaged in the U.S.

According to the Census Bureau Report for 1982, some 34 million persons in the United States have an income below \$9,862 for a non-farm family of four. This figure does not include any of the non-cash benefits (food stamps, housing assistance, medicare, etc.) received by such persons. Not counting non-cash benefits, the total *cash* income reported by the poor—not enough to lift them out of poverty—comes to \$55 billion.⁵ Half of all poor households received at least \$6,477 in 1982 as cash; half received less.⁶ Put another way, the *poverty short-fall*—the amount that would have been needed to raise the cash-income of all over the poverty line—came to approximately \$45 billion.⁷ Viewed in itself, this is not an insuperable amount. It may be compared to annual expenditures for social services in the federal budget (not counting social service expenditures by the states, and not counting assistance from private sources) of \$390 billion in 1982.⁸

As these figures show, an annual grant, totaling about \$45 billion would suffice to eliminate poverty as a monetary matter. Yet significantly more than this amount is already being *targeted* for the poor. Consider the following estimated expenditures in FY 1983 (ending September 30, 1983) for programs targeted for the poor.⁹

FOOD STAMPS	\$12.0 billion
HOUSING ASSISTANCE	9.3 billion
AID TO FAMILIES WITH DEPENDENT CHILDREN	7.8 billion
WOMEN, INFANTS AND CHILDREN	1.1 billion
LOW INCOME ENERGY ASSISTANCE	1.8 billion
CHILD NUTRITION	3.2 billion
SUPPLEMENTAL SECURITY INCOME	8.8 billion
MEDICAID (FEDERAL; DOES NOT COUNT STATE)	19.3 billion
UNEMPLOYMENT BENEFITS	36.9 billion
EARNED INCOME TAX CREDIT	<u>1.2 billion</u>
TOTAL	101.4 billion

One may not conclude from these figures that the poor in the United States are adequately cared for. What one must conclude is that sufficient federal funds are being expended to have lifted every man, woman and

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child in the United States above the basic poverty level of \$9,862 for a non-farm family of four.

It is clear from these figures that if poverty were merely a matter of dollars, the actual cash earnings of the 34 million poor plus the amounts already expended by the federal government in their assistance, would have already eliminated poverty in the United States. Our eyes tell us this is not the case. But before delving deeper into the problems of the poor, it is well to see from the Census Bureau reports just who they are. The following table illustrates their profile (numbers in thousands).

Profile of the Poor in the U.S. (Dec. 1982)¹⁰

TOTAL POVERTY POPULATION, 1982:	34,398
CHILDREN UNDER 15:	11,587
PERSONS OVER 65:	3,751
YOUNG SINGLES (16-24):	1,349
OTHER ADULTS (25-64):	18,012
PERSONS LIVING ALONE:	6,458
WHITE:	23,517
BLACK:	9,697
HISPANIC:	4,301
SINGLE FEMALE-HEAD OF HOUSEHOLDS (NUMBER OF HOUSEHOLDS):	3,434
—SAME, INCLUDING CHILDREN:	11,286
ILL OR DISABLED:	2,809
LOOKING FOR WORK:	1,327
LOCATED IN NORTHEASTERN STATES:	6,364
NORTH CENTRAL STATES:	7,772
SOUTHERN STATES:	13,967
WESTERN STATES:	6,296
OUTSIDE METROPOLITAN AREAS:	13,152
INSIDE METROPOLITAN AREAS:	21,247
INSIDE CENTRAL CITIES:	12,696

These figures illustrate that only 19.4 million of the poor are between the ages of 16 and 64. Of these, nearly 3.4 million are living at home with small children. Another 3 million of the poor are ill or disabled. Thus, only about 13 million of the poor are potentially able to work. Of these, 9 million worked for pay during at least part of 1982.¹¹

This brief survey shows that the vast majority of the poor are truly dependent. Through no fault of their own, most are not, and cannot be,

self-reliant. Other studies show that *individuals* typically move into and out of the poverty ranks with considerable volatility. A study by the University of Michigan showed that only 17 percent of the poor (in the ten years surveyed) had been in poverty for as long as two years running. Poverty for most, the researchers conclude, tends not to be a permanent condition. Individuals in vast numbers fall into it temporarily and rise again. (Many graduate students, numbering 1.6 million nationwide, can testify to that).¹² This is important in countering the myth of “a permanent underclass.”¹³ Many of the poor are temporarily down on their luck and help received can start them on an upward path again.

There are two schools of thought on the problem of poverty. One argues in dollar terms chiefly. The point is simply to give money to the poor and stop worrying. The second is that poverty is not primarily a money problem but a problem dollars alone cannot solve. It is a problem of human potential (the economists say “human capital”). Many of the poor, especially among the young, need help in learning skills and attitudes: how to read, how to apply for and hold a job, how to govern themselves and conduct themselves. Self-reliance is a virtue of many parts, according to this view, and it can be taught. This is especially true of youths currently unprepared for employment, the so-called “unemployables” who even if they get a job do not long hold it.¹⁴ Modern society demands skills in nutrition, child care, literacy, and techniques of many kinds (driving a car, making purchases, preparing a resumé, expressing oneself clearly) which are not given automatically but must be learned. Indeed, the term “disadvantaged” points in part to this aspect, suggesting that not all persons start out with the same advantages.

It is crucial to note here that some persons even of an earlier aristocracy or proper middle class may now be as financially poor as church mice, without being “poor” in social class; while some financially poor persons are “bourgeois” in their virtues and attitudes.¹⁵ In this sense, the “advantages” of a certain culture are not coincident with financial status. The problem of poverty is, therefore, quite different when it is only a question of income and when it is a question of skills. Many Americans can well remember being very poor, in the sense of having a very low income, without ever having felt “poor,” in the sense of being culturally disadvantaged.

This is an important point. For church bodies can do a great deal

about the moral-cultural dimension of poverty which mere money cannot do. It would be naive to believe that money is always an incentive to “lifting oneself out of poverty.” Money can subsidize habits which lead to demoralization. This assertion is subject to empirical testing. In a section of downtown Albany, persons today classified as poor have financial resources far exceeding (even correcting for inflation) the resources of families who lived there in preceding generations; simultaneously, they suffer from far higher levels of violence, demoralization, and despair than were ever known there before.¹⁶

We are accustomed to talking about poverty in pious tones which are blind to its awful reality. For often what we are talking about is not the relative absence of money but the psychological destructiveness felt by individuals. These feelings may not arise from free will; indeed, those possessed of them feel victimized. This is a spiritual, not an economic disease. Some share it who—as dope dealers, thieves, prostitutes or pimps—have income far above the national median. There is a moral dimension to poverty—what Kenneth Clark has described as its “pathology”¹⁷—of which churchmen, above all, are aware.

The vast majority of the poor, as Census Bureau figures show, are white. Many such persons (like many in all races) do not “feel” poor. Some live largely outside the cash economy, needing to purchase only those things they do not produce for themselves. Some live as they do in order to be self-reliant. A cash income of \$9,862 a year in 1982 did not seem to many in the small towns of America a “poverty income” or a cause for desperation.

It may be well to sum up the material so far.

First Thesis: In every society, a certain percentage of persons (the too young, the too old, the disabled, mothers with small children) is not capable of economic independence but is dependent on others; in a good society, such persons must be cared for.

Second Thesis: In the United States, poverty short-fall (1982) amounted to between \$43-45 billion; this represents the cash income needed to lift all persons above the official poverty line of \$9,862 for a non-farm family of four. This is not a socially insuperable amount; in fact, more than that amount is already being spent in federal assistance alone (not counting state, local, and private efforts).

Third Thesis: Clearly, the mere supplying of “the poverty shortfall”

through monetary grants would not solve the problem of poverty, since poverty is not merely a matter of dollars only but also has a moral-cultural dimension, usually captured by the modifier “disadvantaged.” Economic sufficiency and independence depends on health, skills, and attitudes; lack of these constitutes “disadvantage.”

From these three theses, two social policy decisions seem to follow. 1) Those of the poor (especially the young) who possess the health, skills and attitudes necessary to achieve self-reliance need to be assisted by programs which *empower* them but *do not generate dependency*. 2) Those of the poor who lack the skills and attitudes necessary for self-reliance require special assistance. In this second arena, the churches can make a unique contribution.

Beyond finite limits, the church cannot give dollars or provide more than modest material assistance: food lines, used clothing, and the like. Some forms of poverty are not psychologically destructive; many persons have been poor without pathology. Yet the evidence is overwhelming that some portion of the poor is suffering from demoralization and self-destructive behavior.¹⁸ Unless church leaders address this core problem—a problem of the moral-cultural dimension—they turn away from their proper task. For this is a problem in which the state has no special competence and in which great expenditures by the state appear, by the evidence, to be making matters worse.

Consider the devastation to the family which appears to accompany certain specific federal expenditures (i.e., Aid to Families with Dependent Children, but not all). The integrity of the family is a primary issue of social justice. It is one of the main justifications for the concern of the churches about poverty. If poverty made no spiritual difference, especially to the families, the churches would have little cause to be concerned with it. What can the Catholic church do for poor families?

2. A National Family Policy?

One of the deepest and best of all Catholic social traditions is its concern for the integrity of the family. The family, in Catholic social thought (and in virtually universal judgement), is the basic social unit. Modern Anglo-American thought has tended, however, to pay disproportionate attention to “the individual” (the conservative pole) and “the state” (since 1935 the liberal pole¹⁹). The individual and the state were the two novel

realities of modern times. For the rise in individual opportunity liberated the human person from the fixed status of birth and family heritage, which had governed feudalism. And the rise of the modern nation state overrode the social forms of the feudal era. In this shift of attention to the individual and the state, the fundamental importance of family was typically not so much denied as ignored—although not so in Catholic social thought.

It may not at all have been an accident, then, that President John F. Kennedy, in his budget message of 1962 laid down as the first principle of a sound welfare policy (the first step toward President Lyndon Johnson's "War on Poverty") that "It must stress the integrity and preservation of the family unit." Similarly, concentration on the family has been a preoccupation of Senator Daniel Patrick Moynihan.²⁰ Recent publications of the National Association for the Advancement of Colored People and the Civil Rights Commission have also begun to pay close attention to the deterioration in the families of those parts of the population most affected by welfare programs since 1962.²¹

The irony is clear. Welfare programs whose first criterion in 1962 was to "stress the integrity and preservation of the family unit" seem to be correlated with precisely the reverse results. Devastating results have been experienced in white and hispanic welfare families; even more devastating results in black families.

In 1960, before the federal government became involved in the "War on Poverty," white mothers with dependent children constituted 6.0 percent of all white families with children, while the equivalent figure for black families was 20.7 percent. By 1970, these percentages had grown to 7.8 percent and 30.6 percent, respectively. By 1980, they had leapt again: to 13.4 percent and 46.9 percent.²² Clearly, each time many of these mothers have another child, the poverty figures will rise. Each poor young girl aged fifteen to nineteen who has a child will also add to the figures. The birth rate among poor teenagers keeps growing.²³

In 1982, the percentage of poor persons was 15 percent of the total population. But if single mothers with dependent children had remained at the same rate as in 1960, the percentage of poor persons would fall to 13.0 percent (from 34.4 million to 29.9 million).²⁴ This is in part because intact husband-wife families among blacks between the ages of 25-34 have income levels at 89 percent of similar white couples.²⁵ Of the 9.6

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million blacks who are poor, almost half (4.6 million) are in female-headed households. This portion of the poverty population continues to grow at a rapid pace. The following table illustrates the composition of the black poor.²⁶

Poverty Status of Blacks in the U.S. (1982)

(IN THOUSANDS)	TOTAL	BELOW POVERTY LEVEL	
		NUMBER	PERCENT
ALL BLACKS	27,216	9,697	35.6
UNDER 18 YEARS	9,401	4,472	47.6
22-64 YEARS	13,458	3,578	26.6
OVER 65	2,124	811	38.2
BLACK FAMILIES	6,530	2,158	33.0
MARRIED COUPLE FAMILIES	3,481	543	15.6
FEMALE HOUSEHOLDER, NO HUSBAND PRESENT	2,734	1,535	56.2

These figures show clearly that the presence of both a mother and father in the home is the most certain road out of poverty. Only 15.6 percent of such black families are poor. On the other hand 56.2 percent of black female-headed families are poor. In short, the “integrity and preservation of the family unit” of which President Kennedy spoke in 1962 does seem to work as a way out of poverty. But whatever is causing the growth in female-headed households is slowly multiplying the numbers of the black poor: 1,535,000 female heads of households and approximately 3 million children, nearly half the black poor, fall in this growing class.²⁷ This is a human-made tragedy, caused by neither nature nor nature’s God. It should not be beyond the wit of humans to halt what they have set in motion.

Catholic social teaching offers no pat remedy for this problem. It does command the Catholic conscience to attend to it. To assert merely that the federal government should distribute more benefits to single mothers with dependent children is not likely to lead to a decrease in the number of single-parent mothers and their dependent children. On the contrary, the number seems to be increasing from decade to decade in correlation with the advent of social welfare programs designed, purportedly, for the opposite effect. Something seems wrong in the design.

It seems worth pausing to mention that a similar deterioration is taking

place in white and hispanic welfare families. Of the 5,118,000 white families who are poor, 1,813,000 (35 percent) are headed by a female householder, no husband present.²⁸ Of the 916,000 Spanish-origin families who are poor, 425,000 (46 percent) are headed by a female householder, no husband present.²⁹ These numbers, too, keep growing.

Unless welfare programs arrest the growth in female-headed families, no husbands present, it seems certain that the numbers of the poor will continue to grow in future years. In 1982, the largest single category of the poor were single mothers and their dependent children. Their total number came to 11.3 million, or 33 percent of all poor persons.³⁰

Furthermore, it must be added that a growing percentage of single mothers are now abandoned by their *husbands*; a growing percentage of children every year is being born illegitimate. In 1970, e.g., the percentages of illegitimate births were as follows: among whites 5.7 percent; among blacks 37.6 percent. By 1980, these percentages had climbed to 11 percent and 55.2 percent respectively.³¹ Worse still, the *ages* of young women giving birth also declined. Between 1970 and 1980, the proportion of illegitimate births among women aged 15-19 rose from 17 percent to 33 percent among whites and from 63 percent to 85 percent among blacks.³²

Questions of poverty, therefore, are today inextricable from questions of family life. The so-called "feminization of poverty" is, as the figures show, mostly a problem of abandoned single women, many of whom have never formed families.

Moreover, this deterioration in the struggle against poverty is growing just as progress is being made in other areas. In 1959, 35 percent of the elderly were poor.³³ By 1982, advances in social security (especially in indexing payments to inflation) had lowered this percent to under 15 percent, and non-cash programs like food stamps, housing assistance and medicare had ameliorated the lot even of these.³⁴ Similarly, poverty rates for intact husband-wife families had been lowered considerably, although much remains to be done. Finally, the numbers of adult poor persons living alone had been lowered to 6.458 million.³⁵

The great disappointment has been with regard to family life. There welfare programs have seemed to have perverse effects, exactly opposite to those intended. Since so many children are involved, and since a sizeable proportion of their young mothers are not much more than children, the problem is heart-rending and acute.

What is to be done? There can be no doubt that assistance must be provided. Aid to Families with Dependent Children (AFDC) is a relatively small portion of the Federal welfare budget. In 1982, it came to \$8.2 billion.³⁶ Typically, AFDC checks are paid directly to the young mother. So are other forms of assistance, including food stamps, housing assistance, medicaid, and the like. These grants paid directly to the woman make her dependent upon the state rather than upon the father of her children. The incentive for males to take responsibility for their own children is bypassed. The state, feeling no requirement to intervene in matters of morality, may simply mail a check. But this act seems counter to all known systems of social morality and social accountability, and counter to family morality as well. So what is to be done?

Imaginative social philosophy is clearly called for. The United States remains virtually the only welfare state not to have in place a family welfare policy. No doubt, the received intellectual traditions of concentrating either on the individual or on the state, while ignoring the family, has had a profound effect upon public policy. Yet the Catholic tradition clearly teaches that the welfare of families—Kennedy’s “integrity and preservation of the family unit”—is paramount in all schemes of social justice. What would be a fresh Catholic response to the existing problems of care for the needy and dependent in American social policy?

3. A Fresh Start: A Family Welfare Policy.

The 1919 statement by the U.S. Catholic bishops was far in advance of its time. It is the same sort of imaginative leap that seems called for in our present circumstances. The criteria for a new social welfare policy issued by the bishops should be three: that it be distinctively Catholic; that it meet an urgent social need; and that it be—in the long run, if not the short—workable or at least worth working towards.

Reflection on the current poverty population of the U.S. reveals that the vast majority of the needy—some 28 million—live in families. Thus, a welfare policy designed explicitly for families would go a very long way toward ending (or seriously alleviating) poverty in the United States. Secondly, reflection on “the poverty short-fall” in 1982 shows that the *financial cost* of a family welfare policy ought not to be prohibitive. This is particularly true if the new policy were to replace the present confusing,

overlapping “welfare mess.” Finally, from all sides, conservative and liberal, cries for welfare reform coincide with visible exhaustion concerning how to bring it about. These three factors suggest that a new design is worth working towards and, in time, may prove highly practical.

So let us begin with the children first. The best circumstance for infants and the young is an intact family, with both mother and father present. If social policy desires something as the circumstance, it should reward it. Therefore, social policy ought to provide child allowances to parents of intact families. Parents serve the common good by the care they bestow on their children. In the United States in 1982, there were 49.6 million intact families, with a total of 25.3 million children. There were 3.8 million intact poor families with a total of 13 million poor children.³⁷ Clearly, the latter population needs help more than the whole range of families. On the other hand, political action is often easier if its base is as inclusive as possible. So it is with social security.

Thus, two principles come into conflict: 1) to help the neediest; 2) to treat all equally. Usually, a compromise is possible. Thus, one can imagine *larger* child allowances to category 1, and *smaller* allowances above certain income levels. One way to do this would be to treat child allowances as taxable income, in such a way that those whose income is below the poverty level are exempted from taxation, and those above it taxed at proportionate rates.

A non-farm family of four in 1982 required a cash income of \$9,862 to meet the official poverty level. In 1982, all poverty families together numbered 7.5 million.³⁸ If such families had earned no income at all, the maximum cost of full income support would be less than \$75 billion (\$9,860 x 7.5 m.). This sum by itself would in that case eradicate poverty as a monetary matter. But of course no such sum would be needed, since most poor families, and especially intact families, already have considerable cash income. The shortfall, as we have seen, is closer to \$45 billion. It seems plausible that a child allowance of \$150 per child per month or \$1800 per year would suffice to raise a large majority of intact poor families above the poverty level.

It may not be wise to attach numbers to these matters at this early stage. The public policy principle is to devise a system of social welfare which stresses “the integrity and preservation of the family unit.” The point is to achieve two goals at once: to alleviate (or eliminate) poverty while simul-

taneously rewarding intact families, in the hopes of generating more of them. Perhaps one cannot solve the *whole* problem of poverty. But if one could lift out of poverty the 3.8 million intact families who were poor in 1982 (together with their approximately 7.6 million children), one would have dramatically reduced the dimensions of poverty. The total cost of such an effort in 1982 would have been \$14 billion—slightly larger than the food-stamp program (\$1800 x 7.6 m. children).

What about the remaining poor families, those headed by single mothers? Such persons, numbering 11.3 million mothers and children, are often in desperate need; many of the mothers are teenagers themselves (often enough the daughters of mothers who began life the same way). The problem for public policy has three parts: 1) to help such women and their children, in such a way that they may escape from dependency; 2) to avoid having the state assume responsibilities which properly belong to the fathers of children; and 3) to avoid supplying unintentional incentives to others who might choose to follow this path. It is not easy to meet all three criteria.

Despite the rapid growth in the number of abortions among the poor, by 1980 55 percent of all births to black women were of fathers unknown to the law, up from 38 percent in 1970.³⁹ This immense flight of males from the most basic responsibility of manhood is both a social and a moral catastrophe. But what the state can do about it is unclear. Making welfare checks payable directly to a young woman, especially in the 31 states which require the absence of any male, seems clearly to be an incentive to male irresponsibility. It may be wrong to involve the state in questions of marital status; but the claim to assistance based upon marital status does so involve it. For this reason, it seems important that, at least for younger women, state assistance should neither be nor seem to be an incentive to male irresponsibility.

Having a child outside of wedlock, furthermore, should be looked at as a matter not solely of morality but also of social consequences, one of which may be dependency upon the state. May the society not exact costs in return? Socially burdensome behavior must be discouraged, just as socially beneficial behavior should be rewarded. Are there devices open to a good and generous society which might meet the required criteria? Social thinkers have been hesitant in approaching this matter, as well they should be. Their hesitation is a contributing factor to the growing incidence of female-headed households in poverty.

The children in such households are already penalized by the lack of a

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father to guide their steps, to supply a masculine discipline and presence, and to help prepare them for the social economy. They need assistance in overcoming these disadvantages, as well as those of poverty itself. This the state alone can hardly supply.

It thus becomes clear that the poverty which results from single-parent households is a problem demanding social action on a scale larger than that available to the state alone. Moral and cultural institutions must play a role. So must the media. So also the schools, families, neighborhood groups and associations of every sort.

This effort will require moral leadership. For having children out of wedlock, or abandoning the woman and child one has fathered, are not afflictions which fall from the skies but are consequences of voluntary human behavior. The Catholic bishops could provide significant leadership in convening a broad-based coalition of church leaders, media elites, and social workers to support poor persons in non-formed families and in families broken by widowhood or divorce. For example, on each local level, leagues of female-headed households could be formed under the auspices of local churches, neighborhood associations, and voluntary organizations. The idea would be to have local persons who know the heads of households personally become the administrators of social assistance. There is reason to believe that the vast majority of female-headed families are found in cities and towns, in which local organizations already flourish. No new bureaucracy would have to be created. Rather, the good works of such organizations could be sharply focused upon assistance to needy families. Such assistance would have personal as well as monetary dimensions.

Furthermore, AFDC and other forms of federal and state assistance would then be channeled through local family centers. Checks would not be distributed directly to individuals below the specified age (age 20), but only through the sponsoring organizations. It would be more useful for federal funds to be paid to urban churches, for example, to maintain day-care centers for children and learning sessions for young heads of households, including meal service, than to give the funds to individuals. The point is to use the financial power of the state to strengthen the local networks whose personnel know the needy personally, and to spend funds in such a way that the educational assistance they provide *empowers* the needy to begin, at a later stage, to care for themselves. In this way, state assistance need not lead to dependency upon the state, but to personal empowerment.

The moral principle is that state power must not be used to create dependency, but rather to empower local social organizations to meet genuine social needs and to empower needy individuals to acquire the skills of self-reliance.

A summary of Catholic family welfare policy for the needy would, therefore, be as follows:

1) Child allowances would be paid on a monthly basis to husband-wife intact families. These funds would count as taxable income. Those families below the poverty level would not, of course, pay taxes. Indeed, families up to one hundred percent above the poverty line (approximately the median income level) might be exempted.

2) For non-formed families and families broken by abandonment, separation, divorce, and death, for heads of households below the age of (say) 20, federal and state assistance would not be paid directly to the needy but, rather, to local family centers which would provide child care, instruction, and meals.

These two steps should provide two considerable steps forward. First, a significant percentage of intact families now in poverty should be lifted out of poverty by step one. Second, the cycle of dependency would be ameliorated by personalized local assistance and educational programs aimed at self-reliance.

These programs would not alone eliminate all poverty. But by concentrating on family strengths they would significantly diminish the numbers of intact families who are poor. They would also provide, as it were, local surrogate extended families for non-formed and broken families. These alone would represent great steps forward for millions from among the poor. Immediately, they should reduce the numbers of the poor from among intact families. Immediately, they should reduce the impersonal dependence of non-formed and broken families on government checks, while providing significant personal and financial assistance.

4. The Family in Catholic Social Thought

In 1920, John A. Ryan quoted with approval the statement of an Interdenominational Conference of Social Service Unions in Great Britain, which “points out that all social reform must take as its end and guide the maintenance of pure and wholesome family life.”⁴⁰ Similarly, many years

later, Bishop von Ketteler, whom Pope Leo XIII described as a major founder of modern Catholic social thought, held that the chief fault of German liberalism was its opposition to “the divine plan for the procreation and education of men by means of the family.”⁴¹ Indeed, it was concern for the family, the cradle of all human morality and spirituality, that justified for Leo XIII papal attention to the problems of social reconstruction. This tradition is summarized very clearly by Pope John XXIII in *Pacem in Terris* (Para. 16):

The family, grounded on marriage freely contracted, monogamous and indissoluble, must be considered the first and essential cell of human society. To it must be given, therefore, every consideration of an economic, social, cultural and moral nature which will strengthen its stability and facilitate the fulfillment of its specific mission.⁴²

Pius XII, celebrating in 1941 the fiftieth anniversary of *Rerum Novarum*, calls attention to “the three principal issues of social life in economic affairs, which are mutually related and connected one with the other, and thus interdependent: namely, the use of material goods, labor, and the family.”⁴³

One of the very strongest texts of the Catholic tradition, however, is found in *Rerum Novarum* (Para. 10):

For it is a most sacred law of nature that a father must provide food and all necessities for those whom he has begotten; and similarly, nature dictates that a man's children, who carry on, as it were, and continue his own personality, should be provided by him with all that is needful to enable them honorably to keep themselves from want and misery in the uncertainties of this mortal life. Now, in no other way can a father effect this except by the ownership of profitable property, which he can transmit to his children by inheritance. A family, no less than a State, is, as we have said, a true society, governed by a power within itself, that is to say, by the father. Wherefore, provided the limits be not transgressed which are prescribed by the very purposes for which it exists, the family has, at least, equal rights with the State in the choice and pursuit of those things which are needful to its preservation and its just liberty. . . . We say, at least equal rights; for since the domestic household is anterior both in idea and in fact to the gathering of men into a commonwealth, the former must necessarily have rights and duties which are prior to those of the latter, and which rest more immediately on nature. If the citizens of a State—that is to say, the families—on entering into association and fellowship, experienced at the hands of the State hindrance instead of help, and found their rights attacked instead of being protected, such associations were rather to be repudiated than sought after.⁴⁴

This text powerfully underlines the emphasis on families and their associations suggested in the proposal of local family centers independent of state bureaucracy mentioned above.

Allan Carlson, in an important article, has recently pointed out that the cultural system of democratic capitalist societies powerfully inhibits naked

individualism. He writes: "The natural unplanned genius of the new order lay in the cultural forces which kept this destructive consequence of liberal-capitalism in check. *The first of these was the family.*"⁴⁵ Jewish-Christian sexual and family teaching is a crucial component of the holistic liberal sensibility; emphasis on family is central to the American ethos. He continues:

The creative social bond between morality and modern family was particularly strong in the United States. Tocqueville noted that although European visitors to America disagreed on many points, they all concurred that moral standards were far stricter in this country than elsewhere. He attributed this to the unique balance of freedom, equality, and responsibility found in the American marriage covenant.⁴⁶

Catholic social teaching, clearly, recognizes that the family is the essential, fundamental unit at whose integrity and fruition wise social policy should be aimed. Indeed, were there to be a conflict between the will of the state and the good of families, the Church would clearly be bound to side with the latter. Thus, U.S. social welfare policies for the poor must be scrutinized in the light of the good of families. In this respect, President Kennedy's criteria for a sound welfare reform were sound: "It must stress the integrity and preservation of the family unit. It must contribute to the attack of dependency, juvenile delinquency, family breakdown, illegitimacy, ill health, and disability."

No one can correctly say that the people of the United States are not spending through their government enough money to have eliminated poverty. For the total sum of money needed to bring the 7.5 million poor families in the U.S. (1982) to \$10,000 per year is \$75 billion, far less than is currently being spent. Neither can anyone correctly say that the current *design* of the U.S. public policy for the poor is meeting the criteria President Kennedy set for it in its beginnings.

Here is where the Catholic bishops have an *opportunity*. Given the emphasis of Catholic social teaching on family welfare, they have the possibility of offering some badly needed originality. In the past, conservatives faced with a problem have typically turned to the *individual*; liberals faced with a problem have turned to the *state*. Neither solution, time has shown, meets the tests of reality. In drawing the attention of the public policy community to the *family*—a mediating structure *between* the individual and the state—the Catholic bishops could propose a new public policy agenda as wide reaching for the next fifty years as the New Deal was for the past fifty. The role of the state is to *empower* people, not to make them dependent.⁴⁷

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The institution designed by nature to empower them, above all, is the family. The programs of the state should be designed to strengthen families. For strong families provide the surest and most direct path out of poverty, and are nature's own institutional means for providing adequate income to the poor and the needy.

Catholic social policy differs from traditional American conservatism (at least of the libertarian type) by holding that the state must play a role in helping the needy. It differs from traditional American liberalism by holding that state assistance which generates dependency violates the principle of subsidiarity; that the family is prior to the state; and that the family is prior to the individual as the focus for social policy. In all these respects, Catholic social policy has an opportunity to establish new directions, at a moment when new directions are universally desired.

NOTES

1. See Judith Cummings, "Breakup of Black Family Imperils Gains of Decade," *New York Times*, November 20, 1983.
2. Charles A. Murray, *Safety Nets and the Truly Needy: Rethinking the Truly Needy* (Washington, D.C.: Heritage Foundation, 1982), p. viii.
3. David O'Neill, "Poverty and Use of Clever Slogans," *Washington Times*, November 24, 1983, p. 1C. The devastation of the black family is especially evident. The Census Bureau reports: "The number of poor Black families with a female householder rose from 834,000 in 1970 to 1.4 million in 1981. These families accounted for 70 percent of all poor Black families in 1981, substantially up from 56 percent in 1970." U.S. Bureau of the Census, *America's Black Population: 1970 to 1982*, Special Publication PIO/POP-83-1 (Washington, D.C.: 1983), pp. 4, 9.
4. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1982-83*, 103d ed. (Washington, D.C.: 1983), table 727; *Money Income and Poverty Status of Families and Persons in the United States: 1982*, table B.
5. Telephone inquiry, U.S. Bureau of the Census, October 6, 1983; figure from unpublished Current Population survey.
6. See *Money Income and Poverty Status of Families and Persons in the United States: 1982*, table 20.
7. Spencer Rich, "'Poverty Gap' Put at \$45 Billion," *Washington Post*, October 19, 1983, p. A6. Testimonies of Rudolph G. Penner, Director, Congressional Budget Office and Sheldon Danziger of the Institute for Research on Poverty, University of Wisconsin to the House Ways and Means Committee, October 18, 1983.
8. Office of Management and Budget, *Payments to Individuals*, February, 1983.
9. Office of Management and Budget, *Outlays for Social Programs*, February 1, 1983.
10. *Money Income and Poverty Status of Families and Persons in the United States: 1982*, table 14. Testimony of David A. Stockman, Director, Office of Management and Budget before the House Ways and Means Subcommittees on Oversight, and Public Assistance and Unemployment, November 3, 1983, p. 4.
11. *Ibid.*, table 17.
12. National Center for Education Statistics, *Opening Fall Enrollment*, 1982 (unpublished).
13. See Ken Auletta, *The Underclass* (New York: Random House, 1982).
14. "If poverty and lower-class existence are viewed as *structural* patterns, caused by a poor distribution of skills, jobs, income, and the like, then the remedy is apparent: expand lower-class blacks' access to these resources. If, on the other hand, lower-class existence is viewed more broadly, as a function of cultural patterns, then the remedy is far more elusive and problematic. For then the difficulty becomes one of devising solutions that simultaneously correct maladaptive cultural patterns (delinquency, crime, unwed motherhood, street-corner lifestyles, drugs) and those structural deficiencies or institutional inequities (inflation, recession, unemployment, poor schools, and the like) that shrink opportunity for the poor. . . . Allies of the black lower class must devise ways and means for reducing certain cultural or societal pathologies widely prevalent among lower-class blacks. Lower-class lifestyles among young men and women that are associated with the 'man-

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child' and 'woman-child' syndrome—above all, becoming mothers and fathers while still in one's teens—must be interdicted, constrained, and reversed," Martin Kilson, "Black Social Classes and Intergenerational Poverty," *Public Interest*, LXIV (Summer, 1981), pp. 68-70.

15. "Class may (or may not) find phenomenological expression, but at root it is a mode of self-definition. There are aristocrats in England who are as poor as church mice but are definitely 'upper class.' And there are immigrants to the United States who are also poor as church mice but definitely 'middle class' from the moment they set foot here. The very thought that there is someone ('up there?') who knows better than we do what class we are in is as breathtaking in its intellectual presumption as it is sterile for all serious purposes of social research." Irving Kristol, *Reflections of a Neoconservative* (New York: Basic Books, 1983), pp. 199-200. See the whole of ch. 14, "Some Personal Reflections on Economic Well-Being and Income Distribution."

16. See George Gilder, *Visible Man* (New York: Basic Books, 1978).

17. See Kenneth B. Clark, *Dark Ghetto* (New York: Harper and Row, 1965). See esp. ch. 5, "The Pathology of the Ghetto," pp. 81-110. "The dark ghetto is institutionalized pathology; it is chronic, self-perpetuating pathology; and it is the futile attempt by those with power to confine that pathology so as to prevent the spread of its contagion to the 'larger community.' Not only is the pathology of the ghetto self-perpetuating, but one kind of pathology breeds another. The child born in the ghetto is more likely to come into a world of broken homes and illegitimacy; and this family and social instability is conducive to delinquency, drug addiction, and criminal violence" (p. 81).

18. See Auletta, *op. cit.*

19. See John Dewey, *Liberalism and Social Action* (New York: Capricorn Books, 1963).

20. See Daniel Patrick Moynihan's introduction to Alva Myrdal, *Nation and Family* (Cambridge, Mass.: MIT Press, 1968).

21. See, for example, United States Commission on Civil Rights, *A Growing Crisis: Disadvantaged Women and Their Children*, Clearinghouse Publication 78, May 1983.

22. *Statistical Abstract of the United States: 1982-83*, table 73.

23. "Prior to 1970, women 15 to 19 years old had less than half of all illegitimate births. By 1975, as a result of decreasing illegitimacy rates at older ages and increasing rates among women 15 to 19 years old, teenage women accounted for more than half of all illegitimate births." U.S. Bureau of the Census, *Perspectives on American Fertility*, Series P-23, No. 70 (July, 1978), pp. 40-41. From 1975 to 1979, the number of births to unmarried women aged 15-19 increased by 14 percent, from 222 per 1,000 to 253 per 1,000. See *Statistical Abstract of the United States: 1982-83*, table 97.

24. Calculated from *Money Income and Poverty Status of Families and Persons in the United States: 1982*, tables 14-15. As a proportion of the total poverty population, female heads of households with their dependent children virtually doubled between 1960 and 1982, climbing from 15 percent to 29 percent. Despite a reduction in the total number of poor children, from 17.3 million in 1960 to 13.1 million in 1982, the number of poor children in families headed by females increased from 4.1 million to 6.7 million during the same period of time. See *ibid.*, tables 14-15.

25. United States Department of Commerce News, CB 83-127, August 22, 1983.

26. *Money Income and Poverty Status of Families and Persons in the United States: 1982*, tables 14, 17-18.

27. *Ibid.*, tables 15 and 18.

28. *Ibid.*, table 18.

29. *Ibid.*

30. *New York Times*, Sunday, November 27, 1983. Testimony of David A. Stockman, *op. cit.*, Table 1, p. 4.

31. National Center for Health Statistics, *Monthly Vital Statistics Report*, Advance Report of Final Natality Statistics, vol. XXXI, No. 8, (November 30, 1982).

32. *Ibid.*

33. *Money Income and Poverty Status of Families and Persons in the United States: 1982*, table 15.

34. *Ibid.*

35. *Ibid.*, table 14.

36. U.S. Executive Office of the President, Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1984*, p. V-125.

37. U.S. Bureau of the Census, Current Population Reports, series P-20, No. 381, *Household and Family Characteristics: March 1982* (Washington, D.C.: 1983), table 5; *Money Income and Poverty Status of Families and Persons in the United States: 1982*, tables 14-15.

38. *Ibid.*, table 18.

39. *America's Black Population: 1970 to 1982*, p. 20.

40. John A. Ryan, *Social Reconstruction* (New York: MacMillan, 1920), p. 222.

41. L. Lenhart, "Ketteler, Wilhelm Emmanuel von," *New Catholic Encyclopedia* (New York: McGraw-Hill,

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1907), VIII, 170.

42. *Seven Great Encyclicals*, (Glen Rock, N.J.: Paulist Press, 1963), p. 292.

43. *Ibid.*, p. 227.

44. *Ibid.*, p. 6.

45. Allan C. Carlson, "The Family and Liberal Capitalism," *Modern Age*, Summer/Fall, 1982, p. 366.

46. *Ibid.*, p. 369.

47. Peter L. Berger and Richard Neuhaus, *To Empower People* (Washington, D.C.: American Enterprise Institute, 1977).

Fetus-Selection: the French Perspective

Thomas Molnar

IT IS INTERESTING—and also comforting—to know that the fight against abortion and its by-product, the utilization of the fetus for medico-technological ends, is not limited to the United States. Elsewhere too, the mentality of putting technology above human life is being daily strengthened, but so is the will to resist this special temptation, the temptation of playing God with human beings.

The case of France may be particularly instructive, because from the very beginning of the conflict over a weakening sexual morality, political-ideological issues have been out in the open. By way of a brief history of the matter, let me mention that leftist political domination in French public life after 1945 had resulted in some anti-family legislation, although demographic studies showed that even during this period—the forties and the fifties—the governments (that of Pétain until 1944, and of the Gaullists and of various coalitions subsequently) did protect human life and families with numerous children. Indeed, the great bloodletting of the Napoleonic wars in the early nineteenth century, then that other great bloodletting, the first World War, had left the nation exhausted and many families with only two or even one child. As if this had been jointly understood by ideologically opposite regimes, allowances to families were generously increased, so that by the early sixties France's demographic curve was, for the first time in many decades, ascending.

This trend suffered a setback in the fifties when M. Lucien Neuwirth introduced a bill in the National Assembly in favor of easier contraception for minors. The measure met opposition from the Church, and from many political organizations, belonging generally to the right, but also from many Socialists aware that the favorable trend could at any time be reversed, for example by the Communist vote. The Communist party, called both by Socialist Leon Blum and General de Gaulle “the party of the foreigner” (Moscow), was trying to win favor with the middle classes by making life “easier” for women, whether working or not. Outside the

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Soviet Union, that is in bourgeois societies, abortion was considered by the Communist parties as a “progressive” issue; inside the “Fatherland of the Proletariat” it was another matter: it was a patriotic duty to raise as many future workers and soldiers as possible.

Then, in the seventies, President Giscard d’Estaing introduced pro-abortion legislation, which he entrusted to one of his cabinet ministers, Mme. Simone Weil, who had been deported to Germany, as a Jewish woman, during the war. Those opposed to abortion expected her to take *their* side; did she not indeed know the value of human life better than most? But it turned out that Mme. Weil, who had great political ambitions, was enthusiastically in favor of pro-abortion laws, proposing the customary excuses: legalization would reduce life-endangering abortion cases, and enable the authorities to control the conditions under which abortions were to be performed, namely the special hospitals and clinics. The law became known under her name. Her opponents associate her name with the expression “assassin of the innocents.”

The consequences were the expected ones: an enormous rise in the number of legal abortions, penalization of hospital personnel who refused to perform them, penalization of pharmacists who refused to sell “the pill”—and with all that no provable decrease of illegally performed abortions. Because, after all, even though abortion costs are reimbursed from social security funds, there are many women who choose the less safe method of going through “it” at the hands of unauthorized, even incompetent people, for “personal” reasons which the reader will have no difficulty in imagining.

Things of course did not stop there, as they never do except in the minds of naive do-gooders who do not take human nature into account. As in the United States, clinics and hospitals in France have begun to blur the line between abortion authorized for so-called health reasons (to save the mother’s life), and abortions for convenience. The law of 1976 prescribed that organs of the aborted fetus may only be used, that is transplanted to children born with some defect, *if* the donor fetus died a natural death. Interpretation of the law by some doctors allowed, however, the deliberate killing of the fetus (by withholding nourishment or care) so as to transplant tissues and organs into other children. While the law declared that the fetus is a human being who should be protected, indeed protected beyond ordinary care since he is defenseless and fragile, practice

came to operate on another basis. As Dr. François of the city of Lyons suggested recently, "the death of a child enables another to survive!" In fact a bill is now before the National Assembly proposing "the collectivization of the human body," which would permit the view that humans are interchangeable, and that one should be allowed to die (and "helped" along the way) for the preservation of another's life. This bill is formulated by no less an institution than the Ministry of Health, although it is opposed, at the time of this writing, by the Ministry of Justice.

The horror of it ought to be evident. Practice, and perhaps a future law, will introduce the principle that a) a human being, the doctor, or a committee, may decide who should live at the expense of whom, and b) who is inferior, undeserving to live, and who is deserving to live as a superior. In the hands of an ideologically-inspired regime, this gives more than Orwellian powers to agents of a government; it is the ultimate in the Darwinian logic about the "survival of the fittest." And, another proposal, also emerging from medical circles, has been made, on the basis of "human rights," namely the "rights of medicine" (*sic*), authorizing doctors, that is scientists, to decide independently about transplants and the death or life of embryos. The proponents do not seem to realize that this is already the "right" claimed by Soviet psychiatrists in the KGB-run "clinics," and that tomorrow, not only in the Soviet Union but also in the morally-degenerate West, experiments may be performed on human beings in the name of bio-genetics or some other new scientific technology.

In a controversy with the "Association Internationale contre l'exploitation des Foetus humains" and its director, magistrate (judge) Claude Jacquinet, one of the chief practitioners of the above-described practices (letting embryos die of inanition, then using them for transplants), Professor Jean-Louis Touraine, of Lyons' Edouard-Herriot Hospital, argued that those who oppose the practice of "one fetus helps another to survive" have a "medieval mentality"—the usual argument of those who are "modern," and thus authorized to follow their fancy. Prof. Touraine claims that abuses are prevented simply by having two teams working on the issue, in different parts of town: one selects the fetuses among the lifeless ones, another does the transplanting. Maybe Prof. Touraine is not modern enough to have heard of the telephone or other means allowing cooperation between the two teams; the fact is, however, as pointed out

by Dr. Mesnier-Auvray, a member of the above-mentioned Association, that the fetuses sent by the aborting team to the transplanting team were often between 14 and 18 weeks old, and had been extracted by caesarian. The reason is that "ripe" fetuses are preferred to unripe ones, so that only by caesarian intervention can they be delivered.

The large number of abortions performed daily have naturally desensitized many of the medical personnel. Interruption of pregnancy has become such a routine matter that it tends to be regarded as legitimate—if not by the 1976 law, then by its next expected extension which may not be long delayed in view of the daily advances of medical technology. The abortion victims, the embryos, are no longer regarded as human, but rather as available spare parts with which another human mechanism may be "repaired." A new medical ethics (deontology) is born, simply because the instruments are available, in the same way as the technique of manufacturing new telescopes permit new discoveries about the universe. It is no longer morality which dictates technology, it is technological exploration which determines the ethical view of man.

The "medieval mind" that Prof. Touraine attacks argues back, however, on the line of man's sinfulness, a so-called pre-modern view. Touraine and his colleagues insist that they only utilize fetuses when "cerebral death" has been diagnosed. Their opponents charge that in the various laboratories and operation rooms cerebral death is *induced*, by withholding the appropriate care. Nor, they say, are the utilized fetuses products of therapeutic abortions, something rare at 14 to 18 weeks, but of "planned" abortions which can yield desired "spare parts." A very sordid affair, in which religion, ethics, science and the law ought to have their say, otherwise those closest to the operation room will exercise a more-than-human authority unbecoming to human beings. The risk is that—as happens all too often—when practice is permitted to go beyond the law, then law will soon incorporate the new practice in its clauses. This is the consequence of legal positivism and situation ethics, two of the plagues afflicting our intellectual climate (particularly in universities and law schools), itself the consequence of the present academic contempt for moral and natural law.

Needless to say, the issue also affects the much-touted insistence on "human rights." Abstractly, this means everyone has the same rights, and the same amount of rights, as everyone else. Thus it is not on the level of

rights that the threat of abuse arises, but on the level of the definition of the adjective "human." In the unphilosophical mind of Professor Tournaine we may watch the process of reformulation: there are inferior and superior embryos, consequently there are beings less and more human. One ought to be subordinated to the other. The lawyer may still argue that "rights" are equal, but in his laboratory, and proud of his science, the physician may answer that he knows better what the threshold of the "human" is. It is best to be prudent, under the circumstances, and grant all involved as limited an authority over human life as possible.

There remain other problems which, while no less essential, do not receive sufficient attention in the shadow of the central controversy. It is for example not proven that when the fetus is dissected for the purposes of its "utilization," it is indeed dead, and it is not certain either that it does not feel the pain. A kind of mass-production, not to say butcher attitude, takes over, and the physician who already acts contrary to his Hippocratic oath may just not pay attention to these details. We live in an industrial civilization where quality is often sacrificed to quantity; when hospitals are turned into slaughterhouses, they may relax their ethical norms at both ends of human life, with regard to the unborn and the very old. Mercy killing, an expression which at least had a sinister word in it, is now called "alleviation" or "termination" of suffering, by the sound of it a charitable act. Several writers have lately pointed out that in their hedonistic societies, "death" is camouflaged, hygienized; so is the killing of the fetus, the terminally ill, and the aged and infirm now. As family and group fall apart, and as neither the child nor the old finds welcome, certain categories become expendable. When a young woman declares (one illustration of it was given some years ago in *Newsweek*) that she sees no reason why she should give shelter to a foreign, cancer-like body (a child!) in her womb for nine months—the way has been cleared for the hospital in Lyons where lives are regarded as interchangeable, and where more mature fetuses are preferred (like a better, more juicy cut of meat) as suppliers of spare parts.

With the lightly-considered passage of abortion laws in one after the other of our western societies, a dreadful possibility has opened, one that has been added to the other horrors of our very enlightened century. The fight is on, in most nations involved. It has a particular urgency in France (and Germany) where the birth rate is catastrophically low, in fact nega-

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tive in Germany and approaching the negative in France (and Sweden and Hungary). Catholic Spain and Portugal have recently passed similar abortion laws, as if they were just more lemmings ready to follow the first lemming on the way to the plunge to death. It is not at all strange that on this one issue the right-of-centrist, free-marketeer Giscard d'Estaing, and the socio-communist Mitterand wholeheartedly agree, as do Germany's Helmut Kohl and Helmut Schmidt, Felipe Gonzales of Spain, Mario Soares of Portugal—and various pre-Reagan presidents in the United States. A similar, shallow ideology seems to inspire them all, the merely hedonistic idea of having a carefree life and no responsibilities. And no future.

Special Supplement

Nat Hentoff on the Babies Doe

The primary concern of this journal has been abortion. But we have also published a great deal, for a decade now, on infanticide—specifically, arguments that abortion on demand would inevitably lead to widespread killing of born babies: if “unwanted” preborns may be put to death, why not unwanted or “imperfect” newborns? The moral difference is nil. But a difference does remain: whereas the U.S. Supreme Court has legalized abortion, American law still forbids infanticide, even if it has ceased acting to prevent or punish it.

In effect, the current controversy over infanticide began in 1982, because of nationally-publicized efforts to prevent the death of the “original” Baby Doe, in Bloomington, Indiana. In a word, infanticide became *news*.

How that news has been reported—and *not* reported—is the substance of the remarkable series of articles that follows here. Mr. Nat Hentoff, the author, is an unusual journalist by any standard. A prolific writer on a broad range of subjects, he considers himself what used to be called a Man of the Left, and, preeminently, a civil libertarian, allegiances which would seem to fit him comfortably for his journalistic base, *The Village Voice*, New York City’s “radical” weekly.

The question arises: Why did Mr. Hentoff not write about infanticide before now? Surely *born* babies are citizens with civil rights? We asked him that question, not least because we wondered if his answer would be, that he was pro-abortion, and so had avoided (as many others have) the moral nexus between the two issues. No, Hentoff said, he was not pro-abortion; he simply had not “got into” either abortion or infanticide, which are, admittedly, distasteful subjects (and he agreed that the point of Mr. Sobran’s title “The Averted Gaze” might well apply to him). What *did* get Hentoff into the controversy was the recent case of Baby Jane Doe: the more he read about it, he said, the more convinced he became that the news reports were strangely similar (“everybody was saying the same thing”), and less than accurate. For almost nobody was saying anything about what one local reporter had noticed: that a doctor in the very same hospital where Baby Jane still lies (at this writing) had given a quite different opinion of her condition from those appearing in the “standard” versions. Why?

Mr. Hentoff set out to answer that question. He did so in what we would describe as the Grand Tradition of the old-fashioned newspaperman: he made calls, re-checked facts, made more calls, pursued new leads, sought out opinions both expert and ordinary. His conclusion: "This was a clear case of people getting misleading information because they were not getting the complete story."

Hentoff also read voluminously, assembling a mass of facts and information of heroic proportions (certainly his research went far beyond anything the reader can expect from most other journalists nowadays?). And then he did what he does best of all: he wrote his story.

Our original intention was to provide you, dear reader, with the "best" excerpts. But the more we read, the more it seemed to us that Mr. Hentoff weaves seamless stuff that should unfold just as he wrote it (even though the *way* he wrote it—in full-page columns over the six-week period from the Dec. 6, 1983 through Jan. 10, 1984 issues of the *Voice*—plus a seventh column in the April 3, 1984 issue—made necessary some repetitions). Thus we have reprinted *all* of it here, with the permission of the author and the publisher (© 1983, 1984 by *The Village Voice*).

In our judgment, Mr. Hentoff has produced a classic piece of investigative reporting. And, believe it or not, there is more to come: he has already written several columns on an abortion-related story and (he tells us) may begin a whole new series shortly. We hope that we will be able to provide more of this continuing saga in future issues, but we hope most of all that you will not fail to read the historic document you have in hand right now.

J. P. McFADDEN
Editor

Big Brother and the Killing of Imperfect Babies

Political language . . . is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind.

—George Orwell,
“Politics and the English Language”

You can't substitute Government concern for parental love.

—Paul Gianelli,
an attorney for the parents of
Baby Jane Doe, on learning that
a Federal judge had denied the
Government access to the baby's
medical records.

If we compare a severely defective human infant with a nonhuman animal, a dog or a pig, for example, we will often find the nonhuman to have superior capacities, both actual and potential, for rationality, self-consciousness, communication, and anything else that can plausibly be considered morally significant. Only the fact that the defective infant is a member of

the species homo sapiens leads it to be treated differently from the dog or pig.

—Professor Peter Singer, bioethicist,
“Sanctity of Life or Quality of Life?”
July 1983, *Pediatrics*, the official
journal of the American Academy
of Pediatrics

If it becomes accepted practice to terminate a severely handicapped infant's life, where will the line be drawn—multi-handicapped babies? blind babies? deaf babies? potentially learning disabled babies? blue-eyed babies?

—Alan Berger,
a developmental disabilities specialist,
Flower Fifth Avenue Hospital, New York,
letter to the *New York Times*,
November 13, 1983

This is a series on the politics of death. Beginning with infanticide. I don't know yet where we're going to end, but I will certainly have the very bad taste to include certain illuminations from Adolf Hitler's practices in these matters. Like this observation by Yale Kamisar in his all too prescient essay, “Some Non-Religious Views Against Proposed ‘Mercy-Killing’ Legislation,” in the May 1958 *Minnesota Law Review*:

“ . . . while public resistance caused Hitler to yield on the adult euthanasia front, the killing of malformed and idiot children continued unhindered to the end of the war, the definition of ‘children’ expanding all the while.”

A footnote in the same essay reveals that among the factors that encouraged Hitler, early on, to try to push euthanasia were certain petitions to him by “parents of malformed children requesting authority for ‘mercy deaths.’”

Yale Kamisar, professor of law at Michigan State University Law School, is one of the nation's preeminent defenders of the Bill of Rights. He is perhaps best known as *the* leading expert on the Fourth Amendment, but Kamisar is an authority on a hell of a lot more besides. Significantly, he is one of the few civil libertarians in the nation who has explored the legal and moral problems in the

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killing, for example, of infants born with Down's Syndrome.

As we shall see, the American Civil Liberties Union is of no use at all in these cases—to the baby.

Anyway, there will be more from Kamisar as we go on, and the first detailed examination of an actual case will be that of an infant who, last year, in Bloomington, Indiana, was allowed by his parents and doctors to starve to death because he was born with Down's Syndrome. Or, as George Will put it in his column at the time, "The baby was killed because it was retarded."

First, however, an explanation of why I am taking this journey into the minefields of who should decide who shall live and who shall die. And what lines are to be drawn—and where.

The impetus came from Baby Jane Doe on Long Island—born with an opening in the spinal column (spina bifida); a defect in the formation of the brain stem that causes a buildup of fluid on the brain; and an abnormally small head and brain. With her parents refusing to allow corrective spinal surgery for their daughter, just about the only folks battling to get Baby Jane a longer life span were the usual Yahoos, as enlightened liberals like to think of them: the Right-to-Lifers and such columnists as George Will and Patrick Buchanan.

Oh, in letters-to-the-editor and on radio talk shows, there were some parents of children with spina bifida and other severe defects who practically begged Baby Jane's parents to get the surgery performed before more harm was done. Their spina bifida kids were not growing up perfect, but these parents sure were glad the kids were around.

A journalistic aside here. In most newspapers and magazines—*Newsday* being a notable exception—the reporting on Baby Jane's alleged future has been lazy and ignorant. Most reporters have kept copying from each other the worst-possible-case prognosis—if the baby's life were to be extended, she would be in constant pain, would have no awareness of her environment, would be wholly bedridden, and would be altogether inferior to Professor Peter Singer's more morally significant dog or pig (in the epigraph at the top of this column.)

It ain't necessarily so. There was, for instance, disagreement among the doctors at University Hospital in Stony Brook, where Baby Jane Doe is in residence. Not even specialists in this field have the gift of certain prophecy.

Dr. Albert Butler, Chairman of the Department of Neurosurgery at University Hospital was interviewed by B. D. Colen in the November 9 *Newsday*. By contrast with the unrelievedly mechanical reporting in other publications about Baby Jane's dismal future, this *Newsday* story quoted Dr. Butler as one who "favors surgery in cases *medically identical* to those of Baby Jane because he believes such infants have far more potential than other Stony Brook physicians have predicted for the patient." (Emphasis added.)

Dr. Butler has treated some 350 children afflicted with spina bifida. And he has seen Baby Jane Doe's records.

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Butler wasn't making any flat predictions. But, he said, in cases similar to that of Baby Jane Doe—he couldn't ethically talk about her case specifically—you might have “a child who with special education could be able to feed himself, talk some, have fun in a very rudimentary kindergarten-type class but not necessarily go home with much information. Certainly there would be little expectation of pain.”

Nonetheless, said Dr. Butler, while he would present all the options to the parents of such a child, he would never try to force them to consent to surgery, and he is opposed to any Federal intervention in such cases.

Who would not agree that it should be entirely up to the parents? Well, the Right-to-Lifers, George Will, Patrick Buchanan, Joseph Sobran. And me. Infants are not chattel. On the other hand—as will be detailed later in this series—the state has an obligation to provide the parents of these children all necessary financial support, indefinitely, once a handicapped life has been saved.

Let me concede my species loyalty in front. I do believe that humans are more worth saving than dogs or pigs. Justifying that, as an atheist, may present some difficulties, but we'll get to them. As for now, in this particular case, there is a baby who *might*—and unlike “objective” reporters on the other side, I won't go beyond *might*—have some fun and learn a few things if she were allowed to live beyond the two years expected to be her life span without surgery.

As a person under the Constitution, has Baby Jane Doe no rights of her own to live as long as she can? No due-process rights? No rights to equal protection under the laws? Or, let me ask a question of you that the Supreme Court of the United States was recently urged to answer. It was brought by Infant Doe of Bloomington, Indiana, who was sepulchrally asking the Court to review, under the Constitution, the process by which he had been allowed by his parents and doctors to starve to death because he was retarded:

“Does a newborn handicapped infant have rights of his own or do parents have a right of privacy that transcends his rights and allows them to determine whether he will live or die?”

The Supreme Court, without comment, waived the question away. It was moot. Because the baby was moot.

But Baby Jane Doe is still alive. Not yet moot. Do her parents indeed have exclusive rights over her life? Has *she* none at all?

While these principles are being debated, who can rescue her right now?

Not the Feds, God save us! Even if all they want to do is look at her medical records to see what's going on. In editorials, the New York *Times* (“Baby Jane's Big Brothers”) and the *Wall Street Journal* (“Big Brother Doe”), excoriated prying Big Government, but had no comfort for Baby Jane. Her life, even after surgery, would hardly be a life, said the *Times*. Weep for “her tormented parents.” And let the kid die. “Baby Jane, everyone agreed, is not going to get better.”

Everyone?

Listen, said the *Wall Street Journal*, there are going to be a lot more cases like this because advancing medical technology is forcing us to make decisions about death “where formerly nature took its course.” You remember Nature? He also used to go by the name of Thomas Hobbes.

So what are we to do? “The inevitable agony,” says the *Wall Street Journal*, “will be much less if these decisions, and *any mistakes*, are left to the the families involved; most often the families will decide on the basis of love, and, in any event, it is the family that must live with the resulting burden of guilt.” (Emphasis added.)

A “mistake,” as I understand it in this delicate context, is a corpse who ought not to have been a corpse.

And what about those families who do *not* decide “on the basis of love?” Some are cold, some are brutish, some are unswervingly utilitarian. Well, if parents without love make a mistake or two, the justice of the *Wall Street Journal* will be visited upon them: they’ll have the blues in the night. Yet, hasn’t someone been left out in all these homilies? Ah, that’s assuming you believe babies have rights independently of their parents.

As the editorials and the reporting on this issue indicate, we shall find during this journey luxuriant growths of newspeak. For instance, the liberal and civil libertarians—except for Yale Kamisar and a few others—will never speak of killing inconvenient babies. Their much more refined way of putting it is: letting infants die.

Or consider a phrase much circulated during all the coverage on Baby Jane Doe: “conservative treatment.” The parents would not allow surgery, and instead the baby is getting “conservative treatment.” At first, reporters ascribed the phrase to the doctors and the parents, but soon began to use it on their own as if it were, in terms of this child, an honest part of the English language. As in Marcia Chambers’s November 18 New York *Times* story:

“Under the conservative treatment the parents have chosen, [Baby Jane Doe] could live up to two years. With surgery she could live up to 20 years. . . .”

You get the picture? The “radical treatment” is to give the baby 18 years more of life. The other approach is to kill her in two years. But “conservative treatment” sounds so proper, so responsible, that most readers will certainly agree that Baby Jane Doe is in the best possible hands. It’s something like the only President we’ve got calling the MX missile “The Peacekeeper.”

One man not given to euphemism in these concerns is Dr. Joseph Fletcher, a theologian and medical ethicist, who has long been a no-nonsense advocate of euthanasia:

“It is naive and superficial to suppose that because we don’t ‘do anything positively’ to hasten a patient’s death, we have thereby avoided complicity in his death. Not doing anything is doing something.”

Meanwhile, as for Baby Jane Doe, until a shunt is permanently implanted to

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drain the buildup of fluid from her brain, the pressure on her brain will increase and more damage will be inflicted. And the longer her spinal surgery is delayed, the less chance she will have for a reasonable existence. And eventually, the *New York Times* will have been proved right. Baby Jane Doe will not get better. Baby Jane Doe will be moot.

The Baby Who Was Starved to Death for His Own Good

I went into medicine to do two things: to save lives and alleviate suffering. But I do not interpret that to mean that I alleviate the suffering of the parents of my patient by disposing of my patient.

—Dr. C. Everett Koop,
United States Surgeon General,
Face The Nation, CBS-TV,
November 6, 1983

Who do they think they are—asking me to help them commit infanticide?

—Linda McCabe,
an RN in the special care nursery,
Bloomington Hospital, Bloomington,
Indiana, April 1982

Prologue to the short, unhappy life of the Bloomington Baby: In 1976, the American Academy of Pediatrics awarded its highest honor to C. Everett Koop, a pediatric surgeon of international renown. In his acceptance speech, Koop, a truthful man, said: “You all know that infanticide is being practiced right *now* in this country, and I guess the thing that saddens me most about *that* is that it is being practiced by that very segment of our profession which has always stood in the role of advocate for the lives of children.”

No one can be sure how often nature is allowed to take its course—to use one of the many handy euphemisms in neonatal intensive-care units. It’s a very quiet affair. As one team of researchers puts it, the decision to let the baby go is “couched in professional confidentiality between physicians and parents. Unless individual cases present legal challenges or attract media attention, we can know little of the extent or the details of the practice.” (“Treatment or Involuntary Euthanasia for Severely Handicapped Newborns: Issues of Philosophy and Public Policy,” *The Journal of the Association for the Severely Handicapped*, Winter 1982)

Going through the literature on this subject, however, I found that one thing is certain: there is a decided increase in the withholding of life-sustaining treatment for severely handicapped infants. And within the medical profession, this practice is becoming more and more acceptable. Life itself is of less importance than the quality of that life as the doctors in attendance foresee it. (God bless the child that’s got all its parts working.)

With this survival-of-the-fittest value system in the ascendant again, it’s hardly surprising that rather urgent articles on this subject are appearing in such publi-

cations as *The Journal of the Association of the Severely Handicapped*.

If we are to have a brave new world of perfect babies—with parents having a second chance at aborting infants who are born defective—then do we really want the landscape cluttered with badly handicapped adults who cost more than they can produce? And who are aesthetically displeasing besides.

I should note that there are doctors and nurses who are appalled at what the current growth of infanticide portends concerning the brutalization of this society sooner rather than later. Not that they themselves would strive mightily to save *every* infant life. There are babies, they point out, for whom heroic measures make no sense, for they will die no matter what you do. Certain very premature babies, for example. And some babies are born dying, some without brains.

But the concern of these doctors and nurses—and the focus of this series—is handicapped infants whose future is open. They may not grow up to be Ronald Reagan, but they have a chance at a life that could be meaningful to them. Yet a good many such infants are disposed of without review by a court, by a hospital ethics committee, by anybody.

How many babies of all kinds are helped to “pass on”? Again, nobody knows for sure because it’s not all writ down in the records the way it really happened. But B. D. Colen, an exceptionally careful medical writer for *Newsday*, estimates that “the decision to withhold or withdraw treatment from extremely sick, premature, and/or deformed newborns is probably being made at least once every day by anguished parents and doctors in one of the nation’s more than 500 intensive care nurseries.”

Some of the doctors, as we shall see, are less anguished than others. But some do have disquieting moments. B. D. Colen tells of a specialist in the treatment of the newborn who says: “I have a recurring dream every so often. I’ve died and I’m going to Heaven, and as I go through the gates, I see what looks like this field of gently waving grass. When I look closely, it’s babies, slowly undulating back and forth—the babies I’ve shut off.”

Linda McCabe, a nurse with considerable experience in caring for infants who need special attention, works at Bloomington Hospital in Bloomington, Indiana. During the second week of April last year, she was driving to her job and was suddenly confronted by a march that was moving from the front of the courthouse to the hospital. The demonstrators were Right-to-Lifers, and among the signs they carried was one that called Bloomington Hospital “the new death camp.”

Linda McCabe was furious. Not at the marchers, but at the hospital, which had not made it at all clear to the public that what was going on inside—the starving to death of a Down’s Syndrome baby by agreement between the parents and certain doctors—had had nothing to do with the *nurses* after a certain

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point. McCabe and her colleagues in the special-care nursery had refused to be part of the killing. Private nurses were imported instead. Not everybody is that finicky about these things.

"I was horrified having to drive through those signs," Linda McCabe told me recently. "I couldn't believe those people were blaming *me*. While it was in my care, I was doing everything I knew how to do to save that baby." (She also wants to emphasize that the hospital administration *was* consistently supportive of the decision by her and the other regular nurses not to be accomplices in the baby's death.)

Baby Doe was born on April 9, 1982, with two problems. One was correctable—a deformed esophagus which prevented food from reaching his stomach. But the infant *could* be fed intravenously until the blockage was surgically corrected. The operation is not a routine process, but the probable success rate of such operations is better than 90 percent. The sooner the operation the better the success rate.

The infant had one other problem, and that was not correctable. This was a Down's Syndrome baby. He would be retarded.

Down's Syndrome occurs once in every 700 births. It used to be called "Mongolism" because, as Dr. Anne Bannon, former head of Pediatrics at St. Louis Hospital, points out, "the fold of skin at the inner corners of the child's eyes causes a slight upward slant, giving a quasi-Oriental look to the child's face." And "the baby's face may appear to be flat, with a flat-bridged and short nose."

The degree of retardation of Down's Syndrome children varies. Their IQs can range from 30 to over 70. ("Normal" IQ is from 80 to 120.) Many are not severely retarded.

Many respond well when there is early intervention to stimulate their mental capacities. They tend to be happy children, often the joy of a family. At least the kind of family that lets them live.

Many Down's Syndrome children grow up to get jobs. And if they can't work comfortably on the outside, they function in sheltered workshops. Furthermore, there are some who, with love and patience and instruction by one or more members of the family, can exceed expectations by quite a lot. One such kid, having shared a room with his older brother, who kept teaching him things, recently entered high school.

In terms of a Down's Syndrome *infant*, the most important thing to keep in mind is the last sentence of the report on "Baby Doe"—the Bloomington baby—in the September 15, 1983, *New England Journal of Medicine* by Dr. John Pless, the county coroner who performed the autopsy on this baby who was sentenced to be starved to death:

"The potential for mental function and social integration of this child, as of all infants with Down's Syndrome is unknown."

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Neither at the time the Bloomington Baby was born nor at the time he died six days later was it possible to predict how retarded he would be. Yet, his parents and their doctor refused him food and water—and they refused to allow the operation that would have enabled him to live. And so, as Dr. Anne Bannon notes in the Fall 1982 *Human Life Review*: “He died slowly and painfully while many doctors and nurses stood by, watched, and did nothing. But there were some who tried.”

Before I get to those who tried, in addition to Linda McCabe and the other regular nurses, it's worth noting that this was not an infanticide hidden behind the screen of doctor-patient confidentiality. The case was widely publicized, although certain of the details you'll be reading next week were not available at the time, having been sealed by court order.

Furthermore, Baby Doe's future was weighed by the courts of Indiana, and his case even went to the Supreme Court of the United States—though by then Baby Doe could only watch, with bemused interest, from Heaven.

All the proper procedures—as defined by the good liberals and the good civil libertarians supporting the parents in this year's Baby Jane Doe case on Long Island—were taken in Bloomington. Parental wishes were given high priority; at least some doctors agreed with the parents; the courts were involved and they agreed with the parents. What more could any humane civil libertarian want?

Why, even when some people wanted to adopt Baby Doe—Down's Syndrome and all—the baby was saved from those strangers who would have saved him. Better he should spend his last hours with those who loved him.

The point here is that this system won't do. There has got to be a way in which babies are not starved to death because they're retarded. Or are otherwise “shut off” because they have other handicaps that make them a lot less than perfect. By the end of this series, I shall report on a number of ways that are being proposed to monitor these decisions.

On the other hand, as will be evident in future columns, there is a growing school of doctors and bioethicists who believe it is time—as *California Medicine* has put it—we abandon our sentimental attachment to the “long held Western ethic of intrinsic and equal value for every life. . . . It will become necessary and acceptable to place relative rather than absolute values on such things as human lives. . . .” (Editorial, *California Medicine*, official journal of the California Medical Association, September 1970)

Some lives just ain't worth society's trouble to keep them going.

For instance, in *Deciding to Forego Life-Sustaining Treatment*, a March 1983 report by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, there is this cold augury of the future purification of our species:

“When California pediatricians were polled in 1975 about how they would treat a Down's Syndrome baby with a life-threatening intestinal obstruction (assuming paren-

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tal agreement and immunity from existing laws), 17 percent said they would do 'everything humanly possible' to save the baby's life, while 61 percent would give ordinary medical care but 'nothing heroic' (meaning the baby would die without the operation to remove the obstruction). . . . [Another] study found that 51 percent of the pediatricians surveyed in Massachusetts would not [even] recommend surgery for a Down's Syndrome infant with intestinal blockage."

It is a more than safe assumption that the vast majority of those doctors would operate to remove the obstruction if the baby were "normal."

"Ever since that baby was killed at the hospital where I work," Linda McCabe told me, "I have talked about what happened every time I get the chance. It's all I can think of that I can do. People have to know. So I don't mind your using my name at all."

Next week: More from Linda McCabe. And exactly how the decision was reached—by all the responsible, caring parties—to starve Baby Doe to death for his own good. Yes, indeed.

"He was hungry. He cried. He moved. He was one of us."

As to the exposure of children, let there be a law that no deformed child shall live.

—Aristotle, *Politics*, VII

Nature has its laws and we should observe them. Maybe we shouldn't try to rescue those whom nature or God has created so imperfectly.

—Dr. Raymond Duff,
professor of pediatrics, Yale University,
Herald-Telephone, Bloomington,
Indiana, April 16, 1982

I'm a little cookie, yes, I am.

I was made by the cookie man.

On my way from the cookie pan,

A little piece broke off-a me.

Now I ain't as round as I might be.

But I'll taste good, just wait and see.

And I can love back just twice as hard

As any regular cookie can.

—Larry Penn, A Milwaukee truck driver,
composer, and singer. From "I'm a
Little Cookie."

Let us begin at the end of Baby Doe's week of life in Bloomington, Indiana, in April 1982. The baby had been born on April 6 with two defects. One, a malformed esophagus, required surgery so that food could reach his stomach. It is an operation with more than a 90 percent success rate. The other thing wrong was that the baby had Down's Syndrome. He would be retarded.

After listening to their obstetrician, Baby Doe's parents decided they did not want to bring up this child. There would be no operation to correct the malformed esophagus. There would be no intravenous feeding. The infant would get no sustenance at all. As one lawyer who advised the parents told me, "The decision was made to let the infant die."

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"You mean, the decision was made to kill the infant."

"That," said the angry lawyer, "is a loaded word."

You betcha. Killing is a word for street crime, not for what decent people do for the good of the victim. When the Bloomington Baby died, the headline in the *Washington Post* was: "The Demise of Infant Doe." That's how a well-bred person would put it.

But in his *Washington Post* column, George Will, father of a much loved Down's Syndrome boy, said: "'Demise' indeed. That suggests an event unplanned, even perhaps unexplained. ('The Demise of Abraham Lincoln?')"

One of the doctors at Bloomington Hospital had tried to prevent the "demise" of Baby Doe from the day he was born. Pediatrician James Schaffer, who had been called in to examine the baby but whose advice had been rejected by the parents, became a forceful advocate of the infant. With the hospital administrators. With the courts. But nothing worked. And the baby was starving to death.

On the sixth day, Schaffer couldn't stand it any more. In the Fall 1982 *Human Life Review*, Dr. Anne Bannon, formerly head of pediatrics at St. Louis Hospital, tells what happened then:

"... he (and two other pediatricians) went with intravenous fluid in hand to the private room on an 'adult' floor (where the baby and his hired private-duty nurses were sent when the Nursery nurses refused to starve the baby). It was the first time in several days that Dr. Schaffer had seen the infant. It was also the last time.

"He did not start the fluids. But he described for me what he saw in that adult room on that floor in a modern hospital in the richest country in the world. Baby Doe's shrunken, thin little body, with dry cyanotic skin, extremely dehydrated, breathing shallowly and irregularly, lay passively on fresh hospital linens. Blood was running from a mouth too dry to close. ... Too late for fluids. Too late for surgery. Too late for justice."

The *Washington Post* observed: "The Indiana baby died not because he couldn't sustain life without a million dollars worth of medical machinery, but because no one had fed him."

And Stephen Chapman noted in the *Chicago Tribune*:

"The eagerness of so many couples to adopt Baby Doe offers a vision of what we might be. But the death sentence given him by our duly ordained courts offers a glimpse of what we are becoming."

What *are* we becoming? Polls indicate a decisive majority of the citizenry support the parents' decision in Long Island this year to give Baby Jane Doe "conservative treatment." (That is, to greatly speed her "demise.") And increasingly, doctors instruct us that "quality of life" is the name of the survival game as medical technology makes it more and more possible, and costly, to preserve life. If you're just going to be a drag, who needs you? But who decides whether someone's life is worth saving by that rather slippery criterion? Why, the doctors will decide. As law professor Yale Kamisar reports one eminent doctor as saying:

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“Look, do the passengers tell the pilot how to land the airplane? So relax, and leave the dying to us.”

Other doctors, more sensitive to the politics of death, prefer that more hospitals set up ethics committees to decide who shall live and who shall die. (For one thing, it's harder to sue a committee.) These review committees would include not only doctors but other kinds of specialists, and even some token lay people.

Then there is the rapidly emerging new priesthood of bioethicists. No hospital review committee will be kosher without one. They are the multidisciplinarians of death. And occasionally, I hope, of life. But somehow I get the feeling, reading some of them and watching them on television, that I don't want a bioethicist on my case. But as time goes by, will I have a choice?

The case of the Bloomington Baby—and a companion earlier killing, that of the Johns Hopkins Baby (who had the bad grace to take 15 days to starve to death)—can serve as an introduction to what kind of people we're becoming. And what we can do about it. If we want to do anything about it.

How were the decisions which continually condemned the Bloomington Baby to death arrived at? Why did the parents and the courts act as they did? Are new laws needed? Indiana has one now, as a kind of epitaph for Baby Doe. Will it prevent similar killings? Do we need a new law in New York to protect future Baby Jane Does? Is there any place in all of this for the Federal Government, which has suddenly become Orwell's monstrous Big Brother to those very same liberals who urge the Feds to subpoena all records imaginable in cases of racial and sexual discrimination?

We will also examine what “informed parental consent” actually means in these life-or-death situations. And we'll look at the role of the press. I do not believe that so many citizens would have voted thumbs down in the matter of Long Island's Baby Jane Doe if more reporters had done more independent investigating of both the medical facts in that specific case and the actual states of body and mind of those spina bifida children around the country who have not been killed off.

Now to start at the beginning. When the Bloomington Baby was born, the parents' family doctor asked Dr. James Schaffer, a pediatrician, to examine the infant. Schaffer diagnosed the malformed esophagus and the presence of Down's Syndrome. Like the majority of the hospital staff, Schaffer strongly felt corrective surgery of the esophagus should take place so that the baby would live. But the family's obstetrician, Dr. Walter Owens, had already spoken to the parents. He offered them the alternative of doing nothing to save the life of the child.

Why? Because it was a Down's Syndrome child. At a court hearing during the brief life of Baby Doe, Dr. Owens testified that even if the surgery to correct the malformed esophagus were successful, “This would still not be a normal child. . .

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Some of these [Down's Syndrome] children . . . are mere blobs. . . . Most of them eventually learn to walk and most of them eventually learn to talk . . . This talk consists of a single word or something of this sort at best. . . . These children are quite incapable of telling us what they feel, and what they sense, and so on." This baby, Dr. Owens concluded, could not attain "a minimally acceptable quality of life."

There's that killer phrase again—"quality of life."

In rebuttal, Dr. James Laughlin, a pediatrician, testified that at this stage of the infant's life, it was impossible to determine the degree to which he would be retarded. Furthermore, Laughlin pointed out that Down's Syndrome kids have a broad range of IQs, some going into the normal intelligence range.

I have no idea why Dr. Owens, the obstetrician, was so spectacularly uninformed about Down's Syndrome children, but his was the dismal prophecy that persuaded the parents. Maybe, had there been a biomedical ethics review committee at Bloomington Hospital in April 1982, Dr. Owens's decision would have been reversed by the members of the panel who knew, among other things, that Down's Syndrome kids can say more than just one word. And that to call them "blobs" tells us a lot more about the good doctor than about these children.

But what about the parents? Would *they* have been convinced? At the same hearing at which Owens testified, the father of Baby Doe said that he and his wife had "determined that it is in the best interest of the Infant Doe and the two [normal] children who are at home and their family entity as a whole" that the child should be left to die.

There, it seems to me, is a clear and fatal conflict of interest between these parents and this baby. The parents were representing their own interests, as they saw them. The baby's interests were, to say the least, counter to theirs. He needed, and very quickly indeed, to be treated both for his malformed esophagus and for the denial of his right to remain a person under the Constitution.

But although his parents had, in effect, abandoned him, Baby Doe was not alone. Dr. Schaffer was fighting for the infant's life. So were two county prosecutors, a law professor, and nurses at Bloomington Hospital. One of the nurses, Linda McCabe, told me, "A lot of us started looking up legal arguments ourselves. And we found some cases in which the court decided for the baby, not the parents. So we thought Baby Doe would win."

Instead, the judges kept affirming the sentence of death imposed on the baby by his parents. As when, on the afternoon of the night the infant died, Circuit Judge Pro-Tem Thomas Spencer ruled for the second time (as reported in the Bloomington *Herald-Telephone*) "that there was no probable cause to believe that the baby had been neglected by his parents and thus should be taken from their custody."

If starving a baby to death is not neglect, then what the hell is?

Some weeks later, about 75 members of various right-to-life groups conducted

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a memorial march in Bloomington for Baby Doe. Nobody else came. No liberals, no civil libertarians. Hell, they wouldn't be caught dead marching alongside such intellectual inferiors.

The marchers were singing, "All we are saying is give life a chance." And one of them said to a reporter about the dead baby:

"He was hungry. He was thirsty. He cried. He moved. He was one of us."

Well, if he was one of us, why did all the judges say he had to leave?

Sticks and Stones Break Baby's Bones but Words Kill

"If we're going to have legalized euthanasia in this country, it's going to begin in the nursery."

—Dennis Horan, a Chicago attorney and medical ethics expert for the American Bar Association, March 1983

"If a child were not declared alive until three days after birth, then all parents could be allowed the choice only a few are given under the present system. The doctor could allow the child to die if the parents so choose, and save a lot of misery and suffering. I believe this view is the only rational, compassionate attitude to have."

—Nobel laureate James Watson (of DNA double helix renown), May 1973

"One must decide for whose benefit is the decision to withhold treatment from a child with severe defects. Is no life better than one of low quality? The person to ask is an individual who has a disabling birth defect."

—Dr. John Robertson, then of the University of Wisconsin Law School and Medical School, 1975

"The night before little Infant Doe died [in Bloomington], I called the Indiana Supreme Court and told them I wanted the baby saved. Then my 16-year-old called and said, 'I am a Down's Syndrome child and I want the baby boy saved.'"

—Sherry McDonald, letter to the Evansville, Indiana *Courier*, April 17, 1982

D*eath in the Nursery*, a four-part investigative report by WNEV-TV in Boston, was shown in New England in February and March of this year. No television documentary by any of the network news organizations during 1983 came close to equalling the power—indeed, the shock—of this local news team's exploration of infanticide in hospitals around the nation. (There should be a weekly or monthly TV forum, through cable, so that all of us in all the provinces can see the best television journalism from Boston, Chicago, Houston, et al.)

Having examined thousands of death certificates and interviewed many doctors and parents in some 20 states, the Boston reporters discovered that there's a hell of a lot of infanticide going on. That is, the withholding of lifesaving medical care from variously imperfect babies, including a good many spina bifida and Down's Syndrome newborns. One case in that television series should be of particular interest to those who are pragmatically against capital punishment—

what if it's the wrong man?—but do believe parents have the right to dispose of damaged babies when doctors predict for them a poor “quality of life.”

In part four of *Death in the Nursery*, reporter Mike Taibbi tells of a case “where a premature infant was allowed to die . . . at the urging of a neurosurgeon who mistakenly diagnosed anencephaly . . . the absence of a brain . . . An autopsy showed there was a brain . . . which had the characteristics of prematurity but which was perfectly formed.”

There was considerable reaction to the television series, much of it horrified. A viewer in Vermont wrote to the St. Alban's *Daily Messenger* of being stunned that this was going on “not far away, in some remote Red China province, but here, in the land of the free—in some of our most prestigious teaching hospitals!”

Most doctors practicing infanticide wish the cameras and reporters would not meddle in things they do not understand, thereby stirring up those of the laity who also do not yet understand that the value of human life is relative. And the parents involved certainly don't want any attention. That's why the common surname of the victims is Doe.

The parents cannot even bring themselves to say what it is they're doing. Baby Jane Doe, for instance, is getting “conservative treatment.” In 1970, when the “Johns Hopkins Baby,” a Down's Syndrome child, was taking forever to starve to death at the medical center, the father, who had ordered the denial of food and water, would call up the doctor and say “How are things?”

“He meant,” the doctor recalls, “‘Is the kid still alive?’ I felt uncomfortable talking to him, and I felt a little funny saying, ‘Things are working out, they're just taking a little slower.’”

Many nurses avoid talking about their part in the deathwatch. Many do not like the assignment at all; some refuse it. And a few do speak out. For instance, Linda McCabe of Bloomington, Indiana, in the last two columns here. Others, without telling their doctors, sneak in a bit of life. Like the nurse in Phoenix, quoted anonymously in *Death in the Nursery*: “I just can't take it. I know we are not supposed to feed the baby, but I take my finger and put it in a glass of water and drop the water on her lips because they are so dry.”

If we are ever to have a perfect race, we must do something about these sentimentalists.

A key element in keeping most of these infanticides invisible is that the law winks at them. In the just published *The Rights of the Critically Ill* (An ACLU Handbook, Bantam), Professor John A. Robertson notes that parents and doctors could be prosecuted for denying essential treatments to infants with congenital defects such as Down's Syndrome “with the intent and result that they die.” Why? Because “failure to provide necessary medical care would constitute child abuse or neglect.” And when the child dies, the parents can be

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charged with murder or manslaughter. However, there has only been one (1) prosecution of parents and doctors "for nontreatment of defective newborns." And in that case, charges were dismissed "at a preliminary hearing when no one testified that the parents and doctors actually ordered starvation."

With little to fear from the law, and convinced that infanticide is truly in everybody's best interest, doctors and parents, in growing numbers, elect this course of "treatment." The only things that invade their privacy are the occasional cries and alarms accompanying the sudden public discovery of a deliberate killing in the nursery.

If the revulsion to these public deaths is strong and durable enough, a state legislature may change its laws to better protect future imperfect babies. (As Indiana has because of the killing by starvation of Baby Doe.) And conservative members of Congress may speak indignantly into the *Congressional Record*, as they introduce Federal legislation. (But why do no liberals like Ted Weiss or Pat Schroeder ever speak for the Baby Does?)

And it is because of such cases as those of Baby Doe and Baby Jane Doe that the American Civil Liberties Union has, at last, appointed a committee to review the ACLU's policies on euthanasia in general, along with such particulars as who should speak for the defective baby as its parents and doctor begin to give it that good-bye look. "We'll be examining euthanasia from the grave to the cradle," an ACLU official told me. Well, once logic takes hold of the committee, it's going to be difficult for its members to stop at the cradle. Because of accelerating medical advances, the fetus is becoming viable at an earlier and earlier stage. Eventually, not only the ACLU but the Supreme Court too will have to take another look at its life-or-death rules on these matters.

While the ACLU committee performs its labor, I intend to suggest, among other things, some changes in the law to make infanticide a lot less easy. Two of them come from what we learned in the case of the Bloomington Baby.

He was born on Friday, April 9, 1982, and the hospital administration, on being told that the infant's parents and their obstetrician wanted him starved to death, moved to get a judicial opinion. After all, the killing was going to take place right there. The baby had a malformed esophagus which could have been repaired by surgery, but since this was a Down's Syndrome baby, the parents decided to deny him surgery, and also food and water.

Late Saturday evening, April 10, Superior Court Judge John G. Baker held an emergency hearing at the hospital. Since the rights of a minor were at issue, Baker should have first appointed a guardian ad litem (an independent advocate and protector of the child's interests who would also develop a factual record on behalf of the baby). Under Indiana law, Judge Baker was not compelled to immediately appoint a guardian ad litem, nor would he have had to in many other states in which the law is similarly defective.

The judge, therefore, became the "protector" of the child, and in his awesome

wisdom, after hearing from those who would kill the baby and those who would save him, Baker ruled that he would allow the parents to choose the course of “treatment” for the infant suggested by their obstetrician, Dr. Walter Owens. The “treatment” was *no treatment*. No operation. No food. No water.

At that stage, the judge did appoint a guardian ad litem for the baby. He had, after all, administered a sentence of death and for the sake of proper appearance, there ought to be someone to bring an appeal for the kid on death row. Judge Baker selected the Monroe County Welfare Department’s child protection team.

First of all, those worthies did not get themselves together for a meeting on what to do next until the following Monday night, April 12. The baby, meanwhile, was starving right along. And then, missing the judge’s message—he hadn’t thought it was good court etiquette to tell them outright to appeal his decision—the child protection team decided *not* to appeal on behalf of the baby.

To this day, the child protection (*sic*) team has refused all public comment on their reasons for not appealing the sentence of death. They wouldn’t even tell the Department of Justice. (Protecting their own privacy?)

So, Rule One: At the moment when a decision is taken by the parents and the doctors to “let the child go,” that decision must be made known to the courts so that a true *guardian ad litem* will be appointed for the infant. I will leave for later the criteria by which these guardians will be selected and what their powers will be in this context. (Advice from readers, lawyers included, will be welcome.)

Rule Two: No guardian ad litem, let alone a goddamn so-called “child protection team” can be allowed to keep to themselves the reasons for whatever decisions they make.

I will spare you the tumultuous parade of additional guardian ad litem and judges who danced their minuets in the little time the baby had left. But I cannot omit a hearing, five hours before the Bloomington Baby died on Thursday, April 15. The judge was John Baker again, and appearing before him was attorney James Bopp, representing Bobby and Shirley Wright, parents of a three-year-old daughter with Down’s Syndrome. They wanted to adopt Baby Doe.

“To save the baby’s life,” James Bopp told me, “it was necessary for the Wrights to be given temporary guardianship prior to adoption. That way they could get him fed before it was too late. I argued before the court that the baby had been neglected and abandoned. The parents’ lawyer, though conceding that the baby was being given neither food nor water, claimed he had not been abandoned because the parents had come to see him a couple of times and were concerned for the welfare of the child.

“The parents’ attorney also argued that the infant had not been neglected because the parents were following a course of treatment prescribed by a physician. To be sure, the treatment was no medical care, but it became medical care

because it was prescribed by a physician. Therefore, the parents were not denying medical care to their baby. Finally, their lawyer argued, the baby was not in need of medical care, anyway, because he had a potential for mental retardation and therefore did not have sufficient quality of life to be preserved."

Judge Baker agreed with the attorney for the parents. The parents, he ruled, were not neglecting the child, and therefore had not abandoned it.

Leaving the courtroom, attorney James Bopp was shaking his head: "It's 1984. It's newspeak. It's peace is war."

At ten o'clock that night, Baby Doe gave up.

Troublemaking Babies and Pious Liberals

We cannot destroy life. We cannot regard the hydrocephalic child as a nonperson and accept the responsibility for disposing of it like a sick animal. If there are those in society who think this step would be good, let them work for a totalitarian form of government where, beginning with the infirm and the incompetent and ending with the intellectually dissident, nonpersons are disposed of day and night by those in power

—Dr. J. Engelbert Dunphy,
former president of the
American College of Surgeons,
during the annual oration before the
Massachusetts Medical Society, 1976

. . . decisions to forgo therapy are part of everyday life in the neonatal intensive care unit; with rare exceptions, these choices have been made by parents and physicians without review by courts or any other body. This approach has been endorsed by the American Medical Association, whose Judicial Council holds [1982] that "the decision whether to exert maximal efforts to sustain life [of seri-

ously deformed newborns] should be the choice of the parents."

—"Deciding to Forgo Life-Sustaining Treatment," a report by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, March 1983

. . . no newborn infant should be declared human until it has passed tests regarding its genetic endowment and . . . if it fails these tests, it forfeits the right to live.

—Francis Crick, 1962 Nobel laureate in physiology and medicine (This statement was made in January, 1978.)

I personally feel that [Baby Jane Doe] does have the right to life, but the parents shouldn't keep the baby because they don't want her to have the operation. The baby should be adopted and taken care of by parents who want it and will love it. If the [natural] parents will be suffering while the baby is alive, they shouldn't take care of it. Every life has a right to live.

—Julie Martinez, eighth grade,
Ditmas Junior High School, Brooklyn

Richard Cohen is a columnist for the *Washington Post*. If commentators were rated by the groups that publish the batting averages of members of Congress, Cohen would get very high marks from Americans for Democratic Action, the American Civil Liberties Union, Ralph Nader's Public Citizen, and other cadres of liberalism. On occasion, to his credit, Cohen writes

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against the grain of some of his customary constituents, as when he opposed Israel's invasion of Lebanon, thereby himself coming under prolonged bombardment.

He is much concerned with individual rights and liberties—except for those of certain handicapped infants. With regard to the killing by starvation of Baby Doe of Bloomington, Indiana, for instance, Cohen—in his sermonette on the demise of that infant—focused on “the quality of life that lay ahead” of the baby had it not been disposed of. “Its death might have been awful, but its life might have been worse.”

Mind you, as Cohen could easily have found out by using his telephone, the only thing wrong with that baby—aside from a routinely correctable malformed esophagus—was that he was a Down's Syndrome child. And there was *no way* of predicting, at so early a stage of that baby's life, how retarded he might have been. So Richard Cohen could not possibly have known what Baby Doe's “quality of life” would have been.

At the time, Cohen also sort of agonized about how difficult it is to decide whether to “take the life of an infant.” He came to the conclusion that “The only sure answer is, ‘It depends’—usually no, sometimes regrettably, yes. This is what the Indiana court said. As a result, two things died—a baby named Infant Doe, and a belief in absolutes. We have all grown up.”

Have we now? As has been shown here in detail during the past two weeks, the Indiana courts failed miserably to protect the independent rights of this infant—refusing even to let him be adopted, as the judges kept intoning that Baby Doe's parents were neither neglecting nor abandoning him by refusing to allow him to be given food and water. So, the only “thing” that died in this case was a baby who had every right to live.

A few weeks ago, in a conversation, Richard Cohen told me that maybe he hadn't thought hard enough about the Baby Doe case in Indiana. Okay, I figured, maybe he has grown up. Maybe he's not going to depend solely on what he sees on the wire services for his commentary on these cases. Maybe he's actually going to talk to some of the people involved.

Then, on November 29, came a Cohen column titled, like a headstone, *Baby Jane*. Once more, a fusillade of utterly confident prophecies by someone who has done no investigating of his own: “The real expectancy of her life is dismal at best.” “To prolong a life that would be barren of joy and, the doctors say, wracked with pain, is hardly ‘right.’”

But wait, Cohen is no cold fish. He is a liberal. Accordingly, he reminds us: “And neither is it ‘right’ to end that life by withholding surgical treatment that could extend it.”

So where does this leave Baby Jane Doe—strung between the horns of Cohen's dilemma? Well, you gotta go with the parents, says this bioethicist of the *Washington Post*. “Mr. and Mrs. Doe fight on,” writes Cohen, saluting them. But

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what Mr. and Mrs. Doe are fighting on to accomplish is the ending of this baby's life. So which side is Cohen on? Well, he says he's on the side of there being no "right" answers. Oh. So long, kid.

Now we come to testimony, before a New York State Supreme Court Justice, in the Baby Jane Doe case—testimony unreported in most of the press—which reveals, Richard Cohen notwithstanding, that there were no certainties as to the future of Baby Jane Doe if she had corrective surgery. No certainty of a life "barren of joy." No certainty of constant pain. No certainty that she would be wholly bedridden. No certainty that she would never be able to meaningfully interact with her environment. No certainty of any of those other unqualified dismal predictions in so many news reports and editorials. Indeed, as some of the testimony shows, along with corollary analyses I've seen by doctors who are expert in spina bifida cases, the odds are the other way. For the baby.

For instance, Dr. David McLone, Chief of Pediatric Neurosurgery at Chicago's Children's Memorial Hospital—the national center for spina bifida surgery—said after looking at the testimony in this Baby Jane Doe court hearing: *"If you take our experience of a child [in Baby Jane Doe's described medical condition] I would predict that the child in our hands would have normal intelligence and would be a community ambulator . . . [walking] probably with some bracing."* (Emphasis added.)

The testimony I'm referring to can be found in the transcript of an October 19 hearing in Riverhead before New York State Supreme Court Justice Melvyn Tanenbaum. It's a public document. If Richard Cohen had asked reporter Felicity Barringer of the *Washington Post*—who's been doing unusually probing work on this story—she would have given him a copy, they being colleagues. But a column reads better, you know, with touches like "a life that would be barren of joy."

In conflict at the Riverhead hearing were two physicians. Baby Jane Doe's parents had been advised by their original doctor to go ahead with the surgery, but after talking to Dr. George Newman, a neurologist at Stony Brook Hospital, they changed their minds, and the first doctor withdrew. Newman's view of Baby Jane Doe's future was decidedly bleak. On the other hand, Dr. Albert Butler, chief of neurological surgery at the same hospital, who had treated some 350 spina bifida children, was in favor of surgery. Both Newman and Butler testified at Riverhead. And if there is to be a presumption for life in cases like this, the specifics in the conflict between Newman and Butler should have brought the state appellate courts, and the Federal District Court later on, to insist on Baby Jane Doe's right to equal treatment as a person under the Constitution. (What if, by the way, the parents had been Jehovah's Witnesses refusing certain vital medical treatment for their daughter?)

I expect you remember, for instance, how every single news account cited

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Baby Jane Doe's "abnormally small head." That's the way I described it too. Well, at the Riverhead hearing, Dr. George Newman testified that the baby's head at birth was indeed "abnormally small," thereby giving her "virtually a 100 percent chance of being retarded."

But on the stand, Dr. Albert Butler said that the baby's head circumference of 31 centimeters was within normal measurements of a baby that size. (The hearing can be found as *THE PEOPLE OF THE STATE OF NEW YORK, on relation of A. LAWRENCE WASHBURN . . . against STONY BROOK HOSPITAL AND THE STATE UNIVERSITY OF NEW YORK AT STONY BROOK.*)

Worth noting is that the only judge who actually heard the conflicting medical testimony, who actually saw the doctors and other witnesses, ruled that Baby Jane was "in need of immediate surgical procedures to preserve her life." Justice Melvyn Tanenbaum, however, was reversed by the appellate division and the Court of Appeals.

All along, in all the battles through the courts, the only people trying to get Baby Jane Doe a better shot at life have been outsiders: A. Lawrence Washburn, who initiated the court proceedings; William Weber, appointed guardian ad litem because of Washburn's action; various Federal officials; and some advocates from right-to-life organizations.

They have been piously excoriated by editorial writers, among many other good citizens, as wanton intruders, cruel zealots, and well, outside agitators.

But who else was willing to try to get the kid a break?

A useless question, I suppose, if you believe—as Richard Cohen wrote of Baby Doe in Bloomington—that he was allowed to die for his "own good." I gather, from polls and from the mail I've been getting, most folks think if the lights were turned out for Baby Jane, it would be for her own good too. After all, what kind of life would she have? Why, everyone agrees she wouldn't be perfect.

It was on that score that Price Grisham wrote this letter to the *Washington Post* (December 11):

"Did the *Post* note the irony of running Richard Cohen's column on Baby [Jane] Doe in the same edition as the article on the National Decade of the Disabled?

"Mr. Cohen refers to the baby's life as one 'barren of joy.' When will people who are perfectly intelligent, clear-headed and well-educated stop assuming that one must be healthy, handsome, and preferably wealthy to be human and happy? I am not healthy (I have cerebral palsy), not handsome and, as a [Federal] GS-5 clerk, will probably never be wealthy.

"My childhood and adolescence were spent in more than a decade of operations and therapy. Yet I am quite sane and quite firm when I state that I would not exchange my handicapped body for that of the most muscular Redskin player, for through it I have learned more in the 30 years of my life than some people learn in a century. I am not afraid to suffer, and I am not afraid to help those who now suffer."

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What happens or does not happen, to handicapped newborns is related to how the handicapped who grow up are seen, or avoided, by the rest of us. It was logical, therefore, that when the Federal Government tried to get a look at Baby Jane Doe's hospital records, an *amicus* brief was filed on the side of the Government—and, I would say, the baby—by the American Coalition of Citizens with Disabilities, the Association for Retarded Citizens, the Association for the Severely Handicapped, the Disability Rights Education and Defense Fund, Disabled in Action of Metropolitan New York, and the Disability Rights Union.

I bet you didn't see that part of the story in the press. These groups came into Baby Jane Doe's case because they sure know that people with disabilities are often discriminated against, even after they've escaped alive from the nursery. They see this as a civil rights case. Not a time for hand-wringing, but a time for organizing.

'Did You Ever Get a Letter from a Vegetable?'

*And what rough beast, its hour
come round at last,
Slouches toward Bethlehem to be
born?*

—"The Second Coming," W.B. Yeats

At a recent convention of Catholic intellectuals, Morvan Lebesque said, "After centuries of morality, we still cannot answer questions like . . . Should malformed babies be killed? Where does man begin?" To which Father Jolif replied, "No one knows what man is any longer."

—*Humanly Possible: A Biologist's Notes on the Future of Mankind*, Jean Rostand, Saturday Review Press, 1973

The whole history of medicine is at hand to answer any . . . death-doctor. Those who delivered humanity from plague and rabies were not those who burned the plague-stricken alive in their houses or suffocated rabid patients between two mattresses. . . . Victory against Down's Syndrome—i.e., curing children of the ill-effect of their genic overdose—may not be too far off, if only the disease is attacked, not the babies.

—Dr. Jerome Lejeune, discoverer of trisomy 21, the defective gene in Down's Syndrome, *The Lancet*, January 5, 1980

We're talking about people who, in the traditions of our culture and cultures throughout the world, have been left alone by natural law. That is, the argument has been—particularly, for example, in Roman Catholic theology—that what nature or God has created extremely imperfectly should be left alone and go back to nature.

—Dr. Raymond Duff,
Department of Pediatrics, Yale-New Haven Hospital, *CBS Morning News*, May 18, 1982

. . . at the intensive care nursery at Yale-New Haven Hospital . . . sometimes life-saving medicine or surgery is withheld. Other infants are allowed to starve to death. And in some cases, doctors at Yale-New Haven have helped parents give their defective infants lethal drug overdoses, two doctors there said.

—"Defective Newborns Are Dying By Design," Diane Brozek, Medical Writer, *Hartford Courant*, June 14, 1981

A startling article appeared in the October 25, 1973, issue of *The New England Journal of Medicine*. The information in it was not new to most physicians, and certainly not new to any doctor or nurse involved in the care of the newborn. What made the article so startling, however, was that this was the first time the information was being discussed openly. It was about death in the nursery. Death by design. This has been going on for centuries, of course—the swift disposal of defective infants. Sometimes the defect had been simply a matter of gender. No room in the family for another girl.

In a modern nation, however, it was bad form to talk about what went on behind those closed doors. Until that 1973 article, “Moral and Ethical Dilemmas in the Special-Care Nursery” by Dr. Raymond Duff and Dr. A.G.M. Campbell. The latter was a Scottish doctor; Duff was and still is an attending physician in the Department of Pediatrics at Yale-New Haven Hospital as well as a professor of pediatrics at Yale Medical School. The co-authors did not write the article to blow any whistles. The intent of their report was to show that in certain cases, death is a preferable “management option.” Which cases? Those in which the infants “were considered to have little or no hope of achieving meaningful ‘humanhood.’”

In every case in which a baby in their report had been ticketed for death, Duff and Campbell emphasized, the parents had been fully informed of all the options. And had given their consent to the death. (The problem with this kind of “informed consent,” when lay people are basing their decisions on what specialists tell them, is that the temperament and experience of the specialist can make all the difference as to what the parents decide. A sanguine physician tells the parents about severely handicapped adults he knows who are full of “humanhood.” Another physician, who tends to see a glass as being half empty rather than half full, tells the parents about the institutionalized “vegetables” he knows who were needlessly and heedlessly saved at birth.)

The *New England Journal of Medicine* article focused on the deathwatch at the special-care nursery of the Yale-New Haven Hospital from January 1, 1970, through June 30, 1972. During that period there were 299 infant deaths in the nursery. Of them, 43—14 percent—were caused by the withholding of treatment by doctors and nurses. The babies chosen for death were variously defective. Among their ailments: cardio-pulmonary disease, central nervous system disorders, short-bowel syndrome, spinal malformations. Some of these conditions were untreatable, but some could have been treated. A case, for instance, of a Down’s Syndrome baby who also had an easily operable intestinal obstruction.

Why wasn’t the Down’s Syndrome infant treated for his intestinal obstruction? Because, Duff and Campbell explain, “his parents thought that surgery was wrong for their baby and themselves. He died seven days after birth.” Just like

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that. Just like the Johns Hopkins Baby with the same defect, except the latter took eight days longer to starve to death.

It's up to the parents to decide, Dr. Duff keeps insisting. It's their future; it's their family that will be affected if the defective infant is brought home; and they'll have to pay the bills. As for the infant, well, who knows better than the parents what's in the best interests of the child?

In *Ethics at the Edge of Life* (Yale University Press 1978), Paul Ramsey is very skeptical of Duff's insistence that "parents, facing the prospect of oppressive burdens of care, are capable of making the most morally sensible decisions about the needs and rights of defective newborns." Says Ramsey:

"There is a Jewish teaching to the effect that only disinterested parties may, by even so innocuous a method as prayer, take any action which may lead to premature termination of life. Husband, children, family and those charged with the care of the patient may not pray for death."

Duff and Campell were also opposed by two of their colleagues. In a subsequent issue of *The New England Journal of Medicine*, there appeared this letter by Dr. Joan L. Venes and Dr. Peter R. Huttenlocher of the Yale University School of Medicine:

"As consultants to the newborn special-care unit, we wish to disassociate ourselves from the opinions expressed by the authors. The 'growing tendency to seek early death as a management option' that the authors referred to has been repeatedly called to the attention of those involved and has caused us deep concern. It is troubling to us to hear young pediatric interns ask first 'should we treat?' rather than 'how do we treat?'

"*We are fearful that this feeling of nihilism may not remain restricted to the newborn special care unit.* To suggest that the financial and psychological stresses imposed upon a family with the birth of a handicapped child constitutes sufficient justification for such a therapy of nihilism is untenable and allows us to escape what perhaps after all are the real issues—i.e., the obligation of an affluent society to provide financial support and the opportunity for a gainful life to its less fortunate citizens" (emphasis added).

Has anyone else on the Yale faculty—in the humanities, in the law school—protested? Not to my knowledge.

Meanwhile, Dr. Duff has not changed his mind. And so far, he has had no legal difficulties as a result of withholding treatment from certain infants. At the end of the 1973 article, Duff and his colleague do ask: "What are the legal implications of actions like those described in this paper?"

Their answer: "Some persons may argue that the law has been broken, and others would contend otherwise. Perhaps more than anything else, the public and professional silence of a major social taboo and some common practices has been broken further. That seems appropriate, for out of the ensuing dialogue

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perhaps better choices for patients and families can be made. If working out these dilemmas in ways such as those we suggest is in violation of the law, we believe the law should be changed."

If that last line did not chill you to the marrow, read it again.

The Duff-Campbell piece on death as a management option began to reach the lay world through a report in the November 12, 1973 issue of *Newsweek*. That story was read by Sondra Diamond with mounting rage. At, for instance, the prediction that these infant candidates for death had "little or no hope of achieving meaningful 'humanhood.'" And that last line got her too: Change the law so that the killing can go with impunity.

Sondra Diamond also bridled, to say the least, at the use of the term, "vegetables," in the *Newsweek* article to describe the newborns designated for death. Enough already. She wrote a letter, and it was published in the December 3, 1973, *Newsweek*:

"I'll wager my entire root system and as much fertilizer as it would take to fill Yale University that you have never received a letter from a vegetable before this one, but, much as I resent the term, I must confess that I fit the description of a 'vegetable' as defined in this article. . . .

"Due to severe brain damage incurred at birth, I am unable to dress myself, toilet myself, or write; my secretary is typing this letter. Many thousands of dollars had to be spent on my rehabilitation and education in order for me to reach my present professional status as Counseling Psychologist. My parents were also told 35 years ago that there was 'little or no hope of achieving meaningful 'humanhood'' for their daughter.

"Have I reached 'humanhood'? Compared with Doctors Duff and Campbell, I believe I have surpassed it!

"Instead of changing the law to make it legal to weed out us 'vegetables,' let us change the laws so that we may receive quality in medical care, education, and freedom to live as full and productive lives as our potentials allow."

There is no telling, of course, how many of the infants who never checked out of Yale-New Haven Hospital's special-care (*sic*) nursery might nowadays have been writing letters to the New York *Times* on behalf of Baby Jane Doe's right to get spinal surgery. In any case, during the 1983 WNEV-TV (Boston) series, *Death in the Nursery*, there is an intriguing comment on Dr. Raymond Duff's prophetic gifts in these matters.

The third part of that television report began with a look at Jimmy Arria and Kimberly Mekdeci. Jimmy, now eight, was born prematurely, weighing only four and a half pounds. By his second day of life, he had contracted pneumonia and suffered two seizures. Kimberly Mekdeci, one of his classmates, was born with spina bifida (Baby Jane Doe's defect).

It was suggested to the parents of both Jimmy and Kimberly that they take death as the preferred management option so far as these babies were concerned. According to *Death in the Nursery*, this "unsolicited recommendation" came, in both cases, from none other than Dr. Raymond Duff.

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On the television program, Kimberly's father, Ted, recalls that Dr. Duff "said that Kim would probably grow up to be a vegetable, her life would be meaningless."

Kim is no vegetable. Nor does she have any mental impairment. Jimmy, also recommended for extinction, is an A student in the public school system. Said Irene Arria, Jimmy's mother, on *CBS Morning News* (May 18, 1982): "Sometimes doctors can make mistakes too, you know. . . . This doctor . . . was willing to help us decide to let [Jimmy] die, when to me he was . . . worth saving in every way. And you can see that by the way he turned out."

And Kim's father, Ted, on *Death in the Nursery*: "Telling me I should kill my daughter! I would have killed him before I killed my daughter, if my friend wasn't there. 'Cause I had my hand half-cocked and this is when my friend pulled me out of the room."

Dr. Duff refused to be interviewed for the program. No wonder.

A Case of Deformed Journalism at 60 Minutes

*Children are not property whose
disposition is left to parental discre-
tion without hindrance.*

—Cicero, New York State
Supreme Court,
Bronx County, 1979

I will say it without qualification. I do not know of any long-running news story that has been as badly, misleadingly, and lazily covered as the case of Baby Jane Doe. (Her parents have named her Keri-Lynn, as revealed on March 14.) This story has been going on since October, and the news accounts and editorials contain the same bush league errors now that they did at the beginning. ("Spinal surgery may give her a longer life, but cannot correct her severe retardation or ameliorate her pain": New York *Times* editorial, March 13.)

Three years ago, when journalists were squawking because the movie *Absence of Malice* had done a pretty good job of investigative reporting on reporters, the writer of the script, Karl Luedtke (part of a 1968 team at the Detroit *Free Press* that won a Pulitzer Prize) told me the journalistic key to the movie. Each of the stories the reporter in it wrote was accurate. But each one was not complete. Finally, therefore, each one was not true.

Except for some of *Newsday's* coverage at the beginning (not since) and that of Felicity Barringer at the *Washington Post*, the reporting on Keri-Lynn has been largely inaccurate as well as invariably incomplete, and therefore not at all true. Then, on March 11, CBS's *60 Minutes*, with the benefit of five months

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hindsight and its vaunted research staff, reached millions more with its story, "Baby Jane's Parents," than any news organization had before. And *60 Minutes* gave those millions of viewers the shoddiest report yet, a disgraceful contrast with the 1975 investigation that Mike Wallace and producer Joe Wershba did for *60 Minutes* in "To Live or Let Die," a piece on severely handicapped infants. Where the earlier program was as complex and sensitive as the subject, this year's "Baby Jane's Parents" was as flimsy and meretricious as if the show had been done for Channel 4's *Live at Five*.

Something Mario Cuomo said to me a few months ago bears on the herd journalism that has twisted this story from day one. "You know what happened?" the Governor said. "The reporters didn't analyze the case, and the editorial writers, also without doing any hard thinking, took the easy way out too. They took to criticizing 'the intruder,' the so-called Right-to-Life lawyer who kept bringing lawsuits on behalf of the infant. But they didn't think hard enough about whether the infant has rights of her own—rights that may be independent of what her parents decide for her." And hardly anybody in the press, including *60 Minutes*, found out much about the infant's handicap—spina bifida.

Now, let's take a look at "Baby Jane's Parents," reported by Ed Bradley and produced by Monika Jensen for *60 Minutes*.

On Camera, Dan and Linda (no last names were given) were treated very, very gently. That figures. Very few reporters would want to cross-examine the parents of a handicapped baby in a way that might make them look as if they were insufficiently devoted to that baby. Or as if they had made a most unfortunate mistake about the baby's treatment. Not good for the jouranlist's image. But Ed Bradley might at least have probed and analyzed some of their assertions during other parts of the program. He preferred not to. It was as if he were in the presence of Mother Teresa.

Only A. Lawrence Washburn was given a hard time by Ed Bradley. But everybody gives Mr. Washburn a hard time, from editorial writers to this state's Court of Appeals to the Federal Judge in Albany who fined him \$500 for harassment because Washburn has brought so many court actions on behalf of this handicapped infant when he isn't even a member of the family, for God's sake. The nerve of this intruder—trying to preserve the infant's rights as a "person" under the Constitution by trying to get an independent advocate appointed for her so that she might have a chance to live longer and with a brighter mind than is likely under the "conservative treatment" chosen by her parents. A terrible man, huh? Actually, he's become one of my heroes.

Washburn was clearly the antiseptic villain of the *60 Minutes* show, the man who dared to question a mother's capacity to do the right thing for her baby, a zealot-foil for everybody else, very much including Ed Bradley. And so it was that Bradley let the parents' lawyers get away with saying that the record is free of

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any medical dispute concerning this case. And Bradley let the father get away with claiming that it is “total ignorance” to say, as Washburn had, that the infant, if operated on, would have had a reasonably good prognosis in terms of her mental development.

When *60 Minutes* was over, decent-minded folk throughout the land had been led to believe that these afflicted parents were being cruelly hounded by this nut, as well as by the Federal Government. And, they all probably said as they went to bed, what business does *anybody* have intruding on this sorrowing family? Unless the intruders are kind and understanding like Ed Bradley.

That’s What *60 Minutes* is all about—fearlessly making complicated issues clear!

Here are a few facts, among many others, that somehow escaped Mr. Bradley and his producer, probably because, from the start, they were so sure how this story should be played that they shielded themselves from any facts that might inconveniently reveal their ignorance of what the story actually is.

Keri-Lynn is one of some 8000 babies born each year with spina bifida. As Dr. Anthony Gallo describes in the February, 1984, *Hastings Center Report*, spina bifida “results when the spinal column fails to fuse properly in fetal development. The meninges (membranes that cover the spinal cord) protrude in a sac through an open lesion.” This lesion can be repaired through surgery. The sooner the better. The Spina Bifida Association recommends that surgery take place within 24 hours of birth. Without surgery, there is a marked danger of infection that can lead to permanent brain damage.

This is the surgery that Keri-Lynn’s parents have refused to allow. And there *has* been infection. Because the records are now open only to the parents, their doctor, and the hospital, no one else knows how long that infection lasted, how severe it was, what effects it left, and whether there has been additional infection. There is evidence before infection set in—from the medical records of the first nine days, which *were* available—that the infant’s prognosis was quite good. If surgery had taken place, it’s possible there would have been little if any mental retardation. And there was a reasonable likelihood that she’d be able to walk with braces. Then the curtain came down, and Keri-Lynn was left in her privacy. Whether that is an awful privacy or not, we do not know.

None of this was on *60 Minutes*.

Practically all children with spina bifida also have hydrocephalus (“water on the brain”). As Dr. Anthony Gallo notes: “. . . the normal cerebro-spinal fluid, a liquid that looks like water, accumulates within the brain and slowly squeezes the brain. The result is a markedly enlarged head, and, if not treated, usually significant degrees of mental retardation.” This can be treated “by inserting a

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shunt, a small device placed under the skin that drains the fluid from the brain into the abdominal cavity where it can be absorbed.”

If the shunt is not implanted, the head can get bigger and bigger, and the mental retardation worse and worse. The parents of Keri-Lynn refused to have a shunt implanted during the period of time when the records were open. My information is that the only shunting since then was temporary, and took place when antibiotics were given to the infant to treat her infection. A shunt was used to get the antibiotics directly into the fluid.

So far as is known, no shunt has yet been permanently implanted to reduce the pressure of the fluid on the brain. One expert in pediatric surgery to whom I’ve spoken says: “I know from the records of the first nine days that her head circumference, though called ‘abnormally small’ by you journalists, was compatible with normal intelligence. But by now, if there is no shunt, the circumference of her head could be as big as a football. If the parents had allowed the shunt to be implanted at the start, her prognosis is likely to have been much better.”

None of this was on *60 Minutes*.

Some of you may be wondering about the recent statements by Linda, the mother in the case, that insofar as the surgery to repair the lesion in the spinal column is concerned, there’s no longer any need for it—thereby confirming the wisdom of the parents’ original decision not to allow surgery. While revealing that she and her husband were now deciding whether to take five-month-old Keri-Lynn home or put her in “a permanent health care facility,” the mother told an unidentified New York *Post* reporter on March 15:

“Keri’s back has been sealed for months. It’s a joke that the government is still trying to force surgery on her. . . . The baby’s back closed on its own. The skin grew over the opening naturally. If corrective surgery had been done, she would have been totally paralyzed. Now at least she has some feeling in her upper thighs.” The mother said much the same thing to Jerry Rosa in the March 16, 1984, *Daily News*.

The mother is misinformed, say a number of spina bifida experts who have seen medical testimony in the case. It is far from certain that Keri-Lynn would have been even severely paralyzed if she had had the surgery, especially if the operation had taken place early on. No doctor I’ve interviewed believes she would have been totally paralyzed. And as for the back having sealed itself on its own, “It always happens if the child survives,” said Dr. Fred Epstein of New York University Medical School, a nationally respected pediatric surgeon. “The only purpose of surgery is to make the back heal over sooner so there’s no risk of infection.”

The sooner the better. So it’s hardly a “joke” that the Federal Government—which did not go into court to force surgery on the infant—*still* wants to look at

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the medical records to see what's been going on all along. Has this infant been discriminated against with regard to medical treatment because of her handicap? Also, remember that if the surgery had been done at the beginning, the subsequent infection could have been prevented.

Furthermore, as a research associate of Dr. David McLone, Chief of Pediatric Neurosurgery at Children's Memorial Hospital, Chicago, and a specialist in spina bifida, told me: "Just because the skin grew back over does not necessarily mean there's any protection for the spinal cord under the skin, and it does not necessarily mean that the protective covering which is normally around the brain and spinal cord is there."

Getting back to the night *60 Minutes* turned to herd journalism, not a word was said on the program about the conflicting medical testimony in this case at an October 19 State Supreme Court hearing in Riverhead, Long Island. The parents' doctor, George Newman, a neurologist at Stony Brook Hospital, portrayed the infant's future as unrelieved misery and darkness of mind and soul. (What you've been reading in the New York *Times* boilerplate editorial and stories.) But also at that hearing was the chief of neurological surgery at the same hospital, Dr. Albert Butler, who has treated some 350 spina bifida children.

Dr. Butler testified that he would advise surgery; and when Dr. Newman assured one and all that it was unlikely the infant would ever develop any cognitive skills, the more experienced Butler disputed that judgment too. The parents' lawyer did get Butler to say that the parents' choice of treatment was medically appropriate, but most doctors do not like to go so far as to say publicly that a colleague, however misguided, has recommended the wrong course of treatment. And it was Butler, in an interview several weeks later in the November 9 *Newsday*, who said plainly that he favored "surgery in cases *medically identical* to those of Baby Jane because he believes such infants have far more potential than other Stony Brook physicians have predicted for the patient." (Emphasis added.) Butler had seen the baby and her records.

None of this was on *60 Minutes*, which allowed, indeed encouraged, millions of viewers to believe that the parents had done the very best they could do for their "deformed infant girl." (That sweetly non-judgmental phrase was in a CBS press release heralding the show. It's greatly inspirational for spina bifida kids in every state.)

Had the surgery and the shunting taken place, Keri-Lynn, in the years ahead, might have walked, with braces, and gone to school. At the least, she would have had a chance for more of a life. But what of the ceaseless pain that, according to many sad-eyed editorial writers, would have been with her all the days of her life? (What a mercy, they imply, that now she won't have too many days.) Every pediatric surgeon I've interviewed, in this and other cities, has been appalled by the bruited about of such misinformation.

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Says Dr. Fred Epstein of NYU Medical School: "Pain is absolutely not an integral part of the future of a spina bifida infant. Of course she'll know pain, as we all do. More, because of multiple operations. But certainly not intrinsic, constant pain."

Journalists, print and broadcast, sure have brought a lot of honor to our profession in their reporting on Keri-Lynn.

[N.B.: The first six of the above seven articles appeared in The Village Voice consecutively, beginning with the Dec. 6, 1983 issue and continuing through the Jan. 10, 1984 issue; the seventh article first appeared in the April 3, 1984 issue. ©1983, 1984 by The Village Voice.]

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[When President Reagan made his suddenly-controversial statement (to a Washington audience on Jan. 30) that the aborted child feels pain "that is long and agonizing," the White House confirmed that his assertion was based in part on an article by Prof. John T. Noonan, Jr., in The Human Life Review. Prof. Noonan's article first appeared in the book New Perspectives on Human Abortion, published by Aletheia Books (Univ. Publications of America, Inc., Frederick, Maryland), and was reprinted in Fall, 1981, issue of this review. Because of its obvious relevance to the current controversy—and to Mr. Sobran's lead article in this issue—we reprint it again below in its entirety. (©1981 by John T. Noonan, Jr.)]

The Experience of Pain by the Unborn

John T. Noonan, Jr.

One aspect of the abortion question which has not been adequately investigated is the pain experienced by the object of an abortion. The subject has clearly little attraction for the pro-abortion party, whose interest lies in persuading the public that the unborn are not human and even in propagating the view that they are not alive. Indeed, in a remarkable judicial opinion Judge Clement Haynsworth has written, "The Supreme Court declared the fetus in the womb is not alive . . ." ¹ Judge Haynsworth's statement is merely a resolution of the oxymoron "potential life," which is the term chosen by the Supreme Court of the United States to characterize the unborn in the last two months of pregnancy. ² Before that point, the unborn are referred to by the Court as alive only according to one "theory of life"; ³ and as the phrase "potential life" appears to deny the actuality of life, Judge Haynsworth does not exaggerate in finding that, by definition of our highest court, the unborn are not alive. From this perspective, it is folly to explore the pain experienced. Does a stone feel pain? If you know as a matter of definition that the being who is aborted is not alive, you have in effect successfully bypassed any question of its suffering.

It is more difficult to say why the investigation has not been pursued in depth by those opposed to abortion. The basic reason, I believe, is the sense that the pain inflicted by an abortion is of secondary importance to the intolerable taking of life. The right to life which is fundamental to the enjoyment of every other human right has been the focus. That suffering may be experienced by those who are losing their lives has been taken for granted, but it has not been the subject of special inquiry or outrage. The assumption has been that if the killing is stopped, the pain attendant on it will stop too, and it has not seemed necessary to consider the question of pain by itself. In this respect, those opposed to

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abortion have been, like most medical researchers, concentrating on a cure not for the pain but for the disease.

There are good reasons, however, for looking at the question of pain by itself. We live in a society of highly developed humanitarian feeling, a society likely to respond to an appeal to empathy. To those concerned with the defense of life, it makes no difference whether the life taken is that of a person who is unconscious or drugged or drunk or in full possession of his senses; a life has been destroyed. But there are those who either will not respond to argument about killing because they regard the unborn as a kind of abstraction, or who will not look at actual photographs of the aborted because they find the fact of death too strong to contemplate, but who nonetheless might respond to evidence of pain suffered in the process of abortion. In medical research it has proved useful to isolate pain as a phenomenon distinct from disease, so it may be useful here.⁴

The Analogy of Animals

The best indication that attention to the pain of the unborn may have social consequences is afforded by the example of humanitarian activity on behalf of animals. Let me offer three cases where substantial reform was effected by concentrating on the pain the animals experienced. In each case it was accepted that animals would die, whatever reform was enacted; an appeal on their behalf could not be based on an aversion to putting animals to death. The only forceful argument was that the way in which the animals were killed was cruel because it was painful to the animals.

The first case is that of trapping animals by gins—traps that spring shut on the animal, wound it, and hold it to die over a probably protracted period. A campaign was launched in England against this method of trapping in 1928, and after thirty years Parliament responded by banning such trapping.⁵ A second case is the butchering of cattle for meat. The way in which this was for centuries carried out was painful to the animal being slaughtered. A typical modern statute is the law in California which became effective only in 1968—all cattle are to be rendered insensible by any means that is “rapid and effective” before being “cut, shackled, hoisted, thrown or cast.” Or, if the animals are being slaughtered for kosher use, their consciousness must be destroyed by “the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.”⁶ A third case: a 1972 California statute regulates in detail the methods by which impounded dogs or cats may be killed. If carbon monoxide is used, the gas chamber must be lighted so that the animal’s collapse can be monitored. A newborn dog or cat may not be killed other than by drugs, chloroform, or a decompression chamber. The use of nitrogen gas to kill an older dog or cat is regulated in terms of an oxygen reduction to be reached within sixty seconds.⁷

Each of these laws has a single goal: to assure that the animal not suffer as it dies.

It may seem paradoxical, if not perverse, to defend the unborn by considering what has been done for animals. But the animal analogies are instructive on three counts: they show what can be done if empathy with suffering is awakened. They make possible an *a fortiori* case—if you will do this for an animal, why not for a child? And they exhibit a successful response to the most difficult question when the pain of a being without language is addressed—how do we know what is being experienced?

The Inference of Pain

Our normal way of knowing whether someone is in pain is for the person to use language affirming that he or she is suffering.⁸ This behavior is taken as a sign, not necessarily infallible but usually accurate, that the person is in pain. By it we can not only detect the presence of pain but begin to measure its threshold, its intensity, and its tolerability. Infants, the unborn, and animals have no conceptual language in which to express their suffering and its degree.

Human infants and all animals brought up by parents will cry and scream.⁹ Every human parent becomes adept at discriminating between a baby's cry of pain and a baby's cry of fatigue or of anxiety. How do we distinguish? By knowing that babies are human, by empathizing, by interpreting the context of the cry. We also proceed by trial and error: this cry will end if a pain is removed, this cry will end if the baby falls asleep. But animals, we know, are not human and are, in many significant ways, not like us. How do we interpret their cries or their wriggling as pain reactions if they are silent?

What we do with animals to be able to say that they are in pain is precisely what we do with the newborn and the infant: we empathize. We suppose for this purpose that animals are, in fact, "like us," and we interpret the context of the cry. We also proceed by trial and error, determining what stimuli need to be removed to end the animal's reaction.¹⁰ We are not concerned with whether the animal's higher consciousness, its memory and its ability to understand cause and to forecast results, are different from our own, even though we know that for us the development of our consciousness, our memory, our understanding, and our sense of anticipation all may affect our experience of pain. With animals, we respond when we hear or see the physical sign we interpret as a symptom of distress.

Once we have made the leap that permits us to identify with animals, we do not need to dwell on the overt signs of physical distress. All we need is knowledge that an injury has been inflicted to understand that the animal will be in pain. Consider, by way of illustration, this passage on the cruelties of whaling:

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“A lacerated wound is inflicted with an explosive charge, and the whale, a highly sensitive mammal, then tows a 300-ton boat for a long time, a substantial fraction of an hour, by means of a harpoon pulling in the wound.”¹¹ The author does not particularize any behavior of the wounded whale beyond its labor tugging the whaleboat, nor does he need to. We perceive the situation and the whale’s agony. In a similar way the cruelty involved in hunting seals is shown by pointing to their being shot and left to die on the ice.¹² The pain of the dying seal is left to imaginative empathy.

We are, in our arguments about animal suffering and in our social response to them, willing to generalize from our own experience of pain and our knowledge of what causes pain to us. We know that pain requires a force inflicting bodily injury and that, for the ordinary sentient being who is not drugged or hypnotized, the presence of such a force will occasion pain. When we see such a force wounding any animal we are willing to say that the animal feels pain.

The Nature of Pain

If we pursue the question more deeply, however, we meet a question of mixed philosophical-psychological character. What is pain? Pain has in the past been identified with “an unpleasant quality in the sense of touch.” Pain has also been identified with “unpleasantness,” understood as “the awareness of harm.”¹³ In the analysis of Thomas Aquinas, *dolor* requires the deprivation of a good together with perception of the deprivation. *Dolor* is categorized as interior *dolor*, which is consequent on something being apprehended by the imagination or by reason, and exterior *dolor*, which is consequent on something being apprehended by the senses and especially by the sense of touch.¹⁴ The Thomistic definition of exterior *dolor*, while general, is not incongruent with a modern understanding of pain, which requires both harmful action on the body and perception of the action. It has been observed that pain also has a motivational component: part of the pain response is avoidance of the cause of the pain.¹⁵ In the words of Ronald Melzack, a modern pioneer in work on pain, “The complex sequences of behavior that characterize pain are determined by sensory, motivational, and cognitive processes that act on motor mechanisms.”¹⁶

Pain, then, while it may be given a general definition, turns out upon investigation to consist of a series of specific responses involving different levels and kinds of activity in the human organism. Melzack has put forward a “gating theory” of pain, in which the key to these responses is the interaction between stimuli and inhibitory controls in the spinal column and in the brain which modulate the intensity and reception of the stimuli.¹⁷ Melzack’s theory requires the postulation of control centers, and is not free from controversy.¹⁸ Yet in

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main outline it persuasively explains a large number of pain phenomena in terms of stimuli and inhibitors.

To take one illustration at the level of common experience, if someone picks up a cup of hot liquid, his or her response may vary depending on whether the cup is paper or porcelain. The paper cup may be dropped to the ground; an equally hot porcelain cup may be jerkily set back on the table. What is often looked at as a simple reflex response to heat is modified by cognition.¹⁹ To take a more gruesome experience, a number of soldiers severely wounded on the beach at Anzio told physicians in the field hospital that they felt no pain; they were overwhelmingly glad to be alive and off the beach. The same wounds inflicted on civilians would have been experienced as agonizing.²⁰ For a third example, childbirth without anesthesia is experienced as more or less painful depending on the cultural conditioning which surrounds it.²¹

As all of the examples suggest, both the culture and specific instances play a part in the perception of pain. Memory, anticipation, and understanding of the cause all affect the perception. It is inferable that the brain is able to control and inhibit the pain response. In Melzack's hypothesis, the gating mechanism controlling the sensory inputs which are perceived as painful operates "at successive synapses at any level of the central nervous system in the course of filtering of the sensory input."²² In this fundamental account, "the presence or absence of pain is determined by the balance between the sensory and the central inputs to the gate control system."²³

What is the nature of the sensory inputs? There are a larger number of sensory fibers which are receptors and transmitters, receiving and transmitting information about pressure, temperature, and chemical changes at the skin. These transmissions have both temporal and spatial patterns. It is these patterns which will be perceived as painful at certain levels of intensity and duration when the impulses are uninhibited by any modulation from the spinal column or brain.²⁴

The Experience of the Unborn

For the unborn to experience pain there must be sense receptors capable of receiving information about pressure, temperature, and cutaneous chemical change; the sense receptors must also be capable of transmitting that information to cells able to apprehend it and respond to it.

By what point do such receptors exist? To answer this question, the observation of physical development must be combined with the observation of physical behavior. As early as the 56th day of gestation the child has been observed to move in the womb.²⁵ In Liley's hypothesis, "the development of structure and the development of function go hand in hand. Fetal comfort determines fetal

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position, and fetal movement is necessary for a proper development of fetal bones and joints.”²⁶ If fetal bones and joints are beginning to develop this early, movement is necessary to the structural growth; and if Liley is correct, the occasion of movement is discomfort or pain. Hence, there would be some pain receptors present before the end of the second month. A physiologist places about the same point—day 59 or 60—the observation of “spinal reflexes” in the child. Tactile stimulation of the mouth produces a reflex action, and sensory receptors are present in the simple nerve endings of the mouth.²⁷ Somewhere between day 60 and day 77 sensitivity to touch develops in the genital and anal areas.²⁸ In the same period, the child begins to swallow. The rate of swallowing will vary with the sweetness of the injection.²⁹ By day 77 both the palms of the hands and the soles of the feet will also respond to touch; by the same day, eyelids have been observed to squint to close out light.³⁰

A standard treatise on human physiological development puts between day 90 and day 120 the beginning of differentiation of “the general sense organs,” described as “free nerve terminations (responding to pain, temperature, and common chemicals), lamellated corpuscles (responding to deep pressure), tactile corpuscles, neuromuscular spindles, and neurotendinous end organs (responding to light and deep pressure).”³¹ But as responses to touch, pressure, and light precede this period, visible differentiation must be preceded by a period in which these “general sense organs” are functioning.

The cerebral cortex is not developed at this early stage; even at twelve to sixteen weeks it is only 30 percent to 40 percent developed.³² It is consequently a fair conclusion that the cognitive input into any pain reaction will be low in these early months. Neither memory nor anticipation of results can be expected to affect what is experienced. The unborn at this stage will be like certain Scotch terriers, raised in isolation for experimental purposes, who had no motivational pain responses when their noses encountered lighted matches; they were unaware of noxious signals in their environment.³³ But if both sensory receptors and spinal column are involved, may one say with assurance that the reception of strong sense impressions causes no pain? It would seem clear that the reactions of the unborn to stimuli like light and pressure are the motivational responses we associate with pain. We say that a sense receptor is there because there is a response to touch and a taste receptor because there is a response to taste. By the same token we are able to say that pain receptors are present when evasive action follows the intrusion of pressure or light, or when injection of a disagreeable fluid lowers the rate of swallowing. Liley is categorical in affirming that the unborn feel pain.³⁴ His conclusion has recently been confirmed by an

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American researcher, Mortimer Rosen, who believes the unborn respond to touch, taste, and pain.³⁵

While the likelihood of weak participation by the cerebral cortex will work against the magnification of the pain, there will also be an absence of the inhibitory input from the brain which modulates and balances the sensory input in more developed beings. Consequently, the possibility exists of smaller and weaker sensory inputs having the same effect which later is achieved only by larger and stronger sensations.

As the sensory apparatus continues to grow, so does the cerebral cortex: light stimuli can evoke electrical response in the cerebral cortex between the sixth and seventh months.³⁶ By this time there will be a substantial cerebral participation in pain perception together with the likelihood of greater brain control of the sensory input. If a child is delivered from the womb at this date, he or she may shed tears. He or she will cry.³⁷ As we do with other newborns, we interpret these signs in terms of their context and may find them to be signs of pain. What we conclude about the delivered child can with equal force be concluded about the child still in the womb six months through nine: that unborn child has developed capacity for pain.

In summary, beginning with the presence of sense receptors and spinal resources, there is as much reason to believe that the unborn are capable of pain as that they are capable of sensation. The ability to feel pain grows together with the development of inhibitors capable of modulating the pain. By the sixth month, the child in the womb has a capacity for feeling and expressing pain comparable to the capacity of the same child delivered from the womb. The observation sometimes made that we don't remember prenatal pain applies with equal force to the pains of being born or the pain of early infancy. Memory, it must be supposed, suppresses much more than it recalls. If we remember nothing about life before birth or life before three or four, it may even be that some recollections are painful enough to invoke the suppressive function of our memory; life in the womb is not entirely comfortable.

The Experience of Pain in an Abortion

The principal modern means of abortion are these. In early pregnancy sharp curettage is practiced: a knife is used to kill the unborn child.³⁸ Alternatively, suction curettage is employed: a vacuum pump sucks up the unborn child by bits and pieces, and a knife detaches the remaining parts.³⁹ In the second trimester of pregnancy and later a hypertonic saline solution is injected into the amniotic fluid surrounding the fetus. The salt appears to act as a poison;⁴⁰ the skin of the affected child appears, on delivery, to have been soaked in acid.⁴¹ Alternatively, prostaglandins are given to the mother; in sufficient dosage they will

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constrict the circulation and impair the cardiac functioning of the fetus.⁴² The child may be delivered dead or die after delivery.⁴³

Are these experiences painful? The application of a sharp knife to the skin and the destruction of vital tissue cannot but be a painful experience for any sentient creature. It lasts for about ten minutes.⁴⁴ Being subjected to a vacuum is painful, as is dismemberment by suction. The time from the creation of the vacuum to the chief destruction of the child is again about ten minutes.⁴⁵ Hypertonic saline solution causes what is described as "exquisite and severe pain" if, by accident during an abortion, it enters subcutaneously the body of the woman having the abortion.⁴⁶ It is inferable that the unborn would have an analogous experience lasting some two hours, as the saline solution takes about this long to work before the fetal heart stops.⁴⁷ The impact of prostaglandins constricting the circulation of the blood or impairing the heart must be analogous to that when these phenomena occur in born children: they are not pleasant. If, as has been known to happen, a child survives saline or prostaglandin poisoning and is born alive, the child will be functioning with diminished capacity in such vital functions as breathing and cardiac action.⁴⁸ Such impaired functioning is ordinarily experienced as painful.

Do the anesthetics the mother has received lessen the pain of the child? It is entirely possible that some drugs will cross the placenta and enter the child's system, causing drowsiness. Anesthesia, however, is not administered to the gravida with the welfare of her child in mind, nor do the anesthetics ordinarily used prevent the mother from serious pain if she is accidentally affected by the saline solution. It may be inferred the child is not protected either. Is it possible that the abortifacient agent destroys the pain receptors and the capability of a pain response earlier than it ends the life of the unborn, so that there is a period of unconsciousness in which pain is not experienced? This is possible in curettage by knife or suction, but it would seem to occur haphazardly, since stunning the child is not the conscious aim of the physician performing the abortion. In saline or prostaglandin poisoning it seems unlikely that the pain apparatus is quickly destroyed. An observation of Melzack is of particular pertinence: the local injection of hypertonic saline opens the spinal gate, he has remarked, and evokes severe pain. At the same time, it raises the level of inhibitors and closes the gate to subsequent injections.⁴⁹ From this it may be inferred that an unborn child subjected to repeated attempts at abortion by saline solution—the baby in the *Edelin* case was such a child⁵⁰—suffers a good deal the first time and much less on the second and third efforts. The general observation of Melzack on the mechanism of pain is also worth recalling: any lesion which impairs the tonic inhibitory influence from the brain opens the gate, with a consequent increase in

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pain.⁵¹ Any method of abortion which results first in damage to the cortex may have the initial effect of increasing the pain sensations.

From the review of the methods used, we may conclude that as soon as a pain mechanism is present in the fetus—possibly as early as day 56—the methods used will cause pain. The pain is more substantial and lasts longer the later the abortion is. It is most severe and lasts the longest when the method is saline poisoning.

Whatever the method used, the unborn are experiencing the greatest of bodily evils, the ending of their lives.⁵² They are undergoing the death agony. However inarticulate, however slight their cognitive powers, however rudimentary their sensations, they are sentient creatures undergoing the disintegration of their being and the termination of their vital capabilities. That experience is painful in itself. That is why an observer like Magda Denes, looking at the body of the aborted child, can remark that the face of the child has “the agonized tautness of one forced to die too soon.”⁵³ The agony is universal.

Conclusion

There are no laws which regulate the suffering of the aborted like those sparing pain to dying animals. There is nothing like the requirement that consciousness must be destroyed by “rapid and effective” methods as it is for cattle; nothing regulating the use of the vacuum pump the way the decompression chamber for dogs is regulated; nothing like the safeguard extended even to newborn kittens that only a humane mode of death may be employed. So absolute has been the liberty given the gravida by the Supreme Court that even the prohibition of the saline method by a state has been held to violate the Constitution.⁵⁴ The Supreme Court has acted as though it believed that its own fiat could alter reality and as if the human fetus is not alive.

Can human beings who understand what may be done for animals and what cannot be done for unborn humans want this inequality of treatment to continue? We are not bound to animals to the same degree as we are bound to human beings because we lack a common destiny, but we are bound to animals as fellow creatures, and as God loves them out of charity, so must we who are called to imitate God.⁵⁵ It is a sign not of error or weakness but of Christlike compassion to love animals. Can those who feel for the harpooned whale not be touched by the situation of the salt-soaked baby? We should not despair of urging further the consciences of those who have curtailed their convenience to spare suffering to other sentient creatures.

With keener sensibilities and more developed inhibitors than animals, we are able to empathize with their pain. By the same token, we are able to empathize with the aborted. We can comprehend what they must undergo. All of our

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knowledge of pain is by empathy: we do not feel another's pain directly. That is why the pain of others is so tolerable for us. But if we begin to empathize, we may begin to feel what is intolerable.

We are bound to the beings in the human womb by the common experience of pain we have also known in the womb. We are bound to them as well by a common destiny, to share eternal life. As fellow wayfarers, we are bound to try to save them from a premature departure. We can begin to save them by communicating our knowledge of the suffering they must experience.

NOTES

1. *Floyd v. Anders*, 440 F. Supp. 535, 539 (D.S.C. 1977).
2. *Roe v. Wade*, 410 U.S. 113, 162 (1973).
3. *Ibid.* at 163.
4. On the usefulness of looking at pain as a separate phenomenon, see Ronald Melzack, *The Puzzle of Pain* (New York: Basic Books, 1973), pp. 9-10.
5. C.W. Hume, *Man and Beast* (London: Universities Federation for Animal Welfare, 1962), p. 214.
6. Cal. Agric. Code § 19 (1967).
7. Cal. Penal Code §§ 597 v. and w. (1978).
8. John S. Liebeskind and Linda A. Paul, "Psychological and Physiological Mechanisms of Pain," *American Review of Psychology* 28 (1977): 42.
9. As to parentally cared-for animals, see Hume, *op. cit.*, p. 45.
10. *Ibid.*, pp. 94-95.
11. *Ibid.*, p. 215.
12. *Ibid.*, pp. 215-216.
13. Edward Boring, *Pain Sensations and Reactions* (Baltimore: The Williams and Wilkins Co., 1952), pp. v-vi.
14. Thomas Aquinas, *Summa Theologica*, I-II, q. 35, art. 7.
15. Melzack, *op. cit.*, p. 163.
16. *Ibid.*, p. 165.
17. *Ibid.*, pp. 158-166.
18. See Liebeskind and Paul, *op. cit.*, p. 47.
19. Cf. Melzack, *op. cit.*, pp. 29-31.
20. *Ibid.*, pp. 29-30.
21. *Ibid.*, p. 22.
22. *Ibid.*, p. 166.
23. *Ibid.*, p. 171.
24. *Ibid.*, p. 158.
25. A. William Liley: "The foetus as personality," *Australia and New Zealand Journal of Psychiatry* 6:99, 1972.
26. A. William Liley, "Experiments with Uterine and Fetal Instrumentation," in *Intrauterine Fetal Visualization*, ed. Michael M. Kuback and Carlo Valenti (Oxford: Excerpta Medica; New York: American Elsevier Publishing Co., 1976), p. 75.
27. P.S. Timiras, *Developmental Physiology and Aging* (New York: The Macmillan Company, 1972), p. 153.
28. *Ibid.*, p. 153.
29. Liley: "The foetus as personality," *op. cit.*, p. 102.
30. Trypena Humphrey, "The Development of Human Fetal Activity and Its Relation to Postnatal Behavior," in *Advances in Child Development and Behavior*, ed. Hayne W. Reese and Lewis P. Lipsett (New York: Academy Press, 1973), pp. 12, 19.
31. Timiras, *op. cit.*, p. 137.
32. Geoffrey S. Dawes, *Fetal and Neonatal Physiology* (Chicago: Year Book Medical Publishers, 1968), p. 126.
33. Melzack, *op. cit.*, p. 28.

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34. Liley: Experiments with Uterine and Fetal Instrumentation, *op. cit.*
35. Mortimer Rosen, "The Secret Brain: Learning Before Birth," *Harper's*, April 1978, p. 46.
36. Timiras, *op. cit.*, p. 149.
37. Paul Mussen, John Congar, and Jerome Kagan, *Child Development and Personality*, 2nd ed. (New York: Harper and Row, 1963), p. 65.
38. Louis M. Hellman and Jack A. Pritchard, eds., *Williams Obstetrics*, 14th ed. (New York: Appleton-Century-Crofts, 1971), p. 1089.
39. Selig Neubardt and Harold Schwelman, *Techniques of Abortion* (Boston: Little, Brown and Company, 1972), pp. 46-47.
40. *Ibid.*, p. 68.
41. Magda Denes, *In Necessity and Sorrow: Life and Death in an Abortion Hospital* (New York: Basic Books, 1976), p. 27.
42. Sultan M.M. Karim, *Prostaglandins and Reproduction* (Baltimore: University Park Press, 1975), p. 107.
43. See *Floyd v. Anders*, 440 F. Supp. 535 (D.S.C. 1977), for a case where the child died after delivery.
44. André Hellegers, director of the Joseph and Rose Kennedy Institute, to the author, oral communication.
45. *Ibid.*
46. Neubardt and Schwelman, *op. cit.*, p. 68.
47. Karim, *op. cit.*, p. 107.
48. See A.I. Csapo *et al.*: "Termination of pregnancy with double prostaglandin input," *American Journal of Obstetrics and Gynecology* 124:1, 1976.
49. Melzack, *op. cit.*, pp. 181-182.
50. *Commonwealth v. Edelin*, — Mass., 359 (N.E. 2nd) 4 (1976).
51. Melzack, *op. cit.*, p. 171.
52. Thomas Aquinas, *Summa contra Gentiles* 4, 52.
53. Denes, *op. cit.*, p. 60.
54. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).
55. Thomas Aquinas, *Summa Theologica*, II-II, q. 25, art. 3, reply to objection 3.

APPENDIX B

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The Cry From the Womb *Proof of Pain Transforms Abortion Debate*

Adrian Lee

Strange that proof of a poignant hidden factor in abortion should be so plentiful, yet remain pent-up for so long.

Arguing that an aborted child feels the scalpel or saline solution that kills it, Ronald Reagan draws on a long-accumulating body of evidence for a spectacle even the most ardent Pro-Choicer would flinch from—what Professor John T. Noonan, of the University of California at Berkeley, describes as the unborn in their “death agony . . . experiencing the ending of their lives . . . they are sentient creatures undergoing the disintegration of their being.”

A philosopher’s view, a moralist’s, not a scientist’s; Noonan is a law professor. But any Pro-Choicer betting on the medical researchers to confound Professor Noonan, and obliterate his appalling vision of agony in the womb, are betting wrong. The evidence trends in the opposite direction, gathering momentum and weight as the fetus develops. In the third trimester, the fetus recoils from and tries to evade dismemberment or saline injection. Escape is impossible, but the fetus dies hard. The *New York Times*, no anti-abortion sheet for sure, quotes an abortionist as saying the fetus’s initial agitation, finally its convulsive movements as death envelops it, are simply “horrible.”

Just when the Pro-Lifers seem dispirited, this new emotional dimension to the abortion question comes to hearten them. Everybody understands pain. Everybody, even the most convinced Pro-Choicer, relates to it. Even to hear of pain in the womb—not to believe it, but simply to hear it argued—arouses compassion. We are that sensitive to pain, not merely the pain we feel ourselves but the pain others feel.

The abortion debate will never be the same again. Not simply because sensitivity to pain means a living, pulsing being rather than the mere “potential life” the U.S. Supreme Court is forever harping on (and, in the worst decision it ever handed down, is forever stuck with). Distinctions between life and potential life tend to be abstractions. They don’t translate into images; they pale into words, mere words.

But talk of pain, and the image comes through of a doomed, defenseless child, set upon with torturing knives and solutions in the place where it ought to be safest, the

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womb. As the abortionist's saline injection burns away the fetus's skin (flays the fetus alive actually), who doesn't react? Who doesn't wonder at what point death becomes irreversible, whether reprieve is still possible?

Whatever your feelings about abortion, you'd have to own to a feeling of sadness at the point of no return. All that might have been said to convince the mother that her child had a right to life will never be said and all that the child itself might have grown up to do will never be done.

Since pain, the abortion debate has changed. The Pro-Choicers can refuse to debate photographs of unborn fetuses—apparently, the pictures are too lifelike. They can invoke the 1973 court decision to justify the 15 million abortions Reagan talked about, but they can't shut out that cry from the womb. They can hold their ears until the only thing they hear is the singing of their own pulses and the thudding of their own hearts but they'll never escape it.

You wonder why the Pro-Lifers didn't go to pain earlier. Maybe it's because they were preoccupied with the crime of abortion itself, maybe because they themselves didn't really "see" the pictures they wanted to debate with the Pro-Choicers. The debate itself, its slogans, have developed a certain deadening sameness. All of a sudden now, magic new vistas open up; who is to say where they lead? What resolution of the abortion problem do they promise? What lives will they save?

APPENDIX C

[The following article first appeared in the January 17, 1984, *Washington Times*, and is reprinted here with permission (©1984, *The Washington Times*). Mr. Steven Valentine is the chief legal counsel and staff director for Sen. John East's Senate Judiciary Committee's Subcommittee on Separation of Powers; he is also a contributor to the book *Infanticide and the Handicapped Newborn* (Brigham Young University Press, 1982).]

Supreme Court vs. Defective Babies

Steven Valentine

For the second time in its current term, the United States Supreme Court recently refused to hear a widely publicized case involving the civil rights of a handicapped newborn child. But the court cannot continue to avoid the so-called "Baby Doe" cases forever. The court, after all, played a large part in creating these controversies in bioethics and the law.

The court's latest denial of a petition asking it to consider the rights of handicapped newborns came in the "Baby Jane Doe" case, which worked its way to the highest level of the New York State court system. Earlier in its term, the court declined to review the famous 1982 Indiana "Baby Doe" case, which prompted the Reagan administration's entrance into the legal and ethical maelstrom over seriously handicapped newborns.

While the medical facts of the New York and Indiana episodes differ, in both cases state officials made the legal determination that the decision on whether the life of a defective newborn should be preserved is a private matter.

In New York, the state attorney general has argued in state and federal courts for what amounts to an extension of the Supreme Court's abortion privacy doctrine to include the right of Baby Jane Doe's parents to decide their *spina bifida* baby's fate.

In Indiana, the state Supreme Court acquiesced in a lower court ruling that ordered the Bloomington Hospital, basically on right-to-privacy grounds, to allow Infant Doe's parents to starve their Down's syndrome baby boy to death.

These legal assertions are at odds with something that the Supreme Court established in its landmark 1973 *Roe v. Wade* abortion opinion. In the course of finding that the unborn child is never a "person" who is guaranteed the right to life that is found in the 14th Amendment, the court also said that the full panoply of constitutional rights attach to the new human being at birth. Thus it can be said that the Supreme Court never intended that its *Roe v. Wade* decision should lead to the protection of parental privacy rights in making life-or-death decisions about handicapped newborns.

But the law is a teacher, and the law of the Supreme Court in *Roe v. Wade* taught

society a revolutionary lesson about how the law has come to address the sanctity of human life. Having denied that the unborn child has the constitutional right to live at any point during pregnancy, the *Roe* court required each state to allow the abortion of even a healthy “viable” fetus as long as the mother’s doctor finds that carrying the pregnancy to term would harm at least her emotional health. Under *Roe v. Wade*, then, a perfectly “normal” unborn child may be aborted legally even through the final weeks of pregnancy.

If there is an effectively unencumbered privacy right to abort a healthy child even shortly before birth, then why isn’t there a corresponding or similar right to end the life of a handicapped child shortly after birth? Clearly, at least the New York and Indiana officials involved in the Baby Doe cases have taken just that cue from *Roe v. Wade*.

Because the Supreme Court drew its right-to-life line in an arbitrary manner, it would be difficult for it to explain how, in a matter of days, a constitutional right to end even a healthy life just before birth becomes a constitutional “equal protection” duty for states to protect a handicapped life soon afterward.

Another perhaps unintended outgrowth of *Roe v. Wade* has been the rise of the “wrongful life” theory of legal action, which is enjoying increased acceptance in federal and state courts. This development gives the parents of a handicapped child a right to a financial “recovery of damages” against the doctor who attended the pregnancy when they can show that he should have discovered the unborn child’s “defect” so that an abortion could have been obtained.

The resulting pressures on physicians encourage “Baby Doe” cases as they seek to avoid potential financial liability for children whom they “negligently” caused to be born alive. It is not unreasonable, in fact, to speculate on the extent to which considerations of this nature may have played a role in prompting the New York and Indiana “Baby Doe” cases.

Continuing requests for the court to decide the legal issues that are presented by the “Baby Doe” cases come at a time when President Reagan’s prospective reelection portends the reversal of the *Roe v. Wade* ruling, which the court reaffirmed only last June. This is because all five of the remaining Justices who voted with the original 7-2 majority in the *Roe* case are now 75 or older. All would be at least 80 by the end of a second Reagan term.

Though President Ford replaced the sixth pro-*Roe* justice with one who also supports the court’s abortion privacy doctrine, President Reagan named the now clearly anti-*Roe* Justice Sandra Day O’Connor to fill the seat of the seventh. Mr. Reagan is committed to naming other recognized advocates of “judicial restraint,” a class that universally abhors *Roe v. Wade*, to fill future vacancies on the Supreme Court. Since the *Roe* vote is now 6-3, reversal of the abortion decision will require

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replacement of only two of the five remaining aged pro-*Roe* justices during a second Reagan administration.

Before Chief Justice Warren Burger's "Abortion Court" leaves the scene, however, it ought to erase the unintended doubt it has fostered about the constitutional right-to-life of the handicapped newborn child. It ought to seize the next opportunity to say that the Constitution affords no right-to-privacy so broad as to allow parents to seek the death of their handicapped newborn child. On the contrary, it ought to declare, the Constitution requires that the handicapped newborn child must be afforded the same civil rights as every other American.

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