

# RELIGIOUS RESIDUES AND PRESUPPOSITIONS IN THE AMERICAN DEBATE ON ABORTION

GEORGE HUNTSTON WILLIAMS

*Harvard University*

THE TRADITIONAL Christian (Roman Catholic) and (Orthodox) Jewish understandings of the ethical problems of abortion are commonly viewed as "sectarian." In its present normative forms, this body of philosophical, theological, ethical, canonical, and responsorial formulations respecting abortion commonly passes in American legislative chambers and in some hospitals and doctors' offices as of so expressly a religious point of view that it cannot be accorded any special status in the public domain of a pluralistic society which has, in its constitutional articles, chosen to flourish without either the benefits or the burdens of religious sanction. But these religious viewpoints also represent the collective effort over the centuries to help define the nature of human life in the light of the best biological information available and to protect it. The bulk of this religiously perpetuated body of medical ethics and jurisprudence up to quite recent times preserves, in fact, the most comprehensive and systematic effort to interrelate the biology and ethics of the problem. Accordingly, the moral perspective provided by the main religious communities should be heeded as of general human concern in the context of Western civilization quite apart from their own theistic presuppositions. This "sacred embryology" and associated scruples cannot be dismissed as of no relevance to the ethical efforts of rational humanists in a democratic society.

The present essay, however, especially in Part 1, is directed primarily to both cultural and churchly Protestants, many of whom have lost their historic bearings in the current debate and are aware that there is at present no moral consensus among them on the question of abortion comparable to that among Catholics. To provide the perspective needed to clarify the situation for Protestants, the author as a Church historian

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has felt it incumbent upon himself to include in his survey topics dealt with more authoritatively elsewhere by Catholic and Jewish specialists but which constitute a necessary part of the Protestant interpretation of the past and present. After rehearsing that development schematically, the historian turns theorist and in Part 2 proposes a model of a politics of abortion addressed to secular society and its agents and functionaries, yet a theory at once shaped by the moral conscience of all theists—as this has been clarified during more than two millennia of refinement—and responsive to the urgency of more secular or humanistic counterclaims.

#### A PROTESTANT PERSPECTIVE ON TWO MILLENNIA OF LAW AND LORE REGARDING ABORTION

Catholic thought draws on not only Scripture and patristic and Scholastic tradition, but also upon classical philosophical and medical texts, notably of Aristotle and Claudius Galen. Why there is no distinctively Protestant version of this Western Christian tradition being conspicuously pressed at the present juncture in the evolution of American society and of its legal system and its medical code will be taken up momentarily.

The other main religious tradition in the United States, that of Orthodox Judaism, which in any ethical discussion in American pluralistic society inevitably attains more prominence and consideration than it would elsewhere, except in Israel, is likewise more than “sectarian” Jewish. For here, too, very ancient concerns and observations about human life, about right and wrong, have been distilled or codified in a way that makes Jewish testimony on the significance of life in the womb before birth relevant to the democratic community at large as it turns to rethinking its laws on abortion. Moreover, the whole range of Jewish presuppositions, from the Orthodox to the fully secular Jewish, is proportionately highly represented precisely in those professions most closely connected with the issue of abortion: psychiatry, medicine, and law.

Now if it be granted that, quite apart from the religious labels of Jewish and Roman Catholic, the venerable body of interrelated physiological, ethical, and metaphysical thought on abortion can be also of general humanistic interest for a society officially neutral on religion as far as its laws and usages in the public domain are concerned, proponents of these views must nevertheless go on to concede that far back in both the Roman Catholic and the Orthodox Jewish traditions respecting procreation and the formation of the fetus the biological and

physiological presuppositions were faulty in the light of our contemporary knowledge of what actually goes on at this level. A glance at the main points in these superseded embryologies will help explain why Jews, Catholics, and Protestants today generally have demonstrably different *feelings* about the problem of abortion even when they are alike fully abreast of modern genetic facts; why both Catholic and Jewish ethicists are really obliged to recast their traditional ethical norms fully in accordance respectively with sociology and embryology;<sup>1</sup> why Protestant ethicists must reclaim and reassess their full Christian past from the age of the Fathers through the age of the Reformers; and why, finally, non-Christian and non-Jewish doctors, ethicists, and legislators must still take seriously the *essential* principles involved in the traditional religious scruples about abortion.

Above these essential and common religious principles, there are, it must be acknowledged, significant confessional differences. Despite sharing in a common secular culture which is undergirded by a technology that has put a strain on all institutions and ethical theories, the participants in the several major religious traditions in America, when faced by the moral, legal, and medical problems of abortion, display sufficient differentiation in attitude and conviction to justify the attempt to ascertain the historical background of the antecedent "religious" component in the contemporary debate on abortion even when traditional religion is no longer functional in many laws and practices. The fact is that opinions and practices of Jewish social workers, legislators, lawyers, doctors, and rabbis do cluster differently on the spectrum from those of their counterparts among Catholics, as do these, in turn, from those of most main-line Protestants. To be sure, further refinement in ascertaining the confessional distribution of opinion and practice requires a distinction on the spectrum between professionals of various kinds who are conscious of drawing explicit guidance from their religion

<sup>1</sup>As will become clear in the subsequent exposition, Catholicism has historically concentrated on the fetus as a salvable individual to the neglect of the social context of personhood, while rabbinical or now normative (as distinguished from Hellenistic) Judaism, physiologically and socially defining the growth in the womb as unensouled until it receives breath (oxygen) among the living, must rework its responsorial tradition about the fetus as merely an organic part of the mother's body in full view of the embryological fact that the fetus receives in its own circulatory system oxygen from the mother's blood and, more important, that its genetic code is set the moment the haploid generation of sperm and ovum unite.—The reader may as well be alerted that the author, employing the Latin *foetus* and the Greek *embryon* interchangeably, will also use as the setting requires such terms as "zygote," "protoperon," "person," and "intra-uterine [human] life." He does not intend by this variation in terminology in occasional recognition of stages in gestation to imply any distinction in the gravity of an induced abortion as between that of the unformed or diminutive and that of the more developed fetus.

and those who are only "culturally" Protestant, or "secularly" Jewish, or of Catholic "background."

As for those in the three main religious groupings for whom religious tradition is intentionally a determinant in their professional and civic life, it is evident that traditional views embodied in responsorial and casuistic literature and in canon law are more clearly functional in the present debate on the issue of abortion in the case of Jews and Catholics than in that of Protestants. The latter, for the most part, except for Scripture, have in principle, at least, disallowed any body of religious law or tradition to be binding. Thus it is much more to the point for a historian to reach back to Moses Maimonides or Thomas Aquinas than to the relatively more recent Martin Luther or John Calvin in getting at either the subliminal or intentional religious and ethical motivations for what a contemporary American Jew, Catholic, or Protestant might say or do about the issue of abortion. Yet the palpable differentiation between the Catholic and Protestant Christian on so important an issue as to what constitutes human life must have a further explanation that goes beyond the fact that Protestantism has come to be more dependent for its moral system than Catholicism upon the environing culture and science. We shall try to ascertain the factors which have contributed to the ethical differentiation in the Christian community, especially as between Catholics and Protestants. But before we have done that, we shall have had occasion to point out in what respects the classical Protestant Reformers were actually more conservative on the moment of ensoulment and on the gravity of abortion than their Catholic contemporaries and that they may indeed have indirectly served to contribute for a season to the evolution of the present papal position.

Embedded in all traditions are the still emotionally potent and therefore morally functioning residues of archaic or superseded genetic, embryological, and obstetric theories. To bring this submerged biology to the surface, a task congenial to the medical or ecclesiastical historian, can contribute to the present-day sorting out of the more permanent and the merely adventitious elements in the "religious" positions that are being currently defended or reconceived.

The nonmedical public in possession of only what passes for modern biology probably does not realize that it was as late as 1827 that Karl von Baer discovered the joint function of the human ovum and the spermatozoon, supplying the latter term.<sup>2</sup> And much more still remained

<sup>2</sup> Convenient surveys of the relevant medical history are those of Arthur William Meyer, *The Rise of Embryology* (Palo Alto, 1939); Joseph Needham, *A History of Embryology* (2nd rev. ed.; New York, 1959); Tadeusz Bilikiewicz, *Die Embryologie im Zeitalter des Barock und des Rokoko*, with 19 plates (Leipzig, 1932).

to be observed and interpreted before the character of the two components were to be understood as haploid cells, each with a half-set of chromosomes and constituent genes, together constituting the diploid zygote complete with its genetic code. This was first clearly observed in a nematode worm by Edouard van Beneden in 1887.<sup>3</sup> The far-reaching significance of the discovery was first described by August Weismann in 1892.<sup>4</sup> The terms haploid-diploid were first used in the genetic meaning by Eduard Strasburger in 1907.<sup>5</sup>

### *Traditional "Religious" Views on Abortion*<sup>6</sup>

#### 1. Archaic Embryologies and Theories of the Soul: Classical Sources

In solving the specifically religious problems of obstetrics and fetology, much depended upon whether theologians and others thought of man as primarily a soul in a body or as the combination respectively of soul and body and mind or of just soul and body. Christian theologians, drawing both upon Old Testament Scriptures and Greek philosophy, worked, in fact, with all three possibilities: (1) the pre-existence of the soul apart from a body, (2) a bipartite (body-soul) anthropology, and (3) a tripartite (body-soul-spirit) anthropology. Holding also to the doctrine of original sin, elaborated by St. Paul out of Genesis and rabbinical texts (but doing with them what Paul's predecessors had never done within the context of Judaism), the Church Fathers systematized three theories about the origin of the soul and the relationship of the soul to its body (or of the "rational" soul or mind to the animal soul and body), namely: (1) again, psychic pre-existence and either (a) an infusion or (b) a fall of a primordial soul into a body at some point in fetal development, (2) traducianism, and (3) creationism. A distinguished historian of philosophy and interpreter of the Church Fathers has aptly charac-

<sup>3</sup> E. van Beneden, "Nouvelles recherches sur la fécondation et la division cellulaire chez l'ascaride mégalocephale," *Bulletin de l'Académie Royale de Belgique* 7 (Brussels, 1887).

<sup>4</sup> A. Weismann, *The Germ Plasm: A Theory of Heredity* (1892), tr. W. N. Parker and H. Rönnefeldt (London, 1893).

<sup>5</sup> E. Strasburger, "Ueber die Individualität der Chromosomen und die Propfybriden-Frage," *Jahrbuch für wissenschaftliche Botanik* (Leipzig, 1907).

<sup>6</sup> The religious background, medicine, and law are brought together with special reference to the current American scene by Eugene Quay, "Justifiable Abortion: Medical and Legal Foundations," *Georgetown Law Journal* 49/2 (1960-61) 173-256; *ibid.* 49/3, 395-538, with extensive bibliography. See also Roger John Huser, O.F.M., *The Crime of Abortion in Canon Law* (Washington, D.C., 1942); Lawrence Lader, *Abortion* (Boston, 1966) chap. 11; and Harold Rosen, *Abortion in America* (1954, reprinted under this new title, Boston, 1967) chap. 9. I have found useful, as a survey of the Catholic theology of the juridical and the medical-ethical material, the essay by Hans Goeckel, *Die Wandlungen der Bewertung des ungeborenen Kindes* (Heidelberg, 1911).

terized the three positions as the theories of the "ready-made" soul, of the "second-hand" soul, and the "custom-made" soul.<sup>7</sup> St. Augustine of Hippo, as he wrestled with the problem in his *Letter 166* to Jerome (415 A.D.), "A Treatise on the Origin of the Human Soul,"<sup>8</sup> interestingly discussed all three theories.

In the doctrine of psychic pre-existence developed by Plato and Plotinus, the immortal soul was embodied as in a tomb (*sōma* interpreted as *sēma*). In the Christianized version of psychic pre-existence which had to take heed of the scriptural fall of man, Origen of Alexandria, Didymus the Blind, Hilary of Poitiers, Cyril of Alexandria, Nemesius of Emesa (*On Human Nature*), and Boethius (*De consideratione*) all held that the fall of each soul occurred in a premundane phase of being before embodiment. The latter process it underwent partly for punishment and partly to be purged, perfected, and restored to the prelapsarian state.

The doctrine of traducianism or generationism, associated with the Stoic concept of an ethereally corporeal soul and an Aristotelian conception of its interpenetration of the body as its form, was first fully formulated for Christians by Tertullian in *De anima* (27). Arnobius the Elder, Gregory of Nyssa, and Rufinus espoused it. In modified form it was made dominant in early Latin Christendom. In traducianism the soul and body of each person were thought of as a single entity seminally in the loins of Adam, therefore alike involved in the consequence of Adam's disobedience and fall from Paradise, and propagated or transmitted in the generative act from generation to generation.

The third theory, creationism, cultivated by the majority of the Greek Fathers, also Jerome, and eventually coming to prevail also in Latin Scholastic Christendom, held that the soul was at some moment created *ex nihilo* and infused into the embryo at some stage in its development. (For the Pythagoreans, the soul was infused at conception. For the Stoics, this point was delayed until the taking of the first breath.) As a further refinement, incorporating the scriptural doctrine of the fall of mankind in Adam, Christian creationism presupposed (like traducianism) a once-for-all creation of bodily substance prolonged by

<sup>7</sup> Harry A. Wolfson, "Immortality and Resurrection in the Philosophy of the Christian Fathers," in *Religious Philosophy* (Cambridge, 1961) chap. 3, esp. p. 86. For the larger context of the various theories of the origin of the soul, see Karl Rahner and P. Overhage, *Das Problem der Hominisation* (Freiburg, 1961). For a brief characterization, see J. F. Bethune-Baker, *An Introduction to the Early History of Christian Doctrine* (5th ed.; London, 1933) pp. 302-5. The best comprehensive account of traducianism is that of A. Michel, *Dictionnaire de théologie catholique* 21 (Paris, 1946).

<sup>8</sup> *PL* 33, 720-33; translated in *Nicene and Post-Nicene Fathers* (henceforth *NPNF*), First Series 1, 525-32.

propagation from Adam and individually differentiated in time as individual souls were created *ad hoc*.

Of the three theories, traducianism was closest to what modern biologists would call the facts. Creationism was possibly most in need of keeping in contact with the biological data, as philosophers and doctors engaged in speculation and observation about embryology. Philosophical and medical embryology provided "sacred embryology" in general and especially creationism with the fetal facts about the most plausible moment for the divine infusion of the "custom-made" soul. No doubt theological embryology in its turn gave some impetus to scientific observation.

Speaking broadly, philosophical and medical embryology accumulated over all the centuries of genetic and embryological observation, experiment, and theorizing, prior to the discovery by von Baer in 1827, comparably disparate views as to (1) which progenitor was primarily or exclusively responsible for the new life in the womb and as to (2) how much of the new organism was there *in parvo* at its inception.

As to this second point, life at inception, embryologists from Hippocrates of Cos (b. ca. 460 B.C.) and his school and Aristotle (d. 322 B.C.) into modern times have been, to use the older terms, either preformationists or epigenists (epigenesists). As was finally to be recognized by the end of the eighteenth century, when these terms were most widely used, both theories contained an aspect of genetic and embryological truth. In epigenesis new life was thought to be brought into existence in successive accretions or stages and not merely by development. Thus Aristotle's hylomorphic doctrine of generation and corruption with its conception of composite substances and successive vegetative, sensitive, and (in human beings) intellectual souls (from outside) constituted a version of epigenesis. The theory of preformation understood that all parts of an organism pre-exist in the germ or whatever and are merely developed or unfolded (not produced by accretion) in the process of reproduction. Preformationism was set forth by Hippocrates, for example, when he or members of his school wrote in *On Semen; On the Development of the Child*:<sup>9</sup> "Everything in the embryo is formed simultaneously. All the limbs separate themselves at the same time and so grow, none comes before or after the other, but those which are naturally bigger appear before the smaller, without being formed earlier."<sup>10</sup> With the development of the microscope, advocates of preformationism, like Nicolaus Hartsoeker (d. 1725) and F. de Plantade (Dalenpatius, d. 1741),

<sup>9</sup> These two works which have become separated were probably originally a continuous treatise. For the state of scholarship on Hippocrates and his School, see Henry E. Sigerist, "On Hippocrates," in *On the History of Medicine* (New York, 1960) pp. 97-130.

<sup>10</sup> *Op. cit.*, sect. 26; Needham, *op. cit.*, p. 34; Meyer, *op. cit.*, p. 22.

imaginatively went so far as to publish plates of what they considered homunculi, compact diminutive humanoids encased within the sperm and ever ready for their nine-months' expansion in a womb like Japanese flowers in water. The sperm, so interpreted, was called an animalcule. Advocates of the theory were called animalculists. They were contrasted in their century with a lesser school of preformationists who found the diminutive life in the ovum and were hence called ovists.<sup>11</sup>

This distinction between paternal and maternal preformationists returns us to that other main differentiation in the history of embryology between those (a) who have regarded the male, and (b) those who have regarded the female, as the effectual progenitor of the new life, and (c) those who have regarded both as somehow co-ordinately involved.<sup>12</sup> Actually the parthenogenesisists and notably the ovists of the eighteenth century were the only proponents of theory b. Theories a and c were unequal competitors until Strasburger in 1907 vindicated the chromosomic equality of the two progenitors in shaping the character of the fetus.

In antiquity Hippocrates and his school were closest to biological reality in the theory of both a male and a female "seed," the latter identified, however, with the vaginal secretion. It was in *On Generation* that "Hippocrates" made this distinction. Titus Lucretius' *On the Nature of Things* gave Epicurean poetic support for the view: "For the birth always is made out of both seeds, and whichever parent the offspring resembles, of that parent it has more than half; which you may discern whether the child be male or female."<sup>13</sup>

But much more influential was the view of Aristotle and Claudius Galen (d. 200 A.D.) that the male seed was the formative principle coagulating the menstrual blood. In *On the Generation of Animals* Aristotle wrote:

That . . . the female does not contribute semen to generation, but does contribute something . . . is clear from . . . a general and abstract survey. . . . If, then, the male stands for the effective and active, and the female, considered as female for the passive, it follows that what the female would contribute to the semen of the male would not be semen but material for the semen to work upon.<sup>14</sup>

<sup>11</sup> See the illustrations in Needham, *op. cit.*, pp. 205 f., and Bilikiewicz, *op. cit.*, plates 6, 7, 8, 9, 14.

<sup>12</sup> The fullest account at this point may be that of Wilhelm His, "Die Theorien der geschlechtlichen Zeugung," *Archiv für Anthropologie* 4 (1870) 19-220, 317-32; 5 (1871) 69-111.

<sup>13</sup> *Op. cit.*, iv, 1229; tr. W. H. D. Rouse, *Loeb Classical Library* (Cambridge, 1931) p. 335.

<sup>14</sup> *Op. cit.*, i, 21; 729a, 1.22; tr. A. L. Peck, in Smith-Ross, *The Works of Aristotle* 5 (*Loeb Classical Library*) 111.



Elsewhere in the same treatise he wrote with reference to the soul: "If, then, the sexes are separated, it is the male that has the power of making the sensitive soul . . ." <sup>15</sup> and that "while the body is from the female, it is the soul that is from the male." <sup>16</sup>

Galen set forth his embryology in some detail in *On the Natural Faculties*, the salient points of concern in the present review being that the male semen, formed from blood, <sup>17</sup> was the energizing principle in the creation of new life, the female contributing only the nutriment without further influence on the character of her offspring. He likened the semen to Phidias and the menstrual blood to the marble or wax from which the semen-artificer shaped a new form: "And what is the semen? Clearly the active principle of the animal, the material being the menstrual blood. . . . However, . . . we must not . . . credit the semen with reason and intelligence." <sup>18</sup>

Before we enter upon the various religious views about abortion, we may conclude and anticipate by pointing out (1) that preformationism in whatever version, whether that of the animalculists or that of the present-day decoders of the genetic code, will have tended to enhance the moral status of the fetus as an individual rather than as substance; (2) that an attachment to the but recently superseded theory of *male* predominance in the formation of life in the womb has in some social circumstances likewise enhanced the status of the fetus as at least not being simply, like an organ or growth, an appurtenance of the mother's body (*pars ventris matris*); and finally (3) that speculation concerning the modalities of the soul's relation to the body before birth has no doubt been itself a supplementary motivation in the development of experimental embryology.

Within the Greco-Roman world Church Fathers and rabbis came under the influence of the philosophical and medical theories in genetics and embryology briefly characterized above.

Over the Christian centuries, Christology and Mariology also had their cumulative effect upon the way intra-uterine life was to be valued. The scriptural, iconographic, and liturgical interest in the immaculate conception of Mary, the virgin birth (both conception and birth) of Jesus Christ, the quickening life of Jacob and Esau, Jesus and John in the wombs of their mothers—all enhanced the religious significance of intra-uterine life and over the years would tend, by analogy, to extend a divine meaning and safeguard to every conception and fetus.

<sup>15</sup> *Ibid.*, ii, 5; 741a, 1.14.

<sup>16</sup> *Ibid.*, ii, 4; 738b, 1.26.

<sup>17</sup> *Per physike dynameon* 2, 3; cf. 3, 3; Greek and English text by Arthur John Brock (New York, 1916) pp. 126–35; Meyer, *op. cit.*, pp. 26 f.

<sup>18</sup> *Natural Faculties* 2, 3; Brock, pp. 135, 133.

We shall summarily rehearse the philosophical, medical, and religious influences in dealing with the problem of abortion through patristic antiquity and the Scholastic Middle Ages, into the Reformation Era, and finally into the nineteenth-century background of the present differentiation of religious views on abortion in the United States today.

## 2. Judaism on Abortion

An authoritative presentation of Jewish views on abortion is to be sought elsewhere.<sup>19</sup> But Jewish views, as embodied, for example, in the Hebrew Massoretic text of Scripture and in the Greek Septuagint, in medieval Scholasticism, in Renaissance, Enlightenment, and modern medicine and law, have been recurrently influential in Christian and secular developments and are here adduced as they have variously shaped the thinking of Christians in the course of the centuries.

Traditional Jewish thought on the fetus was extreme "creationism," the divine fashioning of the fetus and special animation at birth. Ancient Hebrews held that intra-uterine life did not become fully a human being until into it had been blown the breath of life (*neshamah*) at birth (Gn 2:7). Only the fetus that had come out "into the air of the world" could be considered a *nephesh*, a person with a soul. The only "abortion text," however, in the Old Testament is the somewhat obscure Ex 21:22 f.: "When men strive together, and hurt a woman with child, so that there is a miscarriage, and yet no harm follows, the one who hurt her shall be fined. . . . If any harm [to her] follows, then you shall give life for life."

This text underwent a refinement to the advantage of the fetus among the Hellenistic Jewish translators of the Septuagint in Alexandria. They introduced a distinction, not allowed in the Massoretic (Hebrew) text, between the *unformed* and the *formed* fetus in the womb and construed as murderer the man responsible for even an accidental abortion of a "formed" fetus: "If . . . her child comes forth while it is not yet formed (*mē exeikonismenon*), then the penalty shall be a money payment . . . ; but if it was formed (*exeikonismenon*), then thou shalt give a life (*psychēn*) for a life."

The Hellenistic Jewish distinction between unformed and formed fetus and the severe punishment attaching to even accidental abortion

<sup>19</sup> A fundamental work is that of V. Aptowitz, "The Status of the Embryo in Criminal Law," which is Part 5 of a larger article, "Observations on the Criminal Law of the Jews," *Jewish Quarterly Review* 15 (1924-25) 85-118. One can well imagine a plethora of new studies in Hebrew, historical, rabbinical, medical, and juridical, being now turned out in the State of Israel. The most recent comprehensive coverage in English is that of David M. Feldman, *Birth Control and Jewish Law: Marital Relations, Contraception, and Abortion as Set Forth in the Classic Texts of Jewish Law* (New York, 1968).

of the formed fetus is reflected in Philo Judaeus of Alexandria,<sup>20</sup> in the Jewish *Two Ways* preserved in the Christian *Didache* (2, 1 f.), and in laws and practices of the Samaritans and the Karaites.<sup>21</sup> Hellenistic Judaism, beginning with the Septuagint translators, evidently shared in the Greek medical and philosophical view of the fetus, to the extent of developing an interest in a prenatal soul.<sup>22</sup> But almost none of this Hellenistic Jewish thought on embryology survived in later normative Judaism.

Rabbinical Judaism after the destruction of Jerusalem reverted to its own traditional interpretations of life in the womb as but a part of the mother's body. The New Halakah of the Pharisees and the rabbis, in contrast to Alexandrian Judaism, largely considered the fetus as part of the mother and hence the (accidental) aborter as a man injuring merely a limb. While this main-line Jewish thought has always worked with the biblical injunction to be fruitful and to multiply and has defended the right of the fetus to come to term, it has generally defended the life of a pregnant mother against her fetus innocently "pursuing" her unto death. Moses Maimonides (d. 1204) summed up the scriptural-rabbinical tradition on this point:

The Sages have ruled that if a woman with child is having difficulty in giving birth, the child inside her may be taken out, either by drugs or by surgery, because it is regarded as one pursuing her and trying to kill her. But once its head has appeared, it must not be touched, for we may not set aside one human life to save another human life, and what is happening is the course of nature.<sup>23</sup>

The rabbinical view that the fetus, while human, was not a person until breath (*neshamah*) and, by extension, the breath of God (*ruach*: wind, spirit) was blown into the fetus and it acquired its soul (*nephesh*) has made it easier for Jews in their responsorial literature to decide in difficult obstetric cases for the life of the mother as person against that of the fetus as merely human substance.

One of the ways in which normative Judaism has given visible expression to the view of intra-uterine life as a part of the mother until birth, not an independent person, is to bury a miscarried child outside the cemetery and to hold no funeral service and to recite no memorial prayer for it. Some of this restriction of the personhood applies even to an infant which dies within the first thirty days.

<sup>20</sup> Philo, *The Special Laws* 3, sect. 108 f.; Loeb Classical Library 7, 545.

<sup>21</sup> Aptowitz, *art. cit.*, p. 85.

<sup>22</sup> Rudolf Meyer, *Hellenistisches in der rabbinischen Anthropologie* (Stuttgart, 1937) pp. 22 f.

<sup>23</sup> *Mishna Torah* 11, Book of Torts 1, 9; tr. Hyman Klein, *Yale Judaica Series* 9 (New Haven, 1954) 196-97. Cf. Rosen, *op. cit.*, p. 170.

The scriptural-rabbinical tradition about the fetus as lacking personhood until birth can, of course, be today readily assimilated to a feminist-technocratic ethic. One may instance the Report of the committee on *responsa*, chaired by Rabbi Solomon B. Freehof, for the Central Conference of American [Reform] Rabbis. In response to a number of queries, the committee chose in 1958 to research the representative problem of a young mother who had contracted rubella in the third month of pregnancy. After rehearsing, comparing, and clarifying the earlier responsorial literature, the committee confirmed and extended the opinion of the Sephardic Chief Rabbi in Jerusalem, Ben Zion Uziel (d. 1953):

He [Uziel in *Mishpetei Uziel* 3 (Jerusalem, 1947) 46 f.] concludes . . . that an unborn foetus is actually not a *nephesh* [soul-person] at all and has no independent life. It is part of its mother, and just as a person may sacrifice a limb to be cured of a worse sickness, so may this foetus [in the case before Rabbi Freehof] be destroyed for the [rubella-afflicted] mother's benefit. . . . One may not destroy anything without purpose. But if there is a worthwhile purpose, it may be done. The specific case before him [Uziel] concerned a woman who was threatened with permanent deafness. . . . Uziel decides that since the foetus is not an independent *nephesh* but is only a part of the mother, there is no sin in destroying it for her sake.<sup>24</sup>

Then, passing from *probably permanent deafness* in the case before Uziel to *possible mental anguish* in the case before the Reform committee, Freehof continued:

In the case which you are discussing I would, therefore, say that since there is strong preponderance of medical opinion that the child will be born imperfect physically or even mentally, then for the *mother's sake* (i.e., her mental anguish now and in the future) she may sacrifice this *part of herself*. This decision thus follows the opinion of Jacob Emden and Ben Zion Uziel against the earlier opinion of Gair Chaim Bachrach.<sup>25</sup>

The rabbinical distinction between the fully human *nephesh* in the world of the living and the protohuman life in the uterus which is "part of herself" (although ordinarily it has the right to come to term) may come to be reconsidered by the Jewish ethicists in the light of their biological knowledge about the aeration of the fetus through the mother's

<sup>24</sup> Central Conference of American Rabbis, *Yearbook* 68 (1958) 122. The Freehof text transliterates the Hebrew as *nefesh*.

<sup>25</sup> *Ibid.*; italics mine. In a pregnancy affected by rubella at three months, the chances for deformity are one in four. On the equation of mental and physical health of the mother as a basis for abortion, see also Feldman, *op. cit.*, p. 286.

oxygenated (enspirited) blood,<sup>26</sup> not to say the whole of contemporary genetic and embryological knowledge as to the setting of the genetic code at conception. Perhaps Hellenistic Jewish embryology will be re-possessed and reintegrated in modern Jewish ethical theory. The living Jewish responsorial argument is here adduced, however, only to illustrate the Old Testament tradition that will not have been without its influence on Protestants in their philojudaic phases, as we shall note below.

### 3. Christianity and Abortion<sup>27</sup>

It is possible that the rabbinical view of intra-uterine life as not fully human and yet the miraculous possibility of an exceptional prenatal inspiration lies behind the early Christian formulation that Jesus was conceived of the Hóly Spirit (*Ruach*), that is, that He was a fully human person from conception rather than from birth. The narrative concerning the prophet John "filled with the Holy Spirit" even in the womb of his mother Elizabeth, leaping in joy at the approach of the divine Son also still in the womb of His mother Mary, would be another specimen (Lk 1:15, 41) in this cycle of exceptional but authentically Jewish thinking about procreation and birth.<sup>28</sup>

The New Testament is not, however, very yielding of relevant texts on medical practice and abortion, except possibly when the specialized ancient meaning of "medicines" is pressed.<sup>29</sup> The Greek Old Testament, the Septuagint, however, had a persisting influence in both Latin and Greek patristic thought in later supplying a scriptural sanction for the Greek philosophical and medical distinction between an unformed and a formed fetus in the Greek rendering of Ex 21:22 f. From

<sup>26</sup> It is of passing interest that the Spanish lay theologian and physician Michael Servetus (d. 1553), concerned with the Jewish and Muslim objections to Christianity, discovered the pulmonary circulation and oxygenation of the blood while attempting to establish a physiological basis (the divine Spirit as Breath) for the virgin conception of Christ as the unique Son of God.

<sup>27</sup> The patristic, Scholastic, and papal part of my sketch is much indebted to the article of John T. Noonan, Jr., "Abortion and the Catholic Church: A Summary History," *Natural Law Forum* 12 (1967) 85-131. A not incidental significance of this indebtedness is my acceptance as a Protestant Christian of this Catholic canonist's high humanistic evaluation of the evolution and refinement of Catholic doctrine on the fetus and its inviolability.

<sup>28</sup> There were in the Old Testament references to God's exceptional forming or calling of a king or prophet while still in his mother's womb: e.g., Gn 25:22 f.; Jg 16:17; Jb 31:15; Ps 139:13; Is 49:1; Jer 1:5.

<sup>29</sup> Quite rightly by John Noonan, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (Cambridge, Mass., 1965) pp. 86 f. and in "Summary History," p. 90.

the Septuagint this distinction became fundamental in patristic, especially Greek, Syriac, and Armenian views of abortion. (The Vulgate of Jerome, it is true, remained faithful to the original Hebrew.)<sup>30</sup>

From the beginning, Christianity, unfolding in the Greco-Roman world which tolerated not only abortion but also infanticide, vigorously and consistently opposed the taking of life in the womb, e.g., in the already mentioned *Didache*, in the *Epistle* of Pseudo-Barnabas (ca. 85 A.D.), and in the *Epistle to Diognetus* (5, 6).

Of all the anti-abortionist Fathers we may select Tertullian of Carthage (d. ca. 220) as representative, since he also supplies us with ample material concerning early Christian genetics, embryology, and child care as well. Tertullian is also the classical formulator of one of the three theories of the origin of the soul, traducianism (*De anima* 25).

It was against the doctrine of the pre-existence of souls, propounded, for example, by the Gnostic Valentinians, that Tertullian developed his distinctive traducianism; and indeed he appears to have taken his key term *tradux animae* from the Valentinians, adapting it, however, for his own quite different purpose.<sup>31</sup> In effect, Tertullian made of the male semen the *traductor* (by cloning, as it were) of the bodily, psychic, and spiritual substance of Adam. In insisting on the interpenetration of body, soul, and spirit and the concurrent determination of sex (*De anima* 36) in each individual from the moment of conception, Tertullian was concerned not only to oppose the Gnostic (and Platonic) doctrine of a premundane existence of all souls prior to their embodiment but also and perhaps more importantly to safeguard the essential equality of all human beings over against the invidious Gnostic three-fold distinction among the elite *pneumatics* (or gnostics), the middling *psychics*, and the lowly, hopeless *hylics*. At the same time Tertullian, while having to give up any direct creation of the individual by God, made much of the care with which God molded all human beings in first fashioning Adam and then Eve, leaving it "to angels to officiate for God" in every new conception (*De anima* 37, 1). Tertullian in de-

<sup>30</sup> Aptowitz, *art. cit.*, p. 86, n. 116.

<sup>31</sup> The term is found in *Adversus Valentinianos* 25, 3; *Corpus christianorum*, ser. Lat. 2 (Turnholt, 1954) 771. Volumes 1 and 2 of the *Corpus* (henceforth CC) constitute the most recent critical edition of all the works of Tertullian. Tertullian's polemical appropriation of the Gnostic term is noted by Heinrich Karpp, *Probleme altchristlicher Anthropologie: Biblische Anthropologie und philosophische Psychologie bei den Kirchenvätern des dritten Jahrhunderts*; cf. idem, *Schrift und Geist bei Tertullian* (Gütersloh, 1955). For Tertullian's genetics and embryology in a Stoic context, see also Michel Spanneut, *Le stoïcisme des Pères de l'église: De Clément de Rome à Clément d'Alexandrie* (Paris, 1957) esp. pp. 181-90.

veloping traducianism was apparently quite oblivious of any possible implication of progeny in the original sin and guilt of Adam through seminal solidarity; for he expressly declared that up until about the fourteenth year children were in effect innocent of the knowledge of good and evil (*De anima* 38, 1: a Stoic notion). Although traducianism would much later (in Luther) be revived as an explanation for the implication of mind and will as well as the flesh of everyman from infancy in original sin (see below, at n. 71), Tertullian himself propounded it simply as the most satisfactory explanation both for the unity of the race and for the integrity of each individual, body and soul, from conception to the general resurrection. This unity he stated succinctly in *On the Resurrection of the Flesh*: "Contemporaneous *in fetu*, they [body and soul] are also temporally identical *in natu*. The two are no doubt produced by human parents of two substances, but not at two different periods; rather they are so entirely one that neither is before the other in point of time."<sup>32</sup> Earlier in the treatise (7, 9) he had declared that "so intimate is the union that it may be deemed to be uncertain whether the flesh bears about the soul, or the soul the flesh."

Drawing attention to Old and New Testament references to God's shaping life within the womb, Tertullian ever and again construed the creation of Adam as paradigmatic for each life in the womb and expressly related that life to the initial Breath of God ("the shadow of His own soul, the breath of His own Spirit, the operation of His own mouth": 7, 8) as the ultimate source via the loins of each individual father of the fetal soul. Thus, unlike his medical mentor Soranus of Ephesus (d. ca. 138), who apparently did not regard the fetus as ensouled; unlike the Stoics in general, who regarded the birth-breath rather than conception as the beginning of a new life; and *despite the implication in the Adamic paradigm* of the priority of the earth-body to the breath-soul, Tertullian insisted on the coincidence of conception and the emergence of the new sacred individual: "Since God forms us in the womb, He also breathes upon us, as He also did at the first creation . . . . Nor could God have known man in the womb, except in his entire nature: 'And before thou camest out of the womb, I sanctified (*sanctificavi*) thee'" (Jer 1:5).<sup>33</sup> Tertullian, apparently holding in his latest formulation<sup>34</sup> that the father is sole source for

<sup>32</sup> *De resurrectione mortuorum* 45, 5; CC 2, 981; ANF 3, 578.

<sup>33</sup> *De anima* 26; ed. J. H. Waszink (Amsterdam, 1947) p. 38; ANF 3, 207; cf. Ambrosiaster quoted incidentally below, n. 47.

<sup>34</sup> The most recent editor of, and commentator on, the text observes that Tertullian, under the influence of the neomethodical eclectic physician Soranus, altered his earlier genetic and embryological view, as expressed for example in the *Apologeticus* and *De resurrectione carnis* (above at n. 32) and made the father the sole source of both soul and body (Waszink, *op. cit.*, p. 344).

the fetus of both the breath-soul and the body-building substance and principle (the semen), in his definitive formulation of traducianism understood all (corporeal) souls and their minimal physical integuments to have been present in the loins of Adam to be successively transmitted through the male as by a plough into successive seed plots of the womb, the latter only supplying the menstrual blood as nutriment:

Although we shall allow that there are two kinds of [male] seed—that of the body and that of the soul—we still declare that they are inseparable, and therefore contemporaneous and simultaneous in origin . . . . The entire man being excited by the one effort of both natures, his seminal substance [containing both “seeds”] is discharged, deriving its fluidity from the body, and its warmth from the soul . . . . Adam’s flesh was formed of clay. Now what is clay but an excellent moisture, where should spring the generating fluid? From the Breath of God first came the soul . . . . Now the two substances, although diverse from each other, flow forth simultaneously in a united channel . . . . Accordingly, from the one [primordial] man comes the entire outflow and redundancy (*redundantia*) of men’s souls . . . .<sup>35</sup>

Tertullian, a considerate husband, was an emphatic antiabortionist, citing Ex 21:22 (*De anima* 37, 2) in his defense of intra-uterine life as fully human. His most explicit statement, however, happens to appear *en passant* in indignantly refuting the common pagan charge of infanticide and cannibalism on the part of Christians:

But for us [Christians], to whom murder has been once for all forbidden, it is not permitted to destroy even what has been conceived, while as yet the [menstrual] blood is still being formed into a [new] human being (*hominem*). Interruption of a pregnancy is a hastening of murder, and it makes no difference whether it is a soul already born that is snatched away or a soul in process of being born that is interfered with. He is a human being (*homo*) who will be one; the whole fruit is actually in the seed [diminutive soul and body].<sup>36</sup>

Although Tertullian was vigorously opposed to abortion, he was constrained to make one sad exception, about which he was in possession of considerable obstetric detail, namely, that which was necessary to save the life of the mother: “But sometimes by cruel necessity, whilst

<sup>35</sup> *De anima* 27; Waszink, *op. cit.*, pp. 38 f.; *ANF* 3, 208.

<sup>36</sup> *Apologeticus* 9, 8; *CC* 1, 90; *ANF* 3, 25; cf. *De anima* 37, 2: “Ex eo igitur fetus in utero homo, a quo forma completa est.” Spanneut, *op. cit.*, p. 189, rightly observes that Tertullian is not consistent as to the coincidence of conception and human individuation. For example, in *Adversus Marcionem* 4, 21, 11; *CC* 1, 600 (cf. the quotation from *De anima* above), Tertullian recognizes (in a Christological context) a succession of embryonic stages such as *pecus*, *infans*, *puer*, and *homo*; but his occasional distinctions presuppose in his “preformationist” view that the animated organism in the womb is at all stages essentially one being, *homo*, or, as Tertullian once puts it, *causa hominis*.



yet in the womb, an infant is put to death, when lying awry in the orifice of the womb he impedes parturition, and kills his mother, if he is not to die himself."<sup>37</sup>

Augustine of Hippo (d. 430), who was fully aware of all three competing theories as to the origin of the soul, as for example in his clear exposition to Jerome cited above,<sup>38</sup> because of his concern for explaining the transmission of original sin (including that of men's rational life) from Adam to his progeny, hesitated in his outright rejection of Tertullian's traducianism and in effect espoused a modified creationism.<sup>39</sup>

In *De anima et eius origine* (419) Augustine demonstrated his ambivalence in this matter, freely acknowledging his "ignorance" and suggesting that this ignorance ought not to be censured, "as to whether the souls of men are created afresh (*fiant novae*) at every birth, or are [transmitted] by the parents—an ignorance which is, however, modified by my belief, which it would be impious to falter in, that they are certainly made (*fieri*) by the Divine Creator, though not of his own substance . . ."<sup>40</sup>

In the spiritual order Augustine was a traducianistically modified creationist, opposing primarily Tertullian's materialistic traducianism of a corporeal soul<sup>41</sup> and spurning any suggestion that God is not ultimate creator of each soul at whatever the stage, as he says in his letter to Bishop Optatus (418):

But if you do not discover why or how infant souls become sinful, and why they are obliged to derive the source of their damnation from Adam, though they have no evil in themselves, since you [and Augustine also] believe that they are included in the flesh of sin created (*propagatas*) [at some indeterminate moment] not from that first sinful soul, but new and blameless, do not let your inclination lead you rashly to that other opinion [Tertullian's] to make you believe that they are derived (*traduci*) from that primal one by propaga-

<sup>37</sup> *De anima* 25, 4; Waszink, *op. cit.*, p. 326; Franz Joseph Dölger, "Das Lebensrecht des ungeborenen Kindes und die Fruchtabtreibung in der Bewertung der heidnischen und christlichen Antike," *Antike und Christentum* 4 (Münster, 1934) esp. pp. 30-37.

<sup>38</sup> Above at n. 8.

<sup>39</sup> Cf. Reinhold Seeberg, *Lehrbuch der Dogmengeschichte* 2 (Leipzig, 1910) 456.

<sup>40</sup> *Op. cit.* 4, 38; *PL* 44, 517-18; *NPNF* 5, 371. The Tertullianic verb *traduci* is supplied in translation. Augustine actually eschews technical verbs for either creationism or traducianism and employs instead the neutral *fiant* for both. However, mindful of Tertullian, he goes on to wrestle with the problem of souls as "incorporeal semblances of bodies."

<sup>41</sup> Cf. E. Portalié, *Dictionnaire de théologie catholique* 1, 2359: "The traducianism toward which Augustine leaned was one entirely spiritual: the soul was born from the soul of the parents." Hence Augustine's position might be best characterized as creationist generationism.

tion . . . For those who claim that souls are begotten (*propagari*) from the soul which God gave to the first man, and who say that they are derived (*trahi*) from their parents, if they follow the opinion of Tertullian, they certainly hold that such souls are not spirits but bodies, and are produced from corporal seed—and what more perverted view could be expressed?<sup>42</sup>

In understanding the rational soul over against Tertullian as wholly spiritual and created by God (rather than generated in propagation) at an indeterminant moment, Augustine was not able like Tertullian to be sure about the human, that is, the divine character of the fetus at any given stage in gestation.

Accordingly, on the question of the stage in the fetal development at which the soul is created and/or infused, Augustine, being aware of the Hellenistic and Greek patristic distinction between the formed and unformed fetus, wrote most commonly only in terms of the fetus as "living" or "not-yet-living." This distinction he made in *De nuptiis et concupiscentia* (419–20) in connection with his excoriation of the abortion practices of pagans:

Sometimes (*Aliquando*) their sadistic licentiousness goes so far that they procure poison to produce infertility, and when this is of no avail they find one means or another to destroy the unborn (*conceptos fetus*) and flush (*fundat*) it from its mother's womb. For they desire to see their offspring (*prolem*) perish before it is alive (*vivere*) [he implies by this that the soul is not infused at conception] or, if it has already been granted life, they seek to kill it within the mother's body before it is born.<sup>43</sup>

From this we observe that Augustine himself had no way of affirming the divinely created humanity (rational soul) or even the vitality (as distinguished from nutritive substance) of the fetus before quickening, as he writes elsewhere, in the *Enchiridion*: "I do not know whether it is in man's power to resolve it: At what time the infant (*homo*) begins to live in the womb: whether life exists in a latent form before it manifests itself in the motions (*motibus*) of a living being."<sup>44</sup> Aware,

<sup>42</sup> *Epistola* 190, 14; *PL* 33, 861; *Saint Augustine, Letters* 4 (165–203) tr. Sr. W. Parsons (New York, 1955) p. 279. Augustine goes on sharply to criticize Tertullian for regarding not only the soul but even the Creator as "not spirit but body." Translation here is recast in part.

<sup>43</sup> 1, 15; *PL* 44, 424; *CSEL* 5, 271. This paragraph beginning *Aliquando* was to become a standard canon in canon law from Gratian (see below) to the new Code of Canon Law in 1917 (see Noonan, "A Summary History," pp. 99, 101).

<sup>44</sup> Chap. 86; *PL* 40, 272; *NPNF* 3, 265. He goes on seeming to suggest that an embryotomy to save the life of the mother (presumably involving a dead fetus) does not impair "the interest [of the *puerperia*] in the resurrection of the dead." This passage is susceptible of several interpretations with respect to Augustine's view on therapeutic abortion.

however, of the Aristotelian-Septuagintal distinction between the unformed and the formed fetus, and dealing expressly with the Septuagintal version of Ex 21:22 in his *Quaestiorum in Heptateuchum libri 7*, Augustine first sought to conjecture the circumstances in which two men would be contending with each other and possibly striking a pregnant woman—presumably in the case of an adulterous pregnancy—and then set it forth as also his own generalized view that the destruction of an unformed, i.e., unanimated fetus would not be homicide.<sup>45</sup>

When in medieval canon law and Scholasticism the traditional Christian opposition to abortion came to be formulated systematically and normatively by John Gratian (d. ca. 1179) and by Thomas Aquinas (d. 1270), traducianism was abandoned, patristic creationism was rehabilitated with the help of Aristotle, and the Septuagintal distinction between unformed and formed fetus was universalized.

Gratian, the father of canon law, in his *Concordantia discordantium canonum* (= *Decretum*) sought to harmonize a number of discordant patristic and canonical texts, among them Augustine and Pseudo-Augustine (= Ambrosiaster) on Ex 21:22 and declared, purportedly in direct quotation from Augustine: “He is not guilty of homicide (*non est homicida*) who brings about abortion before the soul is infused into the body.”<sup>46</sup> It is of interest that in both the Augustinian and the Ambrosiastrian texts adduced the Septuagintal version of Ex 21:22 is the basis for the distinction between an unformed and a formed and therefore humanoid fetus. In the text quoted by Gratian from the fourth-century Ambrosiaster, who may have been a convert from Judaism, traducianism is expressly disavowed and the inbreathing of the soul of Adam when his body was fully formed from the dust is taken as the model for the infusion of the divinely created soul into each *formed* fetus.<sup>47</sup> Gratian’s whole collection of patristic texts in

<sup>45</sup> *Op. cit.*, chap. 80; *PL* 34, 626 f.

<sup>46</sup> *Decretum*, Pars 2, causa 32, quaestio 2, cap. 8; *PL* 187, 1471; noted by Huser, *op. cit.*, pp. 41–43; cited above at n. 45. Cf. the discussion by Noonan, “Summary History,” p. 99, where another text from Augustine in Gratian, chap. 7, *Aliquando*, is stressed, quoted above at n. 43.

<sup>47</sup> Gratian, *Decretum*, *loc. cit.*, cap. 9, where Gratian quotes Ambrosiaster, chap. 25; *PL* 187, 1471 f. In the critical edition of Ambrosiaster it is actually chap. 23; Alexander Souter, *Pseudo-Augustini Quaestiones Veteris et Novi Testamenti* 127; *CSEL* 50, 49–51. For the literature identifying Ambrosiaster with the convert Isaac the Jew (a theory not shared by Souter), see Souter, *A Study of Ambrosiaster* (Cambridge, England, 1905). On Adam formed from dust and breathed into by God as a paradigm of the fetus in Tertullian’s traducianist context, see above at n. 33. For a representative twelfth-century philosophical discussion of sire-centered fetology, see William of Conches (d. 1154), *Philosophia mundi* 4, 3–18; *PL* 172 (under the name of Honorius of Autun) 87–91. The

*Quaestio* 2, including Ambrosiaster on the inbreathing of Adam, lived on not only in canon law but also in the *Sentences* of Peter Lombard (d. 1160), in his *Distinctio* 31 of *Liber* 4. In time every Scholastic was to study the *Sentences* as the fundamental systematic work in theology, and many renowned Scholastics like Thomas Aquinas and even the anti-Scholastic Martin Luther have left their commentaries on it.

Thomas Aquinas worked two Aristotelian postulates into what would be the normative Latin Catholic theological position, one concerning the pre-eminence of the male sperm and the other related to the epigenetical theory and the delayed infusion of the rational soul, which allowed for a distinction in moral gravity between an earlier and a later abortion, although Aquinas did not formally deal with abortion.

More specifically, Aquinas adapted from Aristotle the hylomorphic doctrine of generation and corruption, and with it the theory of the nutritive (vegetable), the sensitive (animal), and the intellectual (rational) soul, the last in the end discharging the functions also of the two preceding animating principles: "The soul is in the embryo; the nutritive soul from the beginning; then the sensitive, lastly the intellectual (*intellectiva*) soul."<sup>48</sup>

Aquinas also canonized with appropriate modification Aristotle's sire-centered theory of procreation. He saw the male as temperamentally active and the female passive in coition. Thus the male seed was considered the active principle and the female blood the passive principle parallel to form and matter in any composite substance: "In perfect animals, generated by coition, the active force is the semen of the male, as the Philosopher says (*De generatione animalium* 2, 3); but the fetal matter is produced by the female. In this matter the vegetable soul exists from the very beginning."<sup>49</sup> He goes on to imply that in the female "matter," which he could not, of course, have identified as the ovum,<sup>50</sup> there was a nutritive soul, a sensitive soul

contemporary encyclopedist Honorius preserves a traducianist view of the original sin inhering in the seed as well as in the concupiscent behavior of even the baptized father with the consequence that the baptism of a pregnant mother can be of no avail to a fetus dying *in utero*, because to be reborn in baptism, one must first be born (*Elucidarium* 2, 15; *ibid.*, cols. 1445 f.).

<sup>48</sup> *Sum. theol.* 1, q. 118, a. 2, ad 2m. Earlier he wrote: "The embryo has at the beginning only a sensitive soul. This disappears and a soul more perfect succeeds to it at once sensitive and intellectual" (*ibid.*, q. 76, a. 3, ad 3m).

<sup>49</sup> *Ibid.* 1, q. 118, a. 1.

<sup>50</sup> Cf. *ibid.* 1, q. 115, a. 2, ad 3m: "The seed of the male is the active principle in the generation of an animal. But that can be called seed also which the female contributes as the passive principle. And thus the word *seed* covers both active and passive principles."

being latent in both the semen and the female matter as "in one who sleeps." At coition the female matter "is transmuted by the power which is in the semen of the male" and "is actually informed by the sensitive soul."

Aquinas could not, however, concede that the distinctively human (rational) soul, discharging in due course the functions of the precedent nutritive and sensitive souls, could be likewise generated out of the natural processes of intercourse and early fetal growth. Instead, he held that it was created and infused into the fetus at a certain point in its development:

It is impossible for an active power existing in matter to extend its action to the production of an immaterial effect. Now it is manifest that the intellectual principle in man transcends matter; for it has an operation in which the body takes no part whatever. It is therefore impossible for the seminal power to go beyond the nutritive and sensitive level to produce the intellectual principle . . . . Since it [the intellectual soul] is an immaterial substance it cannot be caused through generation, but only through creation by God.<sup>51</sup>

Thus was creationism formulated for the High and Late Middle Ages. Because Aquinas could not find in the generation of animal life within the mother an adequate causality for the emergence of a spiritually subsistent form, as he understood the intellectual soul to be, he expressly rejected Tertullianic traducianism and Origenistic-Boethian psychic pre-existence;<sup>52</sup> and, accepting expressly from Aristotle that "reason comes from without,"<sup>53</sup> he espoused scriptural-patristic creationism, identifying the creation of the soul with its infusion: "We must simply confess that intellectual souls were not created before bodies, but are created at the same time they are infused into them."<sup>54</sup> He eschewed, however, here and elsewhere to say at what precise moment in fetal development the intellectual souls are created-infused.<sup>55</sup> But, depending on Aristotle's genetics and embryology, Aquinas could not assert the full created humanity of the fetus until

<sup>51</sup> *Ibid.* 1, q. 118, a. 2.

<sup>52</sup> *Ibid.*, Respondeo: "It is . . . heretical to say that the intellectual soul is transmitted with the semen." On pre-existence, *ibid.*, a. 3, Respondeo.

<sup>53</sup> Aquinas, *ibid.*, a. 2, Respondeo, quotes from *De generatione animalium* 2, 3 thus: "It follows that the intellect alone comes from without." A modern reading of Aristotle at this point reads thus: "It remains, then, for reason alone so to enter from the outside and to be divine, for no bodily activity has any connection with the activity of reason." *Op. cit.*, 736b; eds. Smith and Ross, *op. cit.*, 5.

<sup>54</sup> *Loc. cit.*, a. 3, Respondeo.

<sup>55</sup> Cf. 1, qq. 75 and 76, on the essence of the soul and its union with the body.

at least the rudiments of a human body and brain made plausible a rational animation thereof by the divine act of creation-infusion.

Although Aquinas did not deal with the problem of abortion directly, he did in his youthful *Commentary* on Peter Lombard's *Sentences* (which at this point took over Gratian's texts) remark in passing:

This sin [of procuring temporary "sterility"], although grave and to be reckoned among misdeeds and against nature, because even the animals look for progeny (*fetus*), nevertheless is something less than homicide, since conception (*conceptus*) could be inhibited in another manner. Nor is such to be judged irregular unless one procures the abortion of an already formed fetus (*formato puerperio*).<sup>56</sup>

In his more influential *summae* Aquinas abandoned his distinction between the *maleficium* of contraception and that of early abortion; but in an incidental remark in the *Summa theologiae*, making use of the Septuagintal version of Ex 21:22, he continued to draw a distinction between the unformed and the formed fetus: "He that strikes a woman with child does something unlawful; wherefore if there results the death either of the woman or of the *animated* fetus, he will not be excused from homicide . . ."<sup>57</sup>

Thus Aquinas' Aristotelianized creationism<sup>58</sup> and Gratian's more traditional distinction between the unformed and the formed fetus, together with all the subsequent Scholastic and canonistic commentary and gloss, would permit a distinction in moral gravity between an earlier and a later abortion among Catholics well into the Reformation Era.

Any revival of traducianism with its insistence that the rational aspect of the soul no less than the sensitive and the nutritive aspects, being alike involved in Adam's fall, is latently present in the fetus from conception would tend to obliterate *theologically* any distinction between unformed and formed fetus.

Both Lutheran and Calvinist (or Reformed) Protestantism so emphasized the doctrines of original sin and of predestination (in their preference for an invisible church of the elect saved by election and manifest in faith alone), both doctrines associated with Augustine, that

<sup>56</sup> *Comm. in Sent.* 4, d. 31, q. 2, a. 3, *expositio textus*; Aquinas, *Opera omnia* 7/2 (Parma edition) p. 958, col. 2, noted but not quoted by Noonan, "Summary History," p. 101.

<sup>57</sup> *Sum. theol.* 2/2, q. 64, a. 8, reply to objection 2; noted by Noonan, *ibid.*, p. 101.

<sup>58</sup> For the medieval Scholastic problem of creationism and traducianism, see further O. Lottin, *Psychologie et morale aux XIIe et XIIIe siècle* 1 (Louvain, 1954) Part 3:1, p. 57.

Martin Luther, at least, was disposed also to reprimand patristic traducianism and expressly rejected Origen's tripartite anthropology of spirit, soul, and body.<sup>59</sup>

Luther also accepted the embryology of Aristotle and Galen, especially the latter's assumption that the semen, formed from blood, "is congealed . . . and given shape" in the womb taking but nourishment from the woman. In his *Lectures on Genesis* (1535 ff.) Luther had frequent occasion to refer to seed, procreation, and progeny. He held, presumably, that the traducianist (procreative) and the divinely creative action coincided in conception: "Man is brought into existence from a droplet of blood. . . . He [God] now takes a drop from the blood of the father and creates a human being. . . . For the semen congeals in the womb."<sup>60</sup>

Luther became quite specific about traducianism in his interventions in the promotional disputation in theology, "De homine," of his pupil Peter Herzog of Ansbach (Hegemon) in July 1545. With Luther presiding and Philip Melancthon, George Major (as promotor), and many others from several faculties present and even entering in, the disputation on fifty theses formulated by Luther himself gives us a clear view of the mature Reformer on an aspect of our problem, since many of the theses, notably no. 31, are devoted to traducianism and its theological implications.<sup>61</sup>

The candidate, Herzog, and the chairman, Luther, were aware that Lombard's *Sentences*,<sup>62</sup> which, we recall, absorbed Gratian's texts,<sup>63</sup> did not prove creationism and that there were contrary patristic views, specifically Tertullian, *De resurrectione carnis* 7 and 45 (*De anima*, not mentioned, however), Cyril of Alexandria, quoting Apollinaris of Laodicea,<sup>64</sup> and above all Augustine. The chairman and the candidate were referring especially to passages in Augustine assembled by Gratian, Lombard, and Aquinas. And the fact is that Luther construed

<sup>59</sup> *De servo arbitrio* (1525; Weimar Edition 28, 774 f.).

<sup>60</sup> A composite quotation from Weimar Edition 42; American Edition 1 (St. Louis, 1958) 125, 127, 83, see also 84, 125-28, 130, 133, 200. With reference to Jesus Christ, where the creaturely human nature derived from Mary is uppermost in his mind, Luther still adheres to Galen's embryology in understanding the embryo as formed from the menstrual blood of the mother; cf. *Sermons on St. John 2* (American Edition 22, 22 f.).

<sup>61</sup> The Latin disputation with a few lapses into German is recorded in three versions (A-C), published in Weimar Edition 39/2, 337-401. We shall be quoting from version A in every case. The disputation is seen in a larger context by Bengt Hägglund, *De homine: Människouppfattningen in äldre Luthersk Tradition* (Lund, 1959) pp. 62-67.

<sup>62</sup> *Op. cit.*, p. 352, line 16.

<sup>63</sup> Above, after n. 47.

<sup>64</sup> References obscure.

Augustine as definitely leaning toward traducianism, and thus his own position must be defined as a primarily "Augustinian" traducianism, although we have seen that Augustine himself was inconclusive. Luther was determined not to allow human reason to escape the effect of original sin and therefore considered the (rational) soul latent in the seed of the father. Luther confidently turned away from Catholic formulations of creationism as recent as *Apostolici regiminis* of the Fifth Lateran Council (Dec. 19, 1513) and dismissed earlier papal condemnations of traducianism from Anastasius II (498) through Benedict XII (1341):

We lean to this position with Augustine [!] that the soul is transmitted as is the body. And so the father would not make the body [alone]; but God makes the body indeed from the father's seed as also God makes the soul from the father's seed: thus God draws the soul from the seed or by traduction (*ex traduce*) . . . Augustine . . . discussed this at great length and said that neither [creationism or traducianism] ought to be affirmed but that speculation be suspended; however he leaned more to the opinion that the soul arises in traducianism. . . . We are inclined with him to the view that the whole man with body and soul is by traduction. For to God it is not impossible to make an immortal soul from human seed. Since He from the flux of nature makes a mortal body, ought He not, then, be able to make from the seed also a soul?<sup>65</sup>

Luther in his sire-centered traducianism thought of the father under God as the sole source of the offspring's soul.<sup>66</sup>

The father does not make the body of his child, the father generates the child, but not the body of the child nor the eyes nor the hands or any member, but he administers a seed, a small drop, which wet and warm drop is from Father Adam and it proceeds into all men, that is, to make us; but God accepts that seminal drop in the body, excites and perfects it;<sup>67</sup> and, because it is conceived in sin, therefore from this sinful drop comes a sinful body and a sinful soul, that is the sinful propagation of original sin, as the Psalm [51:7] says: "Behold I was conceived in iniquity and in sin my mother conceived me." Therefore we are all propagated by traduction. . . . Whence, then, sin? If the soul is not by traduction and nevertheless it has sin, whence does it therefore have sin? There Augustine considers many arguments on both sides, and let him say whatever he will, let him say what is and what is not, lest it indeed crash on this reef, that it would be such contumely toward God, that God

<sup>65</sup> *Op. cit.*, p. 350 version A beginning line 12; p. 351 beginning line 18.

<sup>66</sup> Tertullian himself moved from thinking of the parents as equal to accepting a sire-centered view. Compare, e.g., Tertullian's statements at nn. 32 and 34 above. Luther himself at one point in the disputation is recorded as having spoken of the "clot of paternal and maternal seed": *op. cit.*, p. 355, version A only, lines 9 f.

<sup>67</sup> Cf. the two actions of the male in coition in Tertullian above at n. 35.



would create a pure soul *de novo* and mix and couple it with impure and polluted flesh. There Augustine labors, neither wishing to affirm nor deny, because if he should assert that souls are created without traduction (propagation) but *de novo*, then the soul would be guilty without any guilt, and God would be the cause and author of sin. . . .<sup>68</sup>

After a discussion of what may have been not Augustine but Ambrosiaster on "the soul inbreathed into each single man as into Adam,"<sup>69</sup> Luther returned to this matter of the insufflation and insisted in accordance with his traducianism that whatever special act of the Creator there may be in conception, "when God inspires, He does not do it from without but from within, as He sends in the Holy Spirit in the heart." He adduces Augustine without citation in support of this view and then reverts to German on a point which he felt strongly: "He [God] doesn't stuff the soul into the body, like a farmer grain into a sack, but He inspirates within; and with the soul in the body go hand, foot, and mouth!"<sup>70</sup>

From our composite quotation from Luther's interventions in the disputation "De homine" two years before his death, it is clear that the Reformer's indirect vindication of the full humanity of the fetus from conception was prompted by a concern to involve the mind or spirit as much as the flesh in the guilt and consequences of original sin, allegedly in conformity with Augustine's own predilection—and not in any awareness of the correlation of this view with the problem of abortion. The interventions are at once antipapal and protraducianist in the name of Augustine. Luther continued, however, Catholic opposition to abortion from his new traducianist base.<sup>71</sup> He did not share the Catholic view of the indispensability of infant or prenatal baptism for salvation. In a small piece, *Ein Trost den Weibern*, in 1542 he sought to comfort mothers of miscarried or stillborn infants who worried about the eternal destiny of the unbaptized fruit of their wombs.<sup>72</sup> Without ever articulating what he had accomplished, the traducianist father of several beloved progeny and the pastoral comforter of mothers grieving about infants within them and stillborn without baptism had tremendously enhanced the status of the fetus in the sight of God and man.

<sup>68</sup> *Op. cit.*, p. 357 version A beginning at line 12.

<sup>69</sup> *Op. cit.*, p. 355; cf. Pseudo-Augustine (Ambrosiaster) above, n. 47.

<sup>70</sup> *Op. cit.*, pp. 356 f.

<sup>71</sup> In his only commentary on Ex 21:22, however, where he might have been expected to deal with abortion, Luther only generalizes on God as the vindicator of wrongdoing: Latin Sermon on Exodus, *Werke*, WA 16, 539.

<sup>72</sup> *Ein Trost den Weibern, welchen es ungerade gegangen ist mit Kinderbären* (1542; Weimar Edition 53, 202–18).

Luther's Wittenberg colleague Philip Melanchthon, who participated in the promotional disputation of Herzog in 1545, persevered in Scholastic (and patristic) creationism. In that very year, indeed, he published in Wittenberg his *Commentarius de anima* (1545), which was really a scriptural-humanistic commentary on Aristotle's view of man, body and soul. Although Melanchthon came out for creationism, it was in a form modified by his association with Luther. He acknowledged the want of certainty in both Luther and Augustine, without naming them, and very significantly in one place implied that the inbreathing (rather than infusion) of the soul—Adam's formation from the dust and the inspiration of his soul being a model—might take place at conception rather than at birth; for he connected the inspiration with election and the bestowal of grace in contrast to the simpler quickening of beasts: "The soul is blown into men *from without*, and such a breath it is into which God floods, as I might say, the rays of His light, namely, His wisdom, awareness of numbers, the distinction between good and evil, and other traits . . . . In that breath there was even the rectitude of will and free election."<sup>73</sup> After rejecting Luther's traducianism as absurd (precisely in contrast to Luther's reasoning) because it would make God the Creator of arbitrarily guilty souls, Melanchthon stated his own view, quoting as several times elsewhere the somewhat Stoic text of Paul's speech on Mars Hill (Acts 17:28): "We would be content with that [ecclesiastical] wisdom which life, sense, deliberation, and election show: that there are souls in us, that they are endowed with traits and other gifts which testify that God exists, and that the souls were established by Him."<sup>74</sup>

In his embryology Melanchthon was expressly following Galen and Hippocrates over against Aristotle, but it would appear that he was interpreting Galen in the light of Hippocrates when he maintained that the male and female "seeds" *alike* contribute to the formation of the fetus.<sup>75</sup> He was more or less traditional in holding that on the forty-fifth day the "fetus with formed and distinct members begins to live because it senses," and he slipped back into the traditional distinction between the unformed and formed fetus when he found it plausible that "souls are inserted into children (*pueris*) about the forty-fifth day and then not only should it [the fetus] be called an embryo (*embryonon*) but even an infant (*infantem*)."<sup>76</sup>

The Wittenberg Reformers, colleagues respectively in Old Testament and Greek, differed markedly on a fundamental point, Luther a tra-

<sup>73</sup> *Op. cit.* 2, "Definitio animae usitata in ecclesia;" *Corpus Reformatorum* 13 (Halle, 1846) 17.

<sup>74</sup> *Ibid.*, col. 18.

<sup>75</sup> *Ibid.*, col. 104.

<sup>76</sup> *Ibid.*, col. 106.

ducianist and Melanchthon a creationist. But Lutheranism would tend to move with Luther, and the effect of his view was to recognize the full humanity of the newly conceived irrespective of the stage in gestation. In the spirit of Luther's *Ein Trost den Weibern* (1542), which allowed that stillborn and unbaptized infants might be buried with due ceremony in church cemeteries in the hope of the resurrection, the Württemberg court preacher Felix Bidenbach published a collection of comforting counsels on unbaptized and unborn infants, *Consiliorum Theologicorum Decas 4* (Laugingen, 1607), reprinting Luther's piece as an introduction to the counsels of John Bugenhagen and other who assailed the Catholic practice of refusing to allow these little ones whom God had made and strangely not brought to term to be buried in sacred ground with the hope of resurrection to eternal life.

After Luther's death the universities of Wittenberg, Tübingen, and Marburg continued to be scenes of disputations concerning the soul. In the University of Tübingen the Aristotelian Jakob Schegk (1511-87), theologian and physician, was the center of a controversy that involved the faculties of philosophy, theology, law, and medicine. Schegk wrote *Dialogus de animae principatu*, in which he dealt with the heart and brain as the possible seat of the soul, and *De plastica seminis facultate*.<sup>77</sup> In Marburg Egidius Hunnius in his *Von der Erbsünde* (1594) against the more Melanchthonian Matthias Flacius Illyricus presupposed more than he developed Luther's view that original sin comes from Adam body and soul.<sup>78</sup>

John Calvin (d. 1564), like Melanchthon, although he stressed with Luther original sin, felt that he could dispense with traducianism<sup>79</sup> as an explanation for his conviction that soul and body were indeed

<sup>77</sup> Melchior Adam, *Vitae Germanorum medicorum* (Heidelberg, 1620) pp. 290-301, his life and writings without, however, any specific reference to embryology or abortion. The career of Jakob Schegk will be illuminated by a forthcoming Stanford University dissertation by James Hinz. Schegk was successor in medicine at Tübingen to the erratic Aristotelian Guillaume Bigot, who engaged in controversy with Melanchthon and touched upon our theme in *Christianae philosophiae praeludium* (Toulouse, 1548); cf. Paul Delaunay in *Bulletin de la Société française d'histoire de la médecine* 2 (1903) 181-226.

<sup>78</sup> *Von der Erbsünde: Grundtliche und richtige Erklärung . . . aus dem Heiligen Wort Gottes und D. Martin Luthers seligen Schriften erwiesen und bestätigt* (Marburg, 1594) esp. pp. 30, 52.

<sup>79</sup> *Institutes* 1, 15, 5; 2, 1, 7; *Commentarius in Genesis* 3, 6; *Opera omnia* 23, 62. Luschsius Smits shows that Calvin was inclined with Luther to interpret Augustine, especially in *De anima et eius origine*, as tending toward traducianism, and therefore he never cited this particular work of Augustine: *Saint Augustin dans l'oeuvre de Jean Calvin* 1 (Assen, 1956) 164, 183.

alike implicated in it; and he espoused a creationism that, with his doctrine of predestination, tended to make conception and the creation of the soul coincident. At the same time Calvin was emphatic in his opposition to abortion and in his commentary on the *locus classicus*, Ex 21:22, indicated a full awareness of the Catholic tradition in interpreting the passage to the advantage of the fetus, preferring to the Massoretic Hebrew the Septuagintal version and the patristic commentary thereon:

At first sight this passage is ambiguous because, if it is understood to be only the death of a pregnant woman, then the imperiled fetus seems forgotten: but this great absurdity does not obtain. For the fetus carried in the mother's womb is already a man (*foetus enim in utero matris inclusus jam homo est*); and it is quite unnatural that a life be destroyed of one who has not yet seen its enjoyment. For, if it seems more unworthy that a man be killed in his home rather than in his field because for each man his home is his safest refuge, how much more abominable ought it to be considered to kill a fetus in the womb who has not yet been brought into the light. For these reasons I conclude that the words "if death should result" doubtlessly apply to the fetus no less than to the mother. Besides, it would be even less appropriate for a father to trade the life of a son or daughter for a price. For this in my judgment is the sense of the Law: it is a crime worthy of death not only where the woman perishes from the abortion but even if the fetus dies, whether it be aborted or it die shortly after from the blow.<sup>80</sup>

Calvin's reference to the fetus, presumably at whatever age in gestation, as already a *homo* recalls within the framework of Reformed creationism the emphatic formulation of Tertullian within the framework of patristic traducianism.

It is just possible that the pan-Protestant stress on original sin, in the case of Lutheranism also a repristination of traducianism, and in the case of both Luther and Calvin a defense of the fetus presumed from conception (if not primordial predestination) to be a predestined saint or a reprobate, constituted a larger environing and challenging factor in pressing the Catholic Church to modify Thomist creationism to the extent of pushing back the infusion of the newly created soul *to conception* or shortly thereafter. In any case, the Roman Catholic Church, drawing out the general fetological implications of the non-Thomist doctrine of the Immaculate Conception of Mary and quite possibly also under the pressure exerted by revived traducianism

<sup>80</sup> *Opera* 24 (Braunschweig, 1882) 625. Also cf. reference to Ex 21:22 in *Sermon 125 sur le Deutéronome* 19 (*ibid.* 27, 586), where, like Luther above (at n. 71), Calvin only generalizes about compensation and vindication.

(Luther)<sup>81</sup> and modified creationism (Melanchthon and Calvin), by the close of the century of Reformation and Counter Reformation was minimizing or even abandoning, with respect to the gravity of abortion. the distinction going back to the Septuagint between the *foetus inanimatus* and the *foetus animatus* or *formatus*.

In any event, by 1585, for example, in the bull *Effraenatam* Pope Sixtus V, with his principal target prostitution in Rome, severely condemned abortion without any distinction between the unfertilized and formed fetus. The Louvain physician Thomas Fienus in *De formatione et animatione foetus* (1620), breaking from Thomist tradition, showed that the rational soul was infused on the third day. The papal physician and Roman jurisconsult Paolo Zacchias went further and defended in a public disputation the coincidence of animation with conception in *Quaestiones medico-legales* (Rome, 1621).<sup>82</sup> Girolamo Fiorentini of Lucca made the same point with special reference to the necessity of baptizing the naturally aborted fetus in *De hominibus dubiis sive de baptismo abortivo* (Lyons, 1674).

The long Mariological (and ultimately anthropological) struggle between the Maculists (Thomists) and the Immaculists (Franciscans and their allies) had indirect bearing on our problem. When in 1701 Clement XI made the feast of the Immaculate Conception of Mary universal, belief in immediate ensoulment of all human beings at conception received support.<sup>83</sup>

If Mariological concern with the sanctity of the Virgin Mary from her conception in the womb of St. Anne, and if Lutheran traducianism and Protestantism generally constituted indirect factors in modifying Catholic creationism by closing the gap between conception and the infusion of the soul, another factor may have been the discovery of the spermatazoon,<sup>84</sup> understood by the animalculists as a homunculus.

By the middle of the eighteenth century Roman Catholicism had pushed Aristotle and Aquinas to one side in espousing the coincidence of conception and animation, leaving the *Aristotelian-Thomist distinction between the inanimate and animate fetus largely to the civil and the common law*. The consolidation of the new position is seen in

<sup>81</sup> It should be remarked that sixteenth-century Italian medical faculties, particularly Padua, were also repristinating traducianism as most compatible with medical observation and that Italian Protestants and sectaries espoused it with conspicuous enthusiasm, notably the Socinians: George H. Williams, *The Radical Reformation* (Philadelphia, 1962) chap. 22 (amplified with respect to this point in the Italian edition, Turin, 1970).

<sup>82</sup> Goeckel, *op. cit.*, p. 95; Noonan, "Summary History," p. 111.

<sup>83</sup> Noonan, "Summary History," p. 113.

<sup>84</sup> Cf. Noonan, *Contraception*, p. 365.

the immensely popular and much translated and excerpted book by Francesco Immanuelo Cangiamila (d. 1763) with special concern for the eternal salvation of the fetus, *Sacra embryologia sive de officio sacerdotum, medicorum et aliorum circa aeternam parvulorum in utero existentium salutem* (in Italian: Palermo, 1745; in Latin: *ibid.*, 1758). In this influential treatise the canonist archbishop went so far as to provide a provisional baptismal formula to be addressed even to the exposed amnion without a visible fetus: "Si tu es capax, ego te baptizo."<sup>85</sup>

Although Cangiamila's volume encountered here and there the resistance of Catholic spokesmen of the Aristotelian-Thomist distinction between the unformed and formed fetus well into the nineteenth century, the present regnant Catholic view began to prevail in the eighteenth century. It is clearly not medieval but both post-Protestant and revived patristic. The present-day normative Catholic position is perhaps even more indebted to traducianist Protestantism than to the Church Fathers, more recently recovered for this important point in moral theology. With this more recent sacred embryology the Catholic Church through her casuists or moral theologians could not but become much more strict on abortion at whatever stage, as well as on fetal baptism at whatever stage.

During the period when *radical* creationism was driving out the Aristotelian-Thomist distinction between the unformed and the formed fetus, some casuists still sought to defend the rights of an imperiled mother against the fetus. There were medieval and Renaissance antecedents upon which casuists might draw, for example, the Thomist John of Naples and St. Anthony of Florence.<sup>86</sup> Besides the not infrequent direct peril to the pregnant mother beyond the facilities for a Caesarean operation, there was into the nineteenth century in southern Italy and elsewhere the indirect peril to an unmarried pregnant girl of being killed by her relations for unchastity. In this context the arguments of the moral casuists about "therapeutic" abortion literally involved the death of a woman or fetus whether at the hands of the doctor or an avenging brother.

On the basis of Cangiamila's sacred embryology, the moral theologians could not but apply the divine commandment *Non occides* to the fetus at whatever stage. They were accustomed to distinguishing three kinds of illicit and licit killing: *occisio malefactoris*, *occisio*

<sup>85</sup> Edition of Munich-Ingolstadt, 1764, p. 98. For the antecedent medieval concern for the fetus in this context, see G. G. Coulton, *Infant Perdition in the Middle Ages* (London, 1922).

<sup>86</sup> Noonan, "Summary History," p. 104.

*injusti aggressoris*, and *occisio innocentis*. They allowed a Christian in self-defense to slay a malefactor or an unjust aggressor, but most casuists could not construe the fetus imperiling a mother's life as a malefactor or an unjust aggressor; for it was properly in the mother and innocent of the harm it unwittingly inflicted; accordingly they usually held the mother had to be prepared to yield her life to it lest she become guilty of the murder of an innocent.

Although the older terms "creationism" and "traducianism" were less in use, the emergent post-Reformation Catholic position was in effect the conflation of the two concepts. As the creation of each individual soul was being pushed back to the inception of the new physical life in the womb, prior to the existence of any observable embryological counterpart, like the heart or brain, the immediately ensouled zygote assumed in moral theology the status of man before the fall, a direct creation of the Almighty, although this theological inference could never be explicit.<sup>87</sup> But there can be little doubt but that a highly significant moral impact of the modified creationism (modified under the pressure of Mariology, Reformation traducianism and predestinarianism, and many other factors) was to enhance for Catholics the dignity and the sanctity of each new intra-uterine life as both a special creation of God and as innocent (in the prelapsarian sense).

Keeping ever alert to new developments in genetics and embryology, to the good and bad trends in social mores, and eventually in quite modern days to the new laws on the part of the secularized state, the moral theologians of the Church and increasingly the papacy at the lead at length reached the most authoritative formulation of the dignity and right of the fetus as a human being (*homo*) from conception in an allocution of Pius XII in 1951: "The baby in the maternal breast has the right to life immediately from God . . . . The baby, still not born, is a human being (*uomo*) in the same degree and for the same reason as the mother."<sup>88</sup>

This papal statement to midwives, defending the God-ordained dignity of the fetus (from the moment of conception) against abortion for whatever "medical, eugenic, social, economic, or moral 'indication,'" represents the culmination of almost two thousand years of

<sup>87</sup> Whereas Luther and Calvin had emphasized original sin in the soul no less than in the body, in the Catholic enhancement of the fetus now from conception the stress was implicitly on its "supralapsarian" innocence.

<sup>88</sup> Allocution to the Italian Catholic Society of Midwives, Oct. 29, 1951 (*Acta apostolicae sedis* 43 [1951] 838 f.), quoted and characterized by Noonan, "Summary History," p. 120.

Christian thinking about the nature and destiny of the unborn as a person created by God. In this lapidary formulation quoted above a cycle of Christian thought was completed and cast in popular language for women professionally engaged in helping with childbirth. From a primary concern for the *eternal* salvation of the soul to be assured by baptism whether in the fetal stage or as normally in infancy, the Roman Catholic Church has gradually moved to a primary concern for the *temporal* salvation of the fetus wherever imperiled by abortion. All Christians and humanists, too, must recognize in the millennial effort of the Catholic Church to come to grips with a basic issue a tremendous moral achievement, namely, the recognition even in the unformed fetus—to revert to the archaic term—of primordial personhood in the sight of God and man. But the Catholic Church achieved her notable definition of the personhood and humanity of the fetus, not without the moral stimulation, it would appear, from Lutheran and Calvinist fetology, and also, it must be said, not without pressing hard upon the rights of the mother as a person, trusting increasingly in the skills of modern gynecology and obstetrics to minimize the lethal implications for the mother of the provisionally one-sided vindication of the right of the fetus within her.<sup>89</sup>

#### 4. Modern "Protestant" Genetics and Embryology

As for Protestant thinking on embryology and abortion since Luther and Calvin and their immediate followers, one must observe that in general non-Catholic Christianity (from that of the established churches of Great Britain and the Continent and their American continuations to that of various sectarian and free churches everywhere) there was never, as far as one is now aware, in the formative generations any explicit or reasoned disavowal of anything in the traditional Christian, i.e., Catholic view on abortion (or on sexuality in general);<sup>90</sup> and, in fact, in the contemporary American discussion both the National Council of Churches (Protestant and Eastern Orthodox) and the spokesmen of conservative, evangelical Protestantism (largely outside that

<sup>89</sup> It should be stated, however, that Pius XII, in a discourse of Nov. 26, 1951, was strenuously specific about the tragic equality: "Never and in no case has the Church taught that the life of the child must be preferred to that of the mother. . . . No, neither the life of the mother nor that of the child can be subjected to an act of direct suppression." "Per la salvezza della famiglia" (*Discorsi radiomessaggi di Sua Santità Pio XII* 13 (Mar. 1951-Mar. 1952) 415.

<sup>90</sup> Cf. Noonan, *Contraception*, pp. 315, 353, who contends that the Protestant rigidity on sexual ethics tended to keep the Catholic moralists stiff.



Council) have alike expressed opposition to abortion.<sup>91</sup> Nevertheless, it is also true that cultural Protestants and active Protestant churchmen are not conspicuously identified in the eyes of legislators, physicians, psychiatrists, and social workers with the highly articulated position on abortion commonly associated with Catholics. In seeking to ascertain the reason for the marked difference in emotion or preoccupation as between Catholics and most Protestants of all types in America as they approach the legal, social, and moral issue of abortion—despite the very strong positions of Luther and Calvin—several possible explanations present themselves.

In the first place, Protestants from the outset, by returning to Scripture as sole authority in religion, tended to exclude centuries of tradition as normative, cutting themselves off from much of the aforementioned patristic texts against abortion in the Greco-Roman environment. In the second place, although in many cases originally disposed to “Augustinian” Tertullianic traducianism, seventeenth- and eighteenth-century Protestant divines and theologically informed medics and jurists fell recurrently under the influence of the reigning scientific embryology. Jewish as distinguished from merely Old Testament influence could have been another factor. As Protestants and then particularly Calvinists lost touch with the body of traditional materials on the moral issues relating to conception and intra-uterine life, they began to forget what even Luther and Calvin had said quite clearly but inconspicuously on abortion; and they would by the nineteenth century, as evangelical biblical literalists, assimilate directly from the Scriptures the pre-Hellenistic “Jewish” view or they would, as liberals, join forces with the proponents of the latest genetic and embryological theories.<sup>92</sup>

One might have thought that in the first and formative Protestant generations, celibate clerics turned reformers and procreative fathers

<sup>91</sup> See the forthcoming symposium on abortion, edited by John Noonan (Harvard University Press, 1970), with articles by Protestant ethicists R. Paul Ramsey and James M. Gustafson; also the article by Ralph Potter in *Religious Situation 1968*, ed. by Donald R. Cutler (Boston, 1968). For a very conservative Protestant survey, see Rousas John Rushdoony, “Abortion,” *Encyclopedia of Christianity* 1 (Marshallton, Del., 1964) 20–23. For a more permissive attitude in a widely circulated evangelical Protestant weekly, see Bruce K. Waltke, “The Old Testament and Birth Control,” *Christianity Today* 13 (Nov. 8, 1968) 3.

<sup>92</sup> On the Continent, the Remonstrant philosopher of law Hugo Grotius and the Lutheran philosopher Christian Wolff accorded the fetus no particular rights: Fritz Sippel, *Die Berechtigung der Vernichtung des kindlichen Lebens zur Rettung der Mutter vom geburtshilfflichen, gericht-medizinischen und ethischen Standpunkt* (Tübingen, 1902); B. Polag, *Die Berechtigung des künstlichen Abortus vom medizinischen, juristischen und nationalökonomischen Standpunkt* (Strassburg, 1909); noted by Goeckel, *op. cit.*, p. 102.

would have sharpened the Protestant sense of the worth of the sire-engendered fetus. The new marital status of Protestant divines is a factor difficult to assess. Surely any man conscientiously under Lutheran discipline, accepting Tertullianic traducianism, and the Aristotelian-Galenic sire-centered theory of genetics, would have felt especially constrained to limit the sexual drive to procreation and always with an intensified sense of paternal responsibility that Augustine himself, after the period of his *Confessions*, did not carry.

In seventeenth-century Lutheranism a body of literature on marriage and related matters developed over the generations. Much of this moral casuistry is well reflected in German Pietism, where Luther's concern with infant and mother was carried forward notably by Philip Spener (1635-1705), the Father of Pietism; by August Hermann Francke (1663-1727), the founder of the Halle Paedagogium and orphanage; and by celibate Count Nicolaus von Zinzendorf (1700-1760), who elaborated a veritable conjugal theology, involving even the explicit sexuality of God the Father, and bachelor Zinzendorf's own prayful presiding in the nuptial Blue Room adjacent to the sanctuary.<sup>93</sup> One Eva von Buttlar, whose followers religiously espoused abortion, appears to have been a very important negative factor in Germany in having turned Pietists to a fresh concern with the morality of sex and with the recovery of some of Luther's strict views.<sup>94</sup>

In general, Pietism dealt extensively with married love. For the conjugal life and specifically the procreative act and for the growing fetus appropriate prayers were formulated. In his *Evangelische Glaubenslehre* in connection with the article on faith, Spener asserted that even infants dying within the mother's womb had light and faith poured into them by God.<sup>95</sup> But Spener did not allow that the mother's life should be sacrificed for the infant. In his *Theologische Bedencken* (Halle, 1700-02), where Spener dealt extensively with evangelical marriage, he had a whole section on perforation of the fetus to save the mother in otherwise fatal labor.<sup>96</sup> Here he wrestled over several deeply involved pages with the moral-medical problem of justifying the in-

<sup>93</sup> Fritz Tanner, *Die Ehe im Pietismus* (Zurich, 1952); Oskar Pfister, *Die Frömmigkeit des Grafen Ludwig von Zinzendorf* (Leipzig-Vienna, 1910); a reply by Gerhard Reichel, *Zinzendorfs Frömmigkeit* (Tübingen, 1911); and the forthcoming article by Manfred W. Kohl, "Man and Woman in the Post-Reformation Period," Harvard Divinity School, 1968.

<sup>94</sup> E. Becker, *Zur Geschichte der Buttlarschen Rotte* (Giessen, 1905), and Ernst Benz, *Der vollkommene Mensch nach Jakob Böhme* (Stuttgart, 1937).

<sup>95</sup> Edition of Frankfurt, 1741, p. 325. Cf. Melancthon above at n. 73.

<sup>96</sup> Edition of Halle, 1712: 2, Teil 2, chap. 3, art. 3, sect. 5, pp. 287-90; sect. 8, pp. 305-13, deals with the duties and joys of married love; chap. 4, sect. 17, pp. 617-28, deals with the dissolution of marriage.

ference that the infant endangering the mother's life could be considered at the moment of embryotomy as dead, since it would in any case be dead because of the mother's constriction. With this exception, however, Spener's tortured moral prose has much of the quality and thrust of contemporary Catholic moral theology in the same area.

The time would come, however, when a different feeling would come to prevail. Protestants, having stressed predestination and, in the case of Lutheranism, also traducianism, had already entered upon a path that despite their moral intensity would lead them away from their earlier sense of the uniqueness of each conception. By strongly stressing the eternal decrees of election and reprobation (they, of course, eschewed the doctrine of psychic pre-existence), Protestants came to understand the decisive moment for individual salvation to have occurred well before the nine months of gestation; and thus, since the divine decrees were fixed, the eternal destiny of the fetus could not be affected by the vagaries of gestation and obstetrics, while fetal or infant baptism would be of no ultimate avail. On this view predestinarianism would appear to have functioned differently in the Reformation Era and say in the eighteenth century: in first enhancing each individual in the womb and then in gradually minimizing any preoccupation with that intra-uterine life over which the individual progenitors could have no redemptive responsibility. Thus continuing stress on predestination in the direction of predeterminism would eventually open Protestantism, particularly in the Reformed tradition, to the ancient Hebraic view of intra-uterine being as an extension of the mother's flesh until the blowing of the breath of individual life into it at birth. We have already hazarded the surmise that Lutheran traducianism induced a change in Catholic creationism that made conception and creation coincident and by the nineteenth century had eliminated in Catholic moral theology any *unensouled* stage in the development of the fetus. We have now made the even bolder conjecture that after the first generations Protestant predestinarianism and biblical literalism would so weaken both Lutheran traducianism and Reformed and Anglican creationism that Protestants would be rendered accessible again to the prepatristic, purely Hebraic view of Ex 21:22 and also to changing secular-scientific views of intra-uterine life. At the same time Protestantism with its more positive appraisal of sexuality and marriage would slowly find theological sanctions for the equalization of woman and man in marriage and her gradual liberation in society at large.

Thus before the completion of the process within Protestantism climaxing, alas, in the enactment of some of the most permissive abortion laws in contemporary Europe in, for example, once Lutheran Sweden and once Anglican-Puritan England, certain quite positive developments in conjugal theology and ethics were nevertheless achieved. Indeed, we completely misunderstand the moral passion of many feminists and woman's liberation fighters in the present debate on abortion if we do not give due place to the moral passion in Protestantism, often led by ministers, which finally emerged to challenge "male moral chauvinism." We shall henceforth limit ourselves to the development in Protestant England until the emergence of American society as a distinct legal and moral entity.

The divorce and successive marriages of the first Head of the Church of England could not have failed to give prominence to conjugal ethics in the moral tracts, domestic duty books, sermons, and laws of that country, although for some time Englishmen writing in the field were partly dependent upon Continental Protestant and Italian Renaissance leads.<sup>97</sup> It is true that the Prayer Book preserved in its provisions for the sacrament of matrimony the medieval Catholic ideal of the three ends of marriage, while both the canon law and the common law perpetuated the medieval confusion of, and opposition to, contraception and abortion. The common law from Henry Bracton (d. 1268), through Edward Coke (d. 1634), to William Blackstone (d. 1780), maintained from the Middle Ages the legal basis for punishing abortion,<sup>98</sup> amplifying Ex 21:22 under the influence of the Aristotelian-Septuagintal-patristic-Thomist distinction between the unformed or inanimate and the formed or animate or quickened fetus. But English ecclesiastical courts had lost interest in punishing abortion before the break with Rome, the last instance dating from 1527.

Significantly it was the Puritans under Elizabeth and the first two Stuarts who initiated certain changes in reconceiving or reordering the three ends of marriage, traditionally listed as procreation, restraint of lust, and companionship. Whereas the Prayer Book and the Anglican divines in line with the medieval Schoolmen held that procreation was the primary end of marriage, many Puritan homilists and moralists came to place companionship and mutual comfort

<sup>97</sup> Henry Bullinger of Zurich provided in translation the much-printed *The Christian State of Matrimonye* (London, 1541) and Luigi Vives, *The Office and Duetie of an Husband* (London, 1553).

<sup>98</sup> Quay, *art. cit.*, pp. 431 f.

first.<sup>98a</sup> They came to this view in reference to the account in Gn 2:18 about woman as helpmate to Adam and they accordingly held that in conjugal love Christians were observing an ordinance ordained by God before the fall. In a sense these Puritans sought in conjugal love and mutual discipline and tutelage the recovery of Paradise. What a powerful incentive to the reshaping of the family as an institution, which Puritans came in the end to regard indeed as belonging not only to the orders of (fallen) creation like the state but also to the orders of redemption like the Church!

Yet on the issue of abortion Anglicans and Puritans in the seventeenth century remained one in their opposition. Still, failing to distinguish contraception from abortion, they continued in England and New England to make, like the Schoolmen before them, a distinction in gravity between the abortion of a formed and that of an unformed fetus. A representative Puritan, James Guillemeau, in *Child-Birth* (London, 1612), distinguished, for example, between "a flowing or issuing of the [partly "sprouted" male] *seed* out of the wombe, which is not yet either form'd or endued with life" and "a violent expulsion or exclusion of the *child* already form'd and endued with life, before the appointed time."<sup>98b</sup> William Gouge (d. 1653), a Puritan divine at the Westminster Assembly, similarly held it murder intentionally to abort "that which hath received a soule formed in it by God [which] if it be vniustly cast away, shall be reuenged."<sup>98c</sup> It will be observed that both these Puritans quite expressly, in ignorance of the genetic and embryological facts, assumed that the father alone was the source

<sup>98a</sup> Among the Puritans who placed companionship as the first end of marriage were Thomas Becon, Thomas Pritchard, Thomas Cartwright, John Wolfe, John Rogers, John Milton, Andrew Willet, Thomas Gataker, and Richard Baxter. Two recent doctoral dissertations have dealt with the Puritan revision in the order of the ends of marriage. Robert Victor Schnucker holds that only some Puritans participated in this momentous shift: *Views of Selected Puritans, 1560-1630, on Marriage and Human Sexuality* (University of Iowa, Iowa City, 1969) esp. p. 127. Schnucker deals expressly with abortion, *ibid.*, pp. 385-89. James T. Johnson in his Yale dissertation fixes upon the shift as the distinctively Puritan contribution to the evolution of modern marriage, stressing William Perkins, along with the aforementioned Gataker, Milton, and Baxter. A portion of his thesis will appear as "The Reversal of the Ends of Marriage in English Puritan Thought," announced for *Church History* 38 (Dec., 1969). The historical and contemporary importance of both of these theses is such that they should be printed in their entirety as soon as possible. I am grateful to both authors, professors respectively in Northeast Missouri State College, Kirksville, and Douglass College of Rutgers University, New Brunswick, N.J.

<sup>98b</sup> *Op. cit.*, pp. 70-73; quoted by Schnucker, *op. cit.*, pp. 385 f.; italics and brackets mine.

<sup>98c</sup> *Of Domesticall Duties, Eight Treatises* (London, 1629) p. 506; quoted by Schnucker, *op. cit.*, p. 394.

of the new life and that his seed did not become alive or human (a child) until it had been ensouled at the time of quickening (animation).

More perhaps than on the Continent, whether Protestant or Catholic, in Great Britain the interrelationship of divines, doctors, and scientists was such that ecclesiastical and medical views on embryology and therapeutic abortion remained in contact. By the eighteenth century English divines, whether Anglican or Nonconformist, or in Scotland the Presbyterians were following closely the new medical and scientific findings.

The Scottish divine George Garden (d. 1733), referring to Anton Leeuwenhoek's "Animalcula: Observed in Semine Humano," and seeking to reconcile the animalculist and ovist theories, approached modern genetics and embryology in a paper for the Royal Society, "A Discourse concerning the Modern Theory of Generation." Interestingly he found suggestion and sanction in Scripture for the animalculist theory: "This [text, Gn 3:15] gives a new light as it were to the first Prophecy concerning the *Messiah*, that the Seed of the Woman shall bruise the Head of the Serpent, all the rest of Mankind being thus most properly and truly the Seed of Man."<sup>99</sup> In England William Wollaston in *The Religion of Nature Delineated* (London, 1724) and James Cooke in *New Theory of Generation* (London, 1762) were imaginative animalculists. Wollaston, a schoolmaster in holy orders, adopted the theory of animalcules in express dissatisfaction with Tertullian's traducianism. From observation he was certain that both parents contribute in varying degrees to the nature and character of the progeny, and traduction from the seed of the father alone failed to explain this. Moreover, Wollaston sought, as a Deistically influenced divine, to safeguard the concept of creationism in postulating God's creation of all human and other creaturely animalcules in the original act of creation: "I cannot but conclude, that there were animalcula of every tribe originally formed by the almighty Parent. . . ."<sup>100</sup>

The country doctor Sir John Hill (pseudonym: Abraham Johnson) with mock seriousness ridiculed the theory of windborne animalcules that might lodge in the male semen or exceptionally directly in the womb in *Lucina sine concubitu*<sup>101</sup> (London, 1750). Although these works dealt with soul and fetus, traducianism, and creationism, they

<sup>99</sup> *Philosophical Transactions*, no. 192 (Jan.-Feb., 1690; London, 1694) 478.

<sup>100</sup> From the eighth edition (London, 1759), with a general account of the life of the author, p. 164. The whole Section 15 deals with our theme, pp. 156-67. The first public edition of the book was set in type by Benjamin Franklin.

<sup>101</sup> The title continues: *A letter humbly addressed to the Royal Society; in which is proved by most incontestable evidence, drawn from Reason and Practice, that a Woman may conceive and be brought to bed without any commerce with Man.*

did not directly deal with the problem of abortion. But in the hands of a moral philosopher like Wollaston the so-to-speak precreated humanoid animalcules were the mysterious handicraft of Deity at the dawn of creation.

Whatever the theory of genetics, by the later eighteenth century in England, perforation of the fetus to save the life of the mother was, in fact, widely practiced. The English physicians William Cooper and William Dease, because of the hazards of the Caesarean operation, urged abortion at various stages to save the life of the imperiled mother.<sup>102</sup>

When in 1803 the Parliament enacted the Miscarriage of Women Bill,<sup>103</sup> Protestant Britain had been going through a moral evolution with respect to intra-uterine life roughly comparable to that of the German Lutheran Pietists and notably of the Catholic Church in the work of her canonists and casuists over the same period (the seventeenth and eighteenth centuries). For, though abortion of the formed fetus had been recognized as a crime in the common law with its medieval sources in part scriptural and canonical, neither the Anglican canon law in a confessionally mixed realm nor the common law had thus far provided between them "adequate means...for the prevention and punishment" of abortion, to quote the Act. It was notable that in the Act of 1803 and its subsequent revisions the abortion of either the unformed or the formed fetus became offenses, in different degrees, against the new statutes of the realm (as distinguished from both common law and canon law), and this out of fresh concern both for the fetus and for the mother (whose life might be endangered by abortion). It should be remarked, however, that the Act and subsequent revisions thereof were directed against willful abortion and the means thereto; it did not mention mechanical abortion undertaken by a physician to save a mother's life.<sup>104</sup> It is difficult in culturally homogeneous England to assess the possible difference between the Nonconformist and the Anglican conscience in the Act of 1803, which represented such a notable advance in the status of the fetus in the protection of the law. The chief architect of the Act of 1803 was the Lord Chief Justice Edward Law, the first Baron Ellenborough. He was the son of the Bishop of Carlisle.<sup>105</sup>

<sup>102</sup> Goeckel, *op. cit.*, pp. 106 f.

<sup>103</sup> The summary phrase comes from the Miscarriage of Women Act of 1803, 43 George 3, c. 58; *A Collection of the Public Statutes in the XLIII Year of the Reign of His Majesty King George III* (London, 1803).

<sup>104</sup> Quay, *art. cit.*, p. 432.

<sup>105</sup> Lader gives in brief compass the social and political background of the enactment, *op. cit.*, pp. 82-84.

In America the Reformed (Nonconformist, Puritan, Presbyterian) factor in mores and the law is somewhat more identifiable than in England. One cannot avoid the impression that wherever the Reformed (as distinguished from the Lutheran) tradition has penetrated and molded society, its biblicism has led to an imitation of the Israel of yore, and here and there to philosemitism; for Puritanism became a Christianity of the Old Testament.

Puritanism, for example, stressed the Sabbath. In America, generations after the founding of New England, circumcision, partly under the impact of Puritan and Reformed morality and a clearly articulated admiration for the domestic life of Jews congregated in increasing numbers in the big polyglot cities, was rather generally introduced into American practice on hygienic but also *moral* grounds.<sup>106</sup> Like the Jews, the Puritans and their eighteenth- and nineteenth-century successors believed in a healthy procreativity. Despite their elaborate ethical casuistry and preoccupation with the minutiae of the upright life, however, Reformed Protestants did not display that intense interest in the fetus which bulked so large in contemporary Catholic moral theology during the same period (Cangiamila, Liguori). Much less than Catholics, the Puritans and their successors possibly took comfort in the doctrine of election, when bereaved parents and the community considered the eternal destiny of a miscarried or stillborn child or of one which perished before baptism, because they saw conception in a covenantal family as presumptive of salvation. The rite of baptism was not regarded by the Puritans as necessary to salvation, the latter being wholly preordained in an eternal decree of God. In the Puritan view, abortion came in part to be abominated because it eliminated the visible sign of immorality.<sup>107</sup>

When the practical consequences of predestination were modified by revivalism, there was another shift in American Protestantism which may well have had its residual effect upon Protestant moral priorities. In pietism and evangelical reform movements of various kinds sexual

<sup>106</sup> References to circumcision abound in the *Catalogue* of the Surgeon General from the 1870's on. A revealing proponent of the new practice, P. C. Remondino, M.D., set forth the following argument: "Circumcision is, in the opinion of the writer, the real cause of the differences in longevity and faculty for the enjoyment of life that the Hebrew enjoys in contrast to his Christian brother. . . . Parents cannot make a better paying investment for their little boys, as it insures them better health, greater capacity for labor, longer life, less nervousness, sickness, loss of time, and less doctor bills. . ." (*History of Circumcision from the Earliest Times to the Present: Moral and Physical Reasons for Its Performance* [Philadelphia, 1891] p. 186).

<sup>107</sup> Cf. Lader, *op. cit.*, p. 89. His extreme view is not fully borne out, however, by a reading of the oldest provincial and state statutes on abortion and adulterous infanticide collected by Quay, *art. cit.*, Appendix I, pp. 447-520.



sins and concupiscence from Adam were invariably stressed. Moreover, the doctrine of reprobation, the other side of predestination, reinforced by traducianism, had so darkened the classical Protestant view of the mass of humanity that in reaction in some groups the experience of justification by faith alone, or regeneration, or sanctification, or second blessing became central for all calculations concerning eternal salvation. Since this decisive salvific experience was not accessible to infants, there was a tendency in some evangelistic-revivalistic movements to be drawn away from religious interest in any preconversionary stage of life, whether in infancy or the fetal stage. As evangelicals became preoccupied with adult sins and salvation therefrom, and sexuality pre-eminently, the tendency was to see in an illegitimate pregnancy the sin of adultery, etc., rather than a new God-sanctioned life.

In the nineteenth century the social idealism of postrevivalist Protestantism also passed by the problem of abortion of the fetus as the clergy turned successively to various groupings of more visibly disadvantaged persons: slaves, children engaged prematurely in heavy labor, immigrant laborers, and finally disfranchised women. The involvement of the liberal Protestant clergy in the women's-rights movement and the political and then the full cultural and economic enfranchisement of women must be set down as another factor in the conspicuous present-day concern of many Protestant ministers for the complete autonomy of the mother and the protection of her from an "unwanted" child. Thus taken together both the Social Gospel and Protestant individualism comprise a factor in the extreme feminism which has promoted in some religiously Protestant, not to say merely culturally Protestant, women a self-righteous indifference about the destiny of the fetus in their overriding preoccupation with "the dignity of woman" as a sovereign individual who should not be socially enthralled by motherhood.

In the revolt of woman against sex servitude, the right of abortion is often understood as the final step in her enfranchisement (after feminine suffrage, the climb toward equality in business and the professions, and the right of contraception), all in the conviction that no woman can call herself free until she can choose consciously whether she will or will not become a mother.<sup>108</sup>

This concern for the dignity of the mother is well illustrated in the thrust of two successive resolutions of a Protestant denomination that has its roots in Massachusetts Puritanism and another resolution representative of all the Massachusetts Protestant Churches, the latter purporting to have the sanction of the "Judeo-Christian tradition."

<sup>108</sup> Lader, *op. cit.*, p. 167.

The Unitarian Universalist denomination in its biennial assembly in Chicago in 1963 resolved:

Whereas, we as Unitarian Universalists are deeply concerned for dignity and rights of human beings; and

Whereas, the laws which narrowly circumscribe or completely prohibit termination of pregnancy by qualified medical practitioners are an affront to human life and dignity; and

Whereas, these statutes drive many women in the United States and Canada to seek illegal abortions with increased risk of death, while others must travel to distant lands for lawful relief;

Be It Therefore Resolved: That the Unitarian Universalist Association support enactment of a uniform statute making abortion legal if: 1) There would be grave impairment of the physical or mental health of the mother; 2) the child would be born with a serious physical or mental defect; 3) Pregnancy resulted from rape or incest; [or] 4) There exists some other compelling reason—physical, psychological, mental, spiritual, or economic.<sup>109</sup>

The Massachusetts Council of Churches in November 1967 adopted a similar resolution, endorsing the Model Penal Code, and argued for changes in the present abortion laws on the basis of a distinction between “potential human life” and “actual human life.”

In accord with the Judeo-Christian tradition, our position is founded on respect for the worth of [“actual”] persons and a commitment to maximize human well-being within the context of the community. . . . However, the parents’ responsibility to potential life can be invalidated by certain tragic circumstances, when the responsibility cannot be fulfilled adequately or at all. We claim that an important distinction exists between actual and potential human life, and that duties to promote the welfare of actual life may outweigh duties to potential life in particular situations, thereby making abortion morally permissible in these cases.<sup>110</sup>

By 1968 in its Cleveland Assembly the Unitarian Universalist denomination had simplified all its arguments for reform of the abortion laws in the following succinct expression of dependence upon the moral judgment of just two persons: the pregnant woman and her physician:

Be It Resolved: That the 1968 General Assembly of the Unitarian Universalist Association urges that efforts be made to abolish existing abortion laws except

<sup>109</sup> *Unitarian Universalist Association Handbook of Resolutions (1961-1968)*, Department of Social Responsibility (Boston, 1968) p. 9.

<sup>110</sup> “Abortion,” A Policy Statement of the Massachusetts Council of Churches, Nov. 30, 1967. The way in which at least one evangelical Protestant weekly has also gone back to a Hebraic Ex 21:22 is illustrated by the article by Bruce Waltke, cited above, n. 91, and the article by Dr. Munson, *United Church Herald* 10 (Feb., 1967).

to prohibit performance of an abortion by a person who is not a duly licensed physician, leaving the decision as to an abortion to the doctor and his patient.<sup>111</sup>

At the end of a millennial cycle of intense moral inquiry about the legitimacy of saving the life of an imperiled mother by an abortion, some women and men defending her right to abortion in mortal peril have now gone on to add the right to abort not only to save the life of a mother but also to secure her psychological well-being and even to serve her convenience in the purely professional context of a doctor's office.

It has thus turned out in the history of American morals that women's-rights Protestants and secularized Jews readily make common cause with the exponents of an essentially secular or technocratic and pragmatic ethic in demanding an extensive relaxation of the early nineteenth-century abortion laws that, in the case of the last resolution cited, intentionally leads to abortion on request.

The new constellation of religious and pragmatic forces in American society today is a little like the convergence, at the beginning of the American Republic, of two other disparately motivated groupings, the Deists and the sectarian Evangelicals, who together brought about the separation of the main-line churches (Congregational and Anglican) from the constituent states concurrently with their concerted success in shaping the separation principle in the First Amendment in the Federal Constitution. But even if the goal of liberal Protestants today and Jews and outright secularists in the relaxation of the present abortion laws is identical or similar, it is useful to distinguish the motivation, especially at the present juncture, when biology and sociology compete with new data and categories in redefining the human person in the context of the abortion issue. It is just possible that further reflection on the ethical implications of the current biological and socio-psychological knowledge about the human being from conception to senescence will help at least a sector of liberal Protestant and Jewish opinion to repossess the still valid testimony of the common Catholic-Protestant and Hellenistic Jewish tradition about intra-uterine life and restrain them from any uncritical support of any unexamined technocratic practice of abortion. There are, in fact, a number of distinctively Protestant and scriptural principles which, while they have not hitherto been extensively employed in discussing the issue of abortion, could be reconceived to that end as a supplement and correction to the official Catholic point of view and be made to contribute to an ecumenical Christian consensus on this contemporary issue as to the ways of life and death in our society.

<sup>111</sup> *Handbook*, p. 36. The resolution was adopted by greater than a two-thirds vote.

In any case, what is now being, for reasons adduced, most conspicuously defended by Catholics in America is not properly to be styled (and dismissed) as "sectarian" by the proponents of the radical "reform" or the abolition of abortion laws as though infringing upon an implicit Constitution-guaranteed personal liberty. To the contrary, this immemorial and until our day ever more informed and humane constraint of abortion is sectarian neither in the legislative-statutory nor in the constitutional-judicial sense and surely not in the ecclesiological sense, as though this religiously and morally motivated constraint of abortion, compounding the testimony of various religious and humane traditions and the community of conscience of the generations, had no place in the courts or legislative chambers of our land because of the constitutional separation of church and state. For surely that constraint is also grounded in the laws of our being, in our sexual differentiation and mutual responsibility for new life, which make of us societally, whether we are married or single, more than wilful autonomous individuals. As the groping concern about intra-uterine life testifies, this constant constraint on abortion in recognition of the fact in the province of new human life that we, female and male, assume corporate responsibilities has drawn sanctions alike from classical philosophy and medicine, Hellenistic Judaism, and patristic anthropology, with a significant reinforcement and refinement in the sixteenth century from the quarter of Lutheranism and Calvinism and in the nineteenth century from the quarter of scientific genetics and embryology—an altogether notable achievement of our diversely alimanted social conscience in an evolving civilization which has become ever more sensitive to the rights of all persons, whether in war, in prison, in the ghetto, or in the womb; whether men or women, whether senior citizens or the permanently handicapped; whether enfranchised fellow countrymen or the unwitting and diminutive denizens of that universal and mysterious realm of maternal darkness whence we all emerge.

CONTRIBUTION OF THE RELIGIO-ETHICAL HERITAGE TOWARD A  
POLITICS OF ABORTION IN THE UNITED STATES: THE SACRED  
CONDOMINIUM<sup>112</sup>

The preceding spot survey of developing religious attitudes as to the components of personhood with special reference to abortion may have helped to explain both the active principles and perhaps especially

<sup>112</sup> The author has expressed himself in print on the politics of abortion only in "The No. 2 Moral Issue of Today," *America*, March 25, 1967, pp. 452 f. This two-page piece was actually an enlarged letter in commendation of an earlier article in *America* by Robert F. Drinan. Part 2 of the present article will appear in a series of seven pieces on abortion to be edited by John T. Noonan (Harvard University Press, 1970).

the moral residues that condition many Americans as they approach the current abortion debate.

With this exposition behind us of how the issues on abortion have been perceived in our past, our first task is now to reflect upon this not entirely homogeneous heritage and in a first section to recast it all with reference to modern categories and some quite new social concerns in an updated Christian fetology in Protestant perspective. We shall then in a second section set forth a basis for a politics of abortion that emerges from this updated fetology and that will heed the rights of minorities and the consensus of the majority, endeavoring out of a Protestant's experience with his collective past to supply or identify a model for the execution of responsible decisions amid a complex of factors and values. The proposed model for a politics of abortion is a sacred condominium in which parents and the body politic are understood to share sovereignty in varying degrees and in varying circumstances. The model will be set forth as something distinctively American, though exportable, and as an elaboration and conceptualization of what in fact already subsists latently in our pluralistic, constitutional commonwealth. In a third section the roles in the sacred condominium will be specified and clarified of the various functionaries like physicians, lawyers, social workers, and clergymen. In a fourth section various types of abortion cases will be dealt with in what is envisaged as the common court of the co-sovereigns, presumably best located in a hospital. It should be remarked in advance of this section that the concept of the sacred condominium and its application is conservative in intent, although it affords a theoretical and procedural rationale for a somewhat larger number of abortions than is now legally permissible in most states.

*An Updated Christian Fetology: Genetic and Social Components of Personality*

On the biological level, patristic, classical Protestant, and especially papal asseverations as to the fully human character of the fetus from the moment of conception have been perhaps more than vindicated.<sup>113</sup> For, once the haploid generation of sperm and ovum have joined in the diploid generation of the zygote, the biological essentials of the inchoate person are in order fixed, the definitive genetic code has been arranged and set. Whereas in traditional Jewish thought even the well-formed fetus still required for completion the essential *neshamah* and

<sup>113</sup> See, for example, the articles and plates in the Conference paperback *The Terrible Choice*.

hence *nephesh* at birth, and whereas in the traditional Aristotelian-Thomist thought (before post-Tridentine adaptation) the fetus required the rudiments of a body in order to be rationally informed or animated, in the understanding of modern biology the fetus only needs time! Tertullian was in third-century Carthage really quite close to our present genetic understanding: "He is a human being [in essence] who will be one."<sup>114</sup> Viability, the term used for the susceptibility of the fetus to being brought to babyhood outside the womb, is being pushed ever backwards by the refinement of the incubator and the auxiliary skills of fetology.

At the same time modern embryology since De Baer and Van Beneden, over against the sire-centered theory of both Aquinas and Luther has demonstrated the precise equality of the two progenitors in shaping the genetic character of the fetus. But despite this genetic equality, still other factors highly evaluated in modern society have tended to make of the mother, whether a wife or unwed, the determining voice as to the fate of the fetus.

An updated sacred embryology must take cognizance of these several shifts along with new socio-psychological definitions of personality which would supplement or even, in extreme formulations, replace the purely genetic definition of the life in the womb. For, partly because modern physiology and medicine are, indeed, unable to distinguish any validly distinctive nodal point in the continuum from the implantation of the blastocyst in the lining of the uterus to birth, much of the modern argument for the legitimacy of abortion, as distinguished from infanticide, is beginning to revolve around the rather new category provided by social science: the conception of person and personality as a consequence of socialization.

For example, an important factor in the shaping of a personality is firstness among the siblings or the middle position, etc. On this view, the abortion of a possibly defective fetus in a young mother afflicted with rubella would still allow for that uniquely social element of firstness (or secondness) to perdure in the succeeding fetal personality. That incommensurable factor of being the first or second or third offspring to be received by expectant parents (and any other members of the family on the scene) is, according to the situationalists, a societal component of personality. Somewhat like the "rational soul" emergent in or infused from without into the "formed fetus" of Aristotelian-Thomist embryology, the "social" soul, i.e., the family pattern or imprint would remain intact, despite a therapeutic abortion, to shape

<sup>114</sup> See above at n. 36.

instead the stricken mother's next embryo brought to term. Obviously, this modern view of the completed person as partly a socialized being (an idea which has Jewish antecedents and Protestant Social Gospel support) goes far beyond such an incommensurable as firstness and secondness to embrace the whole range of psychosocial considerations, from the health of the mother during the pregnancy to the character and mood of the mother and of all the others who would constitute the early environment of the wanted or unwanted, the cared-for or neglected or even, eventually, battered child.

Although there now tends to be a rapid polarization of thinking as between those who hold that the fetus is genetically a complete human being and potential personality from conception (or at least implantation of the blastocyst) and those who hold that it becomes such primarily as the infant draws breath among the living in an accepting social context, it is possible that, updating their theories, Christians and indeed theistic ethicists in general could make use of both these stages of "personification," genetic and social, as they present to the religiously neutral lawmakers a reconsidered rationale for their own nuanced religious code of behavior in this difficult realm and their preferred terms for a politics of abortion in the public domain.

Surely the fact that the laws and canons in various lands, times, and traditions have always distinguished between the crime of abortion and the crime of infanticide indicates that there has always been felt to be some moral difference in the status of the fetus and that of the newborn infant. This is evident not only in rabbinical Judaism but also even in the Catholic tradition, especially from Augustine through Aquinas to Alfonso Liguori, that is, before modern papal pronouncements.

It could be argued that the moral and legal difference between the fetus and the newborn child and hence between feticide and infanticide is ultimately based upon the fact that, unique in all human relationships, up to the decisive moment of birth (the severing of the umbilical cord), the life of the fetus is biologically the creation of its progenitors and that society instinctively feels a difference of some degree between the murder of a full member of society and the termination of the life of a presocialized fetus not yet subject in all respects to the laws governing society at large. Anciently, in the Roman tradition, for example, it was the sire who had plenary power over the unborn and the young. The paterfamilias had the right of life and death over his offspring, not to say merely the fetus in the womb of his spouse. In the Old Testament are preserved clear traces of the parental sacrifice of the first fruit of the womb not only to Baal but also to Yahweh. In our age and society we have until quite recently understood *both*

parents in wedlock (and otherwise residually the mother alone) as sharing with the state—in varying degrees in different societies—the mutual responsibility for the protection of an unborn life. On this view, the fetus is not merely a part of the mother like a limb or not merely an extension of the domain of the paterfamilias, to recall a venerable rabbinic and an ancient Roman theory, but is, as it were, both a subject and ward of two co-ordinate sovereignties: the progenitor(s) and the body politic. Authority over the unborn life today can be best understood as a primordial condominium with preponderance shifting now to the state, now to the progenitor, depending upon the circumstances.

Unless indeed we continue to insist on this implicitly sacred and inherently indissoluble condominium, one can foresee in some future society, in effect statist or feminist, that the state alone could demand eugenic or even demographic abortion on the one hand,<sup>115</sup> or on the other that the mother could acquire by legal concession that complete control over the fruit of her womb which was once exercised in patriarchal society (pagan Roman and pre-Abrahamic) alone by the sire. She would, moreover, be facilitated in the assimilation or arrogation of virtually sole control by the increased availability of chemical abortifacients which would enable her, if she so willed, to act without the approbation of her doctor or even her mate.

Both of these extremes, statist and feminist, are abhorrent for most Christians to contemplate. But a completed Christian theory of the politics of abortion should recognize the rights alike of the mother, the fetus, and society at large. We must affirm and elaborate the principle that the safeguarding of the life of the unborn does, in fact, in the evolution of society represent a unique condominium in which the state and the married couple or the single mother in various circumstances work out literally the *modus vivendi*.

The writer's own would-be Christian fetology, that is, an ethical and religious as distinguished from a purely biological and medical fetology, is to be presented in the larger quasi-political construct of the sacred condominium of the progenitors and the state over the fetus, because perhaps only with this double approach will it be possible to take full account of the moral passion on both sides of the present debate.

*Theoretical Construct: Sacred Condominium of Progenitor and State*

The politics of abortion implies a social institution or set of conventions by which society can reach the best possible resolution of a uniquely difficult moral dilemma because unborn lives are at stake. Since politics is the "art of the possible," we must strive in the special

<sup>115</sup> Cf. Washington Conference paper of Prof. Ralph Potter.



sector of it relating to abortion to find the most humane way between the rights of the unborn, the demands of the common good, the autonomy of the individual conscience, and the various voluntary collectivities like the Church which especially nurtures that conscience. It is as a foundation to such a politics of abortion that we identify and develop the concept of the sacred condominium, already implicit in society's conventions.

The present American legal use of the term and concept of condominium is largely limited to housing, i.e., to joint ownership of apartment houses and the like. The term has, however, a richer historical meaning. In the Middle Ages a condominium referred to the co-rule of two princes over a territory—a rule that could alternate yearly, one prince governing and collecting revenues from the land one year, and the other the next. This kind of condominium could be inherited from generation to generation. It is this venerable usage of co-rule or co-sovereignty that we revive as a theoretical basis for a politics of abortion.

Condominium in this august sense is the co-sovereignty of the progenitor and the state over the life of the fetal person. Both progenitor and state have their proper responsibility for the nurture and tutelage of the child and consequently their own proper authority in the preservation of its life.

This is a primordial co-sovereignty which we are identifying, and it is especially appropriate that it be recognized in a pluralistic society and in a republic shaped by a covenantal constitution that understands the state to have but limited powers. For our Federal government and society at large has from the beginning respected primordial social entities, like the Church and university that antedated the American nation, entities whose charters—literal (the Dartmouth College Decision, 1819) or metaphorical (the First Amendment)—have been constitutionally acknowledged and confirmed. Furthermore, our Federal and state constitutions recognize that there are inalienable rights reserved to private citizens; and numerous personal predilections are respected as zones and sectors of our being and action on which our governments, whether local, state, or Federal, may not trespass, whether in the realms of conscience and the pursuit of life,<sup>116</sup> liberty, and happiness, or in the more public realm of voluntary association.

In our society the family also partakes constitutionally (the Oregon or *Pierce* decision, 1925) of this same primordial character, which is

<sup>116</sup> On the constitutional right to life, see J.T.S., "In Defense of the Right to Live: The Constitutionality of Therapeutic Abortion," *Georgia Law Review* 1:693, Summer 1967.

acknowledged in the Church and the university. But to a greater degree than they, the family is a mixed realm. For, although to some it is a diminutive or molecular commonwealth, for others an *ecclesiola*, for still others a cultural entity with its own customs and usages, the same family nevertheless participates also in the public realm and is both protected and remotely supervised by the state. Into the sphere of the nurture and education of the family's children—prospectively participant citizens—the state can extend its sovereignty in the case, for example, of a battered child who may be removed from an irresponsible parent.

Thus the social constitution of our nation can be said already to recognize a condominium of progenitor and state over the lives of children, including the unborn. And we can add that it is a sacred condominium, quite apart from theistic presuppositions, on the ground that all who are seriously concerned with social and personal responsibility consider human life sacred. Looking, then, to the sacredness of human life, which is at stake in the abortion controversy, our appeal is to this sacred condominium, that, as a principle already legally and socially recognized except for the term, it may be further articulated into a legal doctrine and system which will serve as a foundation for a humane and democratic handling of the abortion problem.

This co-rule is not that limited sovereignty over self which a free-man as distinguished from a serf or slave has over his own body and over what he does, constrained by the state only where that "sovereign" person (a) may be required to offer his life in the defense of the state, (b) trespasses upon another person or society at large, or (c) attempts to take his or her own life. In the last case the state and other persons are indeed commonly held to have the preemptory right to intervene by force or guile to protect any "sovereign" person from an attempt at suicide. Different from this limited sovereignty over self and of a different order is that co-sovereignty or condominium in the unique realm of the procreation of new life. Here the co-rule of the mother or of the two progenitors rests upon the fact that they have voluntarily or involuntarily brought a protoperson into being. In a sense the progenitor is the last sovereign in a democratic society; for the fetus, as creature of the progenitor biologically, is organically, physically, also a *subject*. Of the democratic state the fetus really is but a *ward* in the same condominium. Although the quasi-political theory of the condominium presupposes that the fetus is at least an inchoate person in consonance with the patristic-papal line of development, the theory of co-rule also reinstates something of the scriptural-rabbinical view that the mother is sovereign over the fruit of her womb, even if she can no

longer maintain anatomically and hence morally that the fetus is merely a limb or growth. Our updated theistic fetology thus combines the patristic-papal and the scriptural-rabbinical lines of development in a Protestant quasi-political construct. Herein is stressed individual accountability. The mother or the two covenantally joined progenitors presume pre-eminence over the fruit of their intercourse no longer on the embryologically untenable ground that the fetus is but a growth until it has received "breath among the living," but on the ground that the mother or the two progenitors at once incur new responsibility and acquire a certain primordial co-sovereignty with society the moment their intercourse results in a new life.

It would be a mistake to consider the condominium in the unique realm of fetal life as completely analogous to the venerable Christian conception of the Two Powers (*Duo quippe sunt*), going back to Pope Gelasius (d. 496) and beyond to the beginnings of the Church as an *imperium in imperio*, because it and the related Two Kingdoms theory of Martin Luther rest on a distinction between the eternal and the temporal, the spiritual and the mundane, the inner and the external, the Church and the state, whereas in the sacred condominium the state and that other limited sovereign, the progenitor(s), are alike concerned with the ultimate and the immediate welfare of another person, namely, whether that fetal person is to be or not to be.

The legal and institutional development of the progenitorial-political condominium over the unborn could have for the much-harassed modern family and for the mother as co-sovereign person what the evolution of sacred embryology achieved for the full humanity of the fetus as *homo* in *Casti connubii* (as late as 1930). The recognition and appropriate implementation of such a condominium as exercised by the progenitor(s) and society in mutual concern for the right of all persons involved (the incipient person, the progenitors, and the community at large) could be a uniquely American contribution to establishing a balance between individual and professional autonomy and general social control. In the ideal situation the authority of the progenitor(s) and of society would be balanced in the normal presumption of mutual concern (personal and abstract) for the prospective child as heir and citizen. But in certain instances, as we have already intimated and will detail below, the state could find occasion to withdraw from the condominium to allow the mother or the parents together to make a self-sacrificial decision in accordance with their ideals (religious or other). In other instances, the state could feel obliged to maximize its role or prevail in the condominium to protect,

sometimes the fetus from the parents, sometimes the mother from the imperiling fetus (if she calls for help).

A German jurist in 1889 suggested one dimension of the condominium in his juridical theory for legitimating perforation of a fetus to save a mother's life, arguing in terms of Prussian citizenship. The state, he said, had an interest in protecting the fetus from hostile assaults, but the fetus, not being "Angehöriger des Staates," could not demand protection from the state over against the mother, who as "Mitglied des Staates" had the right at least of self-defense when threatened from within. Therefore "in a collision between the two the state should *withdraw* its protection from the fetus."<sup>117</sup> The doctrine of the sacred condominium now being more carefully articulated recognizes with the German jurist the right of the state to protect the mother as citizen but, going beyond it and neutralizing its inherent statism and indeed insisting upon a quite different political metaphor for the politics of abortion, demands the acknowledgment of two sovereignties, both ideally concerned with fetal life, but in case of conflict, the orderly adjudication of the right of the mother and that of the fetal person in a medical court.

An acceptable medical and legal code, implementing the balanced forces of the condominium over unborn life, presupposes accountability and knowing consent on the part of the progenitors, at least the consent of passion. The condominium would be considered abnormal or unbalanced if the procreative partners, especially the female, were in fact totally unaware that their sexual act could lead to the formation of another human being. Awareness could be wanting either because of the minority of the progenitors or because of the rapaciousness or the imbecility or the insanity of one or both of the progenitors. Not only is witting consent absent in some sexual acts leading to conception, but also even passion. (An adulteress and an adulterer in contrast would know the possible consequences of their act even when carried into it by passion, however irrational.) The same concern of Catholic moral theologians with the fetus as person with rights before the law must now be extended to the innocent victim of intercourse who has not willingly or knowingly participated in the biological act that leads to her creation of another human being. But the fact that the progenitor is not necessarily responsible for what has taken place within her does not dismantle the condominium but requires only that it be more fully articulated. The full recognition of

<sup>117</sup> Joseph Heimberger, *Über die Straftlosigkeit der Perforation* (Berlin, 1889; 33 pp.).

the legal-political principle of the condominium in the unique realm of the co-sovereignty of progenitors and the body politic involves in fact some further revision of our conceptualization and terminology.

Thus the sacred condominium is not to be thought of as collapsing in the case of the progenitor's immaturity or defectiveness, any more than in the precedent or paradigm of the royal sovereign and his or her prerogatives during minority or incapacitation. A woman whose sovereignty over her body has been violated, perhaps by rape, or a child whose body has been imposed upon by reason of her immaturity or defectiveness of mind stands in need of a kind of "regency." A regency in the context of our political metaphor would be the collective term for all those specialists and otherwise—doctors, asylum or orphanage directors, parents, social workers—who *ad hoc* or over a period of time would be acknowledged by the state and in many cases designated and salaried by the state as speaking on behalf of the girl or incapacitated woman whose sovereignty had been in any way encroached upon.

Ordinarily, however, the two sovereignties would each be represented in the hospital court by medical magistrates engaged by each, physicians (and other specialists) indistinguishable in training and appearance from one another but each in the service respectively of the mother with new life in her body and the body politic: the one, advocate and defender of the rights of the mother as limited sovereign; the other, advocate and defender of the fetus<sup>118</sup> within her on behalf of the state.

The use of the term "medical magistrate" or advocate is drawn, of course, from the analogy of law. Before a court the criminal has not only the right to be represented by a lawyer to defend himself against the state prosecutor but also the right, if he be indigent, to choose from a panel of advocates maintained by the state.

Another analogy suggests itself from the realm of marriage, an institution of concern to civil society as well as to religious communities. In other lands where state and church are separated, the civil and religious ceremonies are distinct. The king of the Belgians, for example, must submit to civil services in his two official languages as well as to being joined with his queen in the nuptial Mass. In the United States, in contrast, where church and state are constitutionally separated, it has been possible nevertheless for civil society to regard

<sup>118</sup> I find an analogous proposal in J.T.S., *art. cit.*, p. 706: "Theoretically even a complete stranger should be able to act for the child [=fetus], with the court's permission. A petition to the court for appointment as guardian ad litem should be a feasible procedure."

the celebrant of the nuptial Mass, the minister, or the rabbi as a magistrate *ad hoc*, whose religious act can be taken as a binding legal action so long as, in whatever the religious context, he complies with what civil society deems sufficient for the solemnization of marriage as also a civil contract. By the same token civil society can regard the physicians, deliberating by standards deemed sufficient by both the medical profession and the state, as medical magistrates.

In the sacred condominium the advocate for the mother or the fetus should become in fact the principal magistrate in this realm and acknowledged as such first by his peers and then by the state.

We wish-now to look more closely at these "medical magistrates" and other functionaries who might appropriately discharge roles in the sacred condominium.

### *Roles of Professionals in the Service of the Two Sovereignties in the Sacred Condominium*

We have already come to think of a hospital chamber as the medical court where the sacred condominium of the pregnant mother and society at large become, as it were, jurisdictionally visible. It is now our task to see how especially the medical, the legal, the socio-psychiatric, and the clerical professions and callings function in the deliberations of this *condominial court*, about which we have already said enough to make clear that all these persons, professional and otherwise, are not to be thought of collectively either as a *panel* of specialists seeking some consensus or as a *court proper* with judge, jury, and advocate seeking a verdict, but rather as a confrontation of two sovereigns, clarifying and assessing their respective rights and duties with professional help from various quarters.

#### 1. The Medical Profession in the Sacred Condominium: Physicians as Magistrates

The hospital has been envisaged as the place for an abortion case to be resolved because it is a public institution architecturally and emotionally associated with the mission of mercy and the preservation of human dignity in life and death. One can visualize the *condominial court* in the hospital as a book-lined chamber, provided with appropriate embryological and gynecological charts, and otherwise suited for due reflection and deliberation. Here physicians are in their own setting, gynecologically and fetologically competent. Here they sustain their professional relationships to their patients and their peers. Here, too, they may be said to be ethically competent against the background of the long tradition of ethical awareness that has im-

bued the profession since Hippocrates. However, this is not their chief competence, which is medical; and it would be unfair to place the entire burden of ethical decision upon them.

It is, indeed, being belatedly perceived in the present discussion of abortion that physicians are being called upon to bear too many moral and legal burdens that become inextricably involved in their medical expertise. Doctors must as of now consider at one and the same time, often in trying circumstances, the viability and the condition of the fetus, the circumstances of the conception, the condition of the mother, and the strictures of the law. A decision here must often be made up of many components ranging from prudence to compassion. While it has often been agreed that a panel of two or three physicians should be involved in any decision to abort, a clear differentiation of the roles of these physicians has not hitherto been insisted upon. With the legal recognition of the sacred condominium doctors could divide their roles, just as do lawyers, the one becoming in a given case an attorney for the defense, another the attorney for the prosecution, each within the confines of legal procedure. By analogy there should be a doctor-advocate for the fetus or the unborn life,<sup>119</sup> as well as, in difficult cases, an advocate for the mother or the parents together, seeing things from the maternal side. Moreover, as physicians and surgeons are inured by their profession to doing hard things in order that health may be restored which the suffering person could never bring himself to do, so in difficult cases of fetal or maternal priority a physician for the mother or parents together could do something for them in their name and interest that often could not be easily articulated by them. But individual doctors should be helped to clarify their role by understanding in each instance their specific professional relationship in the condominium, lest they be confused as to whether they are deciding and acting according to their personal medical code, the Hippocratic oath, their patient's intimated intention, the statutes of the state or the accepted usage of the hospital, etc. All of the compassionate involvement of physicians and their professional autonomy could be clarified, safeguarded, and indeed enhanced, if in a given difficult case two doctors faced each other as spokesmen in the condominium respectively of the progenitor and of the fetus and society's concern for it.

These medical magistrates would have the official responsibility of voicing a medical judgment as to whether an abortion in the case be-

<sup>119</sup> In her spirited summons to Americans to turn aside from our slippage into the "Hard Society," Eunice Kennedy Shriver makes a similar request: "When Pregnancy Means Heartbreak: Is Abortion the Answer?" *McCall's Magazine*, April, 1968.

fore them would be licit or if not as to what provision should be made for mother and the life within her. But the burden of the moral decision whether to proceed to abortion would not be theirs alone, for other specialists should in varying strengths participate in the deliberations, broadening the context in which the decision is to be made and assisting from their various professional perspectives.

## 2. The Legal Profession: Moderation and Arbitration

It would be the first function of the legal profession to establish the sacred condominium as a legal doctrine in the constitutional theory of the land, to define the jurisdiction of the condominium court in the hospital, and to help construct specific state abortion laws appropriately in these terms. If these efforts should succeed, one can envisage lawyers also specialized in medical law being named by the medical magistrate to serve as career moderators and arbiters in hospital courts and as additional counselors for the two concerned parties therein. In many circumstances it would be incumbent upon these legal moderators (or arbiters, but never judges) to establish contact between the hospital court and other independent legal jurisdictions: juvenile, criminal, and probate courts. Without infringing on the magisterial functions of the two physician-magistrates representing respectively the mother and the state on behalf of the fetus, the legal moderator could well expedite what could often prove to be an emotionally taxing process. The legal moderator, as one familiar with the evaluation of evidence and the procedures of regular courts, would preserve the records of each case and thus build up a body of medical-moral clarifications of issues and precedents to be duly edited, bound, and shelved in the hospital chamber established for these deliberations. It is quite possible that the hospital court and its legal moderator could serve also for the many other hard moral cases that with increasing frequency will be coming before the men of medicine in the years ahead.

## 3. The Socio-Psychiatric Professions

Psychiatry has been increasingly involved in abortion proceedings when endangerment of the life and health of the mother includes psychological indications. Social work has more recently emerged to join psychiatry as a profession with its own distinctive character and mission. These two professions, the one a little more conspicuous in abortion cases involving the affluent, the other in those involving the poor or the marginal, are alike relevant to the proceedings of the condominium court in recognition of the fact that in the modern discussion



emphasis has for good or ill shifted from preoccupation with the soul of the fetus to the psyche of the unwed or overproductive mother, from ensoulment of the fetus and sire-centered embryology to social conditioning of the mother and the irresponsibility of the father. Thus in many abortion cases in the hospital court the insight and testimony of the psychiatrist and the social worker would constitute useful background for sound and informed moral judgment.

The "social history," as a distinct genre of assessment developed by the social worker, should be part of the proceedings when indicated, reflecting as it often would the effect of social stratification upon life style, of economic pressures, of social mobility, and of anonymity upon interpersonal relations and on the moral accountability of individuals and society itself ever being molded by these and other forces even more difficult to sort out and assess.

#### 4. Clarification of Clergy in Sacred Condominium and Condominial Court

The balancing and adjustment of the respective authorities of the progenitors and the state in the condominium over the unborn must be worked out on the basis of the common humanistic and democratic concern for the rights of the mother as individual and the otherwise unprotected person of the fetus, and not on the basis of generally theistic convictions or specifically Christian or Jewish views as to the nature and destiny of man. But in recognizing the co-sovereignty of the progenitor in the condominium, the state recognizes also the right of the mother or the parents to call upon the counsel of their rabbi, priest, or minister prior to and during the hospital court session. Indeed the clergy as religio-ethical professionals could function as advisors in the sacred condominium, not only on the side of the indisposed or overwhelmed or conscientious mother, but also on the side of the state in behalf of the fetus. It is indeed important to reserve a place for the professional ethicist as counselor for the medical magistrates. The presence of a clerical figure in the hospital court would tend to conserve in the deliberations that dimension of concern and sanction to which more than two millennia in the development of sacred embryology sketched in Part 1 testify. Increasingly religious communities might place at the disposal of the state and religiously uncommitted but conscientious persons involved in the dilemma of an abortion such specialized ethicists as might give additional counsel within the contingencies of our pluralistic society.

The religious community, acknowledged by our constitutional society as having certain prior claims on those citizens who freely avow loyalty to it, will never become irrelevant to the discussion of the

issue of abortion merely by being once removed from the basic parental-political condominium. The religious community can be energized as it works freely and indirectly through the clergy by suasion within a society where the state has already acknowledged that the parents have rights prior to the state with respect to their child and its nurture. Moreover, the whole doctrine of the sacred condominium and the condominium court would represent *mutatis mutandis* a projection into the institutions and conventions of modern society of some of the perennial concerns of the religious community in dealing with the nature and destiny of personhood.

### *Operation of the Condominium in Selected Cases*

On the basis (1) of recognizing that there is properly a condominium of a responsible society and consenting progenitors in the unique realm of the procreation of a new human being, (2) of recognizing as valid both the genetic and the social component in the human soul or personality, and (3) of recognizing that in the complicated issue of abortion the rights of persons in different degrees of accountability and sensibility and articulateness have to be adjudicated—in other words with the express purpose of allowing more than one moral principle to operate—we may turn to several specific cases where abortion could be variously legitimated or restrained. It is understood at the outset that the operation of the three foregoing principles in concert, while it may allow for a few exceptions to the traditional moral and legal formulations against abortion, will not affect the greater number of cases now in the mind of the public. The theory of the sacred condominium would primarily clarify the politics and procedures of limited abortion. The author has hoped to supply the outline of an ethical and social theory (with historical and embryological background) for only those few cases where many conscientious people feel the legitimation is most clearly indicated without violence to the main body of “sacred embryology.” Intensified sex education on all social levels, the extension of the knowledge and use of birth control, and imaginative and concerted public and private support for super-numerary or unwanted children are the only proper ways in his view to solve the bulk of the problem before us in America, if Christians and others are earnest about preventing abortion from establishing itself as an acceptable “second line of defense” for birth control.

#### 1. Abortion to Save the Mother's Life

The case of abortion to save the life of the mother is apparently scarcely more than a theoretical question in the present stage of gynecology. It is, in any event, not a legal issue in the United States

and has largely ceased to be a moral issue for theologians. In traditional Jewish and Catholic thought, the mother-threatening fetus was called an "innocent pursuer" or "innocent aggressor." Traditionally the force of the adjective in the Jewish *responsa* was to describe the kind of "assailant" from which the mother had a right to have her life defended. In contrast, in Catholic casuistry the same adjective had the force of protecting the fetus, since in law an innocent or irresponsible person, like a madman, might not be punished for what would otherwise be a crime. Modern Catholic moral casuistry, however, by virtue of the doctrine of the indirect effect, confirmed by a widespread instinctive sympathy of Catholic theorists and practitioners with the endangered mother and her family, has been able to justify the removal of cancerous wombs and ectopic pregnancies on the ground that the intention of the operation is to save the mother, not directly to destroy the fetus. In any event, in many another situation the saver of life is ever and again confronted with the necessity of a swift and anguishing choice for life between persons whether assailed by flames or water, in emergency wards, among the wounded on the battlefield, or during disaster at sea when traditionally women and children are saved first. The decision for abortion in case of absolute necessity for the life of the wife, the mother, the loved one, the woman in torturous travail is now swift and humane. The suggested implementation and apparatus of the sacred condominium is here nonfunctional except in the recognition that in an emergency the life of one of the principals in the condominium takes precedence over the fetus (subject of the joint protectorate).

But there is always the theoretical possibility that the imperiled mother would herself wish, under the influence especially of Catholic tutelage, to lay down her life for the life within her. As an ordinary sovereign individual, she could be prevented by the state from making a decision that would lead to her own death. But as a co-sovereign with the state in the unique realm of procreation, she should, without obstruction, be able to make that self-sacrificial decision, sustained by the religious sanction for freely laying down one's life for another. Although an anguished husband as co-progenitor and the attendants of several professions might intercede with her not to lay down her life for the child within her, in this most poignant of moments the mother would be sovereign in her final decision and without peer, for the state may not interfere with the exercise of a religious conviction in conscience, and even the husband, "one flesh" with her in the bonds of marriage, would not have that final power to restrain her decision as to her own soul.

## 2. Conception from Felonious Intercourse

It is first in the area of felonious intercourse that the condominium begins to function substantially in helping us to draw distinctions in terms of the genetic-social definition of person and the minimal requirement of the consent of passion on the part of the progenitor and thus to allow for abortions in certain limited cases.

In the case of rape the victim has not consented even by passion. One person has been misused by another. Without at least the consent of passion the insemination that results from the violation of one person by another is as misplaced as a begonia planted in someone's ear. In such a case an immediate curettage has been allowed also by Catholics. Society's role in this phase of the condominium would be limited to ascertaining the validity of the charge of rape. Here the principals in the condominium could be at odds in assessing the case and require specialized arbitration. Thereupon the medical and the legal professions would enter along with the expertise of social work. But even if rape is demonstrable, the mother may surely assent to the continuance of the misplaced life within her; and society represented in the condominium by the medical magistrate should make her affirmative decision as easy as possible by being prepared to help socially and economically. Although the intercourse is felonious, the state has no reason to resist the innocent fetus so long as the violated mother herself chooses to give it birth.

In contrast, in the case of incestuous pregnancy, the role of society through the agencies of the state should probably take precedence in the condominium, because here one or both partners in the felonious intercourse have violated the code of society and engaged in a genetic felony which, once committed, the state has no reason further to condone by perpetuating the fruit of that forbidden relationship. The conceptive act of both progenitors being felonious, the fetus illicitly formed in the body of the one should probably be removed. Although genetic defects from incestuous pregnancies are not so common as often supposed, society at large has a tremendous stake in the maintenance and the protection of the family as a basic institution and may plausibly refuse as a co-sovereign in the realm of procreation to extend to incestuous progenitors recognition as co-sovereigns in a *sacred* condominium.<sup>120</sup>

<sup>120</sup> There is no more "statism" in this asseveration, one could say, than in the comparable harshness of the state, which ordinarily is concerned to protect the citizen, in punishing a citizen inducted into military service who has, e.g., gone AWOL.

### 3. The Mentally or Physically Defective Fetus

Far more difficult than abortion by reason of rape or incest is the indication of a serious physical or mental deformation of the fetus. Fetology will irresistibly advance its skills in prognosis, prophylaxis, and therapy. A viable theory as to the limits of licit abortion must take it into consideration that increasingly fetology will be able to ascertain well in advance of birth and with ever-decreasing incidents of error the presence of a defective fetus. To the demographic will be added with ever-greater urgency the eugenic demand for the abortion of the demonstrably defective fetus for the sake alike of the mother (and her family) and society at large, and to an extent out of compassionate consideration of the gravely defective embryo itself. It will be at this point that humanistic and theistic groups will most quickly divide. But the legal principle of the sacred condominium is especially useful here.

Christians, presupposing the soul or/and working with the idea of the worth of each person regardless of his potential or achievement, must enter the public domain with their theistic and humane convictions by recasting their argument in terms of the right of all persons before the law,<sup>121</sup> or by alerting society to the imminent hazard to all human life whenever or wherever any society (as with the Nazis) presumes to make a life-and-death value-judgment about any classes of human beings before birth and hence, by implication, about the same classes in asylums and hospitals for both the young and the aged (euthanasia).<sup>122</sup> For many Christians, the most serious objections to a eugenic (though often called a "therapeutic") abortion are the direct involvement of the state in setting standards for human life and the frequent willingness of the proponents of "eugenic" abortion to sacrifice, for example, in the case of rubella statistically as many as three normal fetuses to be sure about eliminating a defective one.

In the difficult case of gravely defective embryos the concept of the sacred condominium over unborn life is especially helpful with the provision of medical and other specialists standing by in compassionate support of the two principals. Where, for example, the medical magistrate representing society's interest in the condominium has proven a given fetus without any doubt to be gravely defective physically or mentally, the state, it could be argued, might well withdraw from the condominium on the ground that it may legitimately act to check

<sup>121</sup> Washington Conference paper of Prof. John Noonan.

<sup>122</sup> Washington Conference paper and interventions of Dean Robert Drinan and the intervention of Mr. Milton Himmelfarb.

a gross intrusion upon itself. Thereupon the state would relax to the mother or the two parents together full authority within the condominium, leaving it to them with their medical and clerical counsel to make the momentous decision on their own. At the same time, in order to attenuate the eugenic implication of this relinquishment of its own protective role (having assured itself through its own medical counsel that the case be indeed *with utter certainty* that of a gravely defective fetus), that state should be sufficiently concerned with sustaining the right of the mother or the parents (and their supportive community of faith) to proceed with the pregnancy to term if her or their consciences so dictate, to offer to maintain for defective offspring adequate care in state institutions.

#### 4. Statutory Rape

There may be two more cases where the operation of the condominium might legitimate an abortion. What is called statutory rape, consenting intercourse of a minor female, could be carefully redefined and restricted so that it would fully cover, but in a more limited way than customary, those pregnancies of girls who by reason of age (say twelve and thirteen) or of mental retardation *demonstrably* (by psychological tests and social data) could not possibly have known or foreseen how their (immature) bodies could produce another human being. Under the general protection of minors and the mentally undeveloped or erratic, the pregnancies also of mentally disordered or dependent adults could be terminated whose intercourse could not be said to have been based upon knowing consent or passion. In the condominium court the professional regency for a minor or a mentally retarded adult could argue that her limited sovereignty over her own body had been violated or misused.

What might be called a Protestant disposition in this paper is perhaps most apparent in the foregoing paragraph of the exposition. Protestantism, with its classical emphasis upon the priesthood of all believers, and subsequently upon the accountability of morally sovereign individuals, is not so willing as Catholicism, with its special understanding of nature and the natural, to accord to an unwitting and even unimpassioned mingling of two mentally irresponsible human beings the same legal and moral and biological status as that of responsible persons, even though it would in most cases have the same aversion as Catholicism to the direct tampering with nature, for example by compulsory sterilization. Protestantism would prefer to work with persons rather than nature and its processes and, where persons were either by age or mental underdevelopment completely irrespon-

sible, spare both them and society from the consequences of their imbecility.

### 5. Adulterous Pregnancies

There is one final case which seems to be appropriately introduced into any redrawing of the licit bounds of abortion. It is the case of an adulterous pregnancy. A large percentage of actual abortions in the United States are carried out for married women. The recently proposed or enacted relaxations of certain state codes on abortion do not affect this large group as a class, nor does the author of this paper so intend. Within this class there is, however, the morally distinguishable category of adulterous pregnancies. In terms of both moral offense and psychological distress an adulterous pregnancy is for the husband the nearest equivalent of rape for the woman. As in the case of adultery, it could be argued that the state should withdraw from the condominium, after being satisfied by blood tests in order to rule out a deceptive charge or claim, and then leave the sole authority with the two legal partners, in this case with the offended husband-non-father in the prevailing role. As the husband and wife are of one flesh by law and religious covenant or sacrament, it could be argued that, as in the case of rape, so here in the case of another kind of violation, the husband would ultimately have the right either to call for abortion of the misconceived fetus (or to demand a divorce) or to assent to the completion of the pregnancy to term, and then either accepting the child as his own or of placing it up for adoption. Again, one would hope that the violated husband's conscience informed by his religious community would persuade him to affirm intra-uterine life and that both church and society would assist institutionally and psychologically to help the estranged couple to be reconciled to each other and to the misconception; but one could well argue that in the case of an adulterous breach of the family, an ever imperiled institution to be protected by law, society could formally withdraw from the condominium and leave the final decision to the compassion of the usurped progenitor.

### CONCLUSION

We may conclude that, as medicine recognizes physiologically ectopic pregnancies which must be terminated for the sake of the life of the mother, perhaps ethics, with a combined genetic-social definition of the human person, and the state, with its recognition of the shifting roles of state and progenitors in unique condominium, could argue with restraint that there are also some instances of socially or psychologically ectopic pregnancies, namely, those issuing from felonious, unwitting, or adulterous intercourse, or those issuing in demon-

strably and gravely defective embryos, warranting the removal of the unformed or unviable fetus either out of concern for the progenitors or society at large, and in a few cases of extreme deformation out of a humane concern for the still unsocialized and perhaps unsocializable fetus itself. But the composite of three principles, (1) the genetic-social definition of the person, (2) the ranking of innocent or unwitting or unconsenting women and girls along with the fetus as alike entitled to protection by society, and (3) the primordial condominium of authority in the unique realm of procreation and early nurture, has in it both that restraint and flexibility which could open up a few new ways of getting at difficult problems in this area without repudiating the venerable Judeo-Christian and humanistic tradition in law, medicine, and religion concerning the right to protection of the unborn fetus, now understood as never so clearly before as a complete human being from the moment of the setting of the genetic code in the first fusion of the successful sperm and the waiting ovum.

The sacred condominium, as put forth in Part 2 of this essay, is not so much an arrangement or a setup, like a panel of doctors and others for deciding on a given case, as it is a concept or model by which all persons concerned may clarify their proper roles in a primordial covenant. Fundamental in the condominium is the recognition that the mother or the two progenitors are co-rulers constituting with the state a joint protectorate over the new life. Thus the condominium is undoubtedly a unique social concept in acknowledging a kind of partial sovereignty of the mother over her own body and the new creation therein. In according this recognition of a joint sovereignty to the mother, the condominium would represent a notable achievement in the long evolution of the rights and dignity of woman. But the condominium presupposes the woman's as well as society's concern to safeguard the innocent life within her. If, therefore, the mother is an extreme minor or an imbecile and therefore incapable of sustaining the normal role in the condominium, her parents, her lawful or institutional guardians, or the equivalent among social workers could discharge that role in her stead. In any case, society at large, as the other member of the condominium, has a responsibility not only for the innocent fetus but also for the innocent mother, immature or permanently *non compos mentis et corporis*.

As we saw in Part 1, the mother as a person and especially as an innocent person has suffered relative to the fetus from moral preoccupation at her expense with the soul, the salvation, and latterly the temporal life of the fetus within her. Yet the theory of sacred condominium, set forth in Part 2, presupposes the hard-won completed Catholic view, traced in Part 1, of the fetus as on principle a human



being from conception, leaving it to fetological experts, of course, to draw or redraw at the very lowest reaches the precise line beyond which an act would no longer come within the scope of licit birth control (i.e., more accurately, conception control). In its modification of creationism from Aquinas to Pius XII, Catholic moral theology has indeed kept pretty close to the genetic and embryological facts. Protestantism, without knowing exactly when, long since abandoned the traducianism of Luther and Calvin's clearly articulated abhorrence of abortion; and it must now rally in general to the Catholic position concerning the fetus (not, however, the Pian-Pauline position on contraception) in its latest, its Pian form, remotely influenced as that may have been by classical Protestantism and in any case substantiated by modern genetics.

Quite Protestant and Jewish, however, in the delineated sacred condominium is the recognition of the mother as an accountable and, with limits, sovereign person above nature, rather than wholly ruled by nature, state, or church.

Alike neo-Protestant or sectarian Protestant and Catholic in the concept of the sacred condominium is the recognition that the state is not omnicompetent in the temporal realm and that the progenitors bearing the awesome responsibility for each new creation have within circumscribed limits a voice over against the state where their conscience (in solidarity perhaps with their church) dictates the bringing into the world life considered by society's standards as inferior. In implementing the parents' rights to bring such life into the world, a humane in contrast to a hard society as the other partner in the condominium would in case of need provide the means for upholding the conscientious parental decision. In the condominium any eugenic (as distinguished from therapeutic) decision would rest with the progenitor alone. The state through its fetological experts would be limited to establishing the *certainty* of a major defect in the fetus before withdrawing in favor of the sovereign parental decision. The parents would be helped by the mother's doctor, religious counselor, and other professionals.

Thus in every sector in every new situation the concept and procedures of the sacred condominium would help clarify the sometimes quite disparate roles of parents, religious advisors, doctors, social workers, and jurists in considering and carrying out a substantial but still limited number of cases of justifiable abortion. At the same time the vaster number yearly reported or surmised of cases of abortion or attempts at abortion for any less compelling reasons would not fall outside the concept of the condominium. They would instead be constrained by it. Society, becoming automatically a partner in every new

condominium as soon as life is conceived, should be ever more vigilant in its duty through its representatives (jurists, doctors, social workers, and clergymen) to safeguard the life of the innocent fetus lest the perceptible moral evolution toward increased concern for unborn life over more than two millennia of our civilization be suddenly reversed, all in the name of human dignity and freedom, by a technologically potent, affluent, and strangely harsh generation, which would presume to dismiss as "sectarian" in the context of legislation or juridical appeal the immense testimony of our common past.

Over the millennia mankind has tried to explore the ethical problem of abortion, ever held back from clarity of view by the obscurity of the biological process, until in fairly recent times biologists have made clear the distinction between the haploid generation of life represented by the sperm and the ovum and the diploid generation represented by the zygote with the plenary set of chromosomes, complete with genetic code. All the zygote/fetus needs to be one of us is time!

It is an anomaly of the development of the moral conscience of society at the very moment when we know the most about fetal life and when we are, in our reverence for life, reviewing such formerly major instruments of society as capital punishment and war, that many in the name of humaneness and humanity would be disposed to let go centuries of ethical concern about prenatal life and the accumulated legal and medical safeguards thereof. The reason for this slippage or insensitivity precisely in those circles and professions traditionally associated with moral definitions is surely in part the fact that in the atmosphere of a sexual revolution many are mistakenly subsuming abortion under the general heading of contraception and sexual freedom.

Tragically, an overriding issue of life and death concerning the zygote become fetus has been either trivialized or confused because the "right" to or the opposition to abortion has come to be almost inextricably linked either with sexual freedom and "women's rights" or, on the papal side, with birth control.

Yet the acknowledgment at law of the emergent principle of the sacred condominium over prenatal life could constitute an integrated movement forward in the evolution of both fetal rights and the rights of woman and parents, and would, without the exercise by the ecumenical Church of any direct or coercive role, turn out to be the final moral vindication and secular implementation of her millennial tutelage as *mater et magistra* to the human race.