CURRENT THEOLOGY

NOTES ON MORAL THEOLOGY: THE ABORTION DOSSIER

On Jan. 22, 1973, the Supreme Court handed down its historic decisions on abortion (*Roe* v. *Wade*, *Doe* v. *Bolton*). The reactions to these decisions were swift and predictable. Paul Blanshard and Edd Doerr, apostles of a rather tedious and faded anti-Catholicism,[1] exulted that "we feel like a champagne dinner in honor of the United States." [2] Flushed with victory, they were in a "festive mood" and called the Court's action "the most direct defeat for the Catholic hierarchy in the history of American law." J. Claude Evans regarded the decision as "a beautifully accurate balancing of individual rights gradually giving way to community rights as pregnancy progresses. It is a decision both proabortionists and antiabortionists can live with, as it leaves the decision up to the individuals most closely involved. . . ." [3] Lawrence Lader, chairman of the National Association for the Repeal of Abortion Laws, spoke of "a stunning document . . . a humanitarian revolution of staggering dimensions." [4]

On the other hand, the Administrative Committee of the National Conference of Catholic Bishops rejected the opinion as "erroneous, unjust, and immoral." [5] Similarly, the episcopal Committee for Pro-Life Affairs branded the Court's action as "bad morality, bad medicine, and bad public policy." [6] John Cardinal Krol, president of the National Conference of Catholic Bishops, referred to the decision as "an unspeakable tragedy" and added that "it is hard to think of any decision in the 200 years of our history which has had more disastrous implications for our stability as a civilized society." [7] For Most Reverend Edward D. Head, chairman of the Committee on Health Affairs (USCC), it was a "frightening decision." [8] *Christianity Today* editorialized that the decision "runs counter . . . to the moral sense of the American people . . . [and] reveals a callous utilitarianism about children in the womb that

[1] Cf. Paul Blanshard and Edd Doerr, "Parochaid, Abortion, School Prayer," *Humanist* 33 (1973) 34-35. The authors refer to "Pope Paul . . . their anti-sexual chieftain." They note that "the hierarchy is doubly embarrassed because celibate bishops are not recognized as the most natural guardians of a woman's womb."

[2] Paul Blanshard and Edd Doerr, "A Glorious Victory," *ibid.*, p. 5.

[3] J. Claude Evans, "The Abortion Decision: A Balancing of Rights," *Christian Century* 90 (1973) 195-97.

[4] Lawrence Lader, "The Abortion Revolution," *Humanist* 33 (1973) 4.

[5] Cf. *Hospital Progress* 54 (1973) 83 ff.

[6] Cf. *Catholic Lawyer* 19 (1973) 31-33.

[7] Cf. *ibid.*, p. 33.

[8] Cf. *Hospital Progress* 54 (1973) 96a.

harmonizes little with the extreme delicacy of its conscience regarding the imposition of capital punishment." [9] And so on.

Whatever one's opinion of the Court's action, one thing is clear: in *Wade* and *Bolton* we are dealing with "one of the most controversial decisions of this century," as the Hastings *Report* phrased it.[10] With other nations contemplating or having completed similar liberalization, it is understandable that the literature on abortion in the past months has been enormous. In the many years that I have composed these "Notes," I have never seen so much writing in so concentrated a period of time on a single subject.

Abortion is a matter that is morally problematic, pastorally delicate, legislatively thorny, constitutionally insecure, ecumenically divisive, medically normless, humanly anguishing, racially provocative, journalistically abused, personally biased, and widely performed. It demands a most extraordinary discipline of moral thought, one that is penetrating without being impenetrable, humanly compassionate without being morally compromising, legally realistic without being legally positivistic, instructed by cognate disciplines without being determined by them, informed by tradition without being enslaved by it, etc. Abortion, therefore, is a severe testing ground for moral reflection. It is transparent of the rigor, fulness, and balance (or lack thereof) that one brings to moral problems and is therefore probably a paradigm of the way we will face other human problems in the future. Many of us are bone-weary of the subject, but we cannot afford to indulge this fatigue, much as the inherent risks of the subject might be added incentive for doing so. Thus these "Notes" will be devoted entirely to this single issue.[11]

To order this review, four subdivisions may prove of use: (1) critiques of the Court's decision; (2) legality and morality; (3) moral writings on abortion; (4) personal reflections.

CRITIQUES OF THE COURT'S DECISION

I shall limit this overview to seven or eight critiques, since it is fair to say that they raise most of the substantial issues. David Goldenberg, in a good review of the legal trends leading to *Wade* and *Bolton*, takes no moral position but faults the Court on legal grounds.[12] For instance, on the basis of lack of direct reference to the unborn in the Constitution, the Court asserts that the fetus is not protected by constitutional guarantees.

[9] "Abortion and the Court," *Christianity Today* 17 (1973) 502-3

[10] "Abortion The New Ruling," *Report* 3 (1973) 4

[11] Much interesting and important literature must be overlooked at this point, I hope to include it in a future survey

[12] David Goldenberg, "The Right to Abortion Expansion of the Right to Privacy through the Fourteenth Amendment," *Catholic Lawyer* 19 (1973) 36-57

"If this is so, how could a state satisfy the compelling interest test in purporting to protect the fetus at the stage of viability?" A similar criticism of the Court's consistency is made by Emily C. Moore of the International Institute for the Study of Reproduction.[13] After saying that "person" does not cover the unborn, how can the Court segment pregnancy by trimesters and permit the state a controlling interest in the third trimester? This point is repeated throughout the literature.

Daniel Callahan rightly contends that the Court did for all practical purposes decide when life begins: not in the first two trimesters, possibly in the third.[14] He scores the Court for making it impossible to act in the future even if a consensus on this point were achieved. He shrewdly notes that there is a hidden presumption that when the state withdraws from resolving "speculative" questions, freedom is somehow served. If this were true, all decisions touching equality and justice would be up to the individual conscience, for these notions are highly speculative in their final meaning. Callahan argues that the entire matter should have been left to state legislatures. I agree and will return to this point.

Dr. Andre Hellegers (Kennedy Institute for the Study of Reproduction and Bioethics) resents in the entire debate the falsification of embryology for the purpose of avoiding the fundamental question: "when shall we attach value to human life?" [15] Hellegers, therefore, argues that the basic question is not, when does life begin? It is, when does dignity begin? The Court fudged this. "They have used terms like 'potential life' trying to say that life wasn't there, when the reason for saying that life wasn't there was because they didn't attach any value to it. The abortion issue is fundamentally a value issue, not a biological one." [16] If the Court is to be truly consistent, Hellegers contends, there is no reason to worry about the *health* of the fetus. This implies that experimentation on the fetus *in utero* is perfectly acceptable. It also renders uncomfortably inconsistent the FDA's strict rules about drugs during pregnancy.

Several longer critiques round out this review. In a stinging but congent rebuttal to the Court, John Noonan raises several serious questions.[17] First, if the liberty to procure termination of pregnancy is "fundamental" and "implicit in the concept of ordered liberty," how is it that this liberty has been consistently and unanimously denied by the people of the United States? Second, with many commentators, Noonan argues that the Court, in spite of its contrary allegations, allowed

[13] *Report* (n. 10 above) p. 4.

[14] *Ibid.*, p. 7.

[15] Andre Hellegers, "Amazing Historical and Biological Errors in Abortion Decision," *Hospital Progress* 54 (1973) 16–17.

[16] *Ibid.*, p. 16.

[17] John Noonan, "Raw Judicial Power," *National Review*, March 2, 1973, pp. 260–64.

abortion-on-request; for the viable fetus was denied personhood and the state was granted the right to proscribe abortion in the third trimester "except when it is necessary to preserve the life or health of the mother." Then the Court describes "health" as involving a medical judgment to be made "in light of all the factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." Briefly, in the third trimester a child may be aborted for the mother's well-being. As Noonan reasonably notes, "what physician could now be shown to have performed an abortion, at any time in the pregnancy, which was not intended to be for the well-being of the mother?"

Noonan's next objection is aimed at the Court's schizoid style of judicial interpretation. That is, the Court was evolutionary in its reading of the notion of liberty, but utterly static and constructionist in its interpretation of the term "person." Finally, Noonan, with Callahan, argues that the Court was inconsistent on its own competence. "The judiciary," *Wade* reads, "is not in a position to speculate as to the answer [as to when life begins]." [18] Yet Texas is said to be wrong in "adopting one theory of life." Clearly, if Texas is wrong, then the Court does indeed know when life begins, especially "meaningful life."

Underlying this decision Noonan sees a whole new ethic of life wherein it is appropriate for the state to protect beings with the "capability of meaningful life." We used to contend that all life is a sacred trust. Now, however, only "persons in the whole sense" are protected. Noonan warns that the mentally deficient, the retarded, the senile, etc. are now exposed; for each could be described as lacking "the capability of meaningful life."

P. T. Conley and Robert J. McKenna accuse the Court of a "foray into the legislative domain." [19] After confessing its own incompetence about life, the Court should have, on this basis, declared the matter nonjusticiable. Furthermore they argue that the Court has failed to practice what it preaches. In several recent decisions it had decided that the more fundamental the right, the more compelling must be the state or government interest in excluding certain groups from enjoyment of the right. After criticizing the Court's utilitarian valuation of life, its inconsistencies and intellectual sloth, they contend that while the unborn's right to life is not explicit in the Constitution, still, unlike the right to abort, it is recognized by law, custom, and majority opinion and could rather easily be inferred from the Declaration of Independence. There it is stated that "all men are created equal and endowed with

[18] *Roe* v. *Wade*, p. 44.

[19] P. T. Conley and Robert J. McKenna, "The Supreme Court on Abortion—A Dissenting Opinion," *Catholic Lawyer* 19 (1973) 19–28.

inalienable rights." But creation is traditionally associated with conception. They conclude that "the decision was patently unsound from either a logical, biomedical, moral or legal perspective."

Many of the points raised by Noonan and others are covered by Edward Gaffney in a devastating critique of the Court's use of history and of its defective anthropology.[20] For instance, using three of Lonergan's imperatives for the operations of human consciousness (be attentive, be intelligent, be reasonable), he finds the Court's use of history in violation of all three.

Blanshard and Doerr state that "the Court proved in long and scholarly footnotes that the Church had permitted abortion for centuries." [21] Footnotes may be lengthy, but whether they are scholarly is another question. The footnoting in *Wade* does, indeed, appear imposing and could be very deceptive. But John R. Connery, S.J., in a careful study of the animation, nonanimation debate, notes that "from the beginning of Christianity abortion has been condemned as morally wrong. The only issue was one of classification." [22] As for the Court's historical presentation, Connery says that it "is too fragmentary, misleading and erroneous to be of any real value." His conclusion: "Rather than rely on such a travesty, it would have been far more honest if the honorable justices admitted openly that they were simply departing from the past, and not just the past that began in the early nineteenth century. The decision has no precedent in either Christian moral or legal tradition." Those familiar with both the care of Connery's research and the softness of his critical touch will see this particular salvo as a deathblow to the Court's pretensions to historical scholarship.

Finally, Robert M. Byrn accuses the Court of inartistic and unpersuasive historical revisionism "before it could administer the fatal blow." [23] The controversy is about the value of human life, and the Court refused to protect unborn children "because there is a controversy over whether their lives are of value—whether they are 'meaningful.'" Social convenience and utility decided the day. If there is any doubt about the Court's shabby utilitarianism, Byrn acidly reminds the justices of William O. Douglas' dissent in *Sierra Club* v. *Morton*. In this dissent Douglas urged that "swamps and woodpeckers should be considered legal persons entitled to due process of law." Douglas continued: "The problem is to

[20] Edward M. Gaffney, "Law and Theology: A Dialogue on the Abortion Decisions," *Jurist* 33 (1973) 134-52.

[21] Blanshard and Doerr, *art. cit.* (n. 2 above) p. 5.

[22] I am indebted to Fr. Connery for use of this manuscript, which, as these "Notes" go to press, is still forthcoming in *Theology Digest*.

[23] Robert M. Byrn, "Goodbye to the Judaeo-Christian Era in Law," *America* 128 (1973) 511-14.

make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed." [24]

In summary, the critiques available thus far attack the Court's reasoning from almost every conceivable point of view: logic, use of history, anthropology. As William J. Curran, J.D., of the Harvard Medical School, notes, "The abortion decisions are already under a good deal of attack by constitutional lawyers, not so much for their result as for their reasoning." [25] At some point there must be a relationship of dependency between conclusion and reasoning; otherwise the conclusion is simply arbitrary. Whether another form of reasoning is available to support the Court's conclusion is, of course, what the legal discussion is all about.

From the point of view of the Christian ethician, what is most interesting (and appalling) is the utilitarian form of argument adopted by the Court and its one-dimensional value scale within the utilitarian calculus. For the Court, the overriding value is privacy. Three points here. First, if traditional attitudes toward abortion have been one-dimensional in their deafness to the resonances of other (than the sacredness of fetal life) values, the Court is no less one-dimensional. Secondly, one may legitimately ask with Albert Outler "just how private an affair is pregnancy, after all—since, from time immemorial, it has been the primal *social* event in most human communities?" [26] This is not to negate the value of privacy; it is merely an attempt to hierarchize it. Finally, the Court's reasoning on privacy raises a much broader cultural issue. Are *Wade* and *Bolton* simply symptoms of a highly individualized and ultimately antisocial notion of rights? There are many other indications in American life that such a notion of rights does indeed dominate our cultural and legal consciousness. If this is the case, there is much in the Catholic tradition, particularly in the recent social encyclicals, to redress the imbalance.

The discussion of *Wade* and *Bolton* will continue for years to come. And as with so many other profoundly divisive issues, it will inevitably be boxed and labeled with the misleading terms "liberal" and "conservative." For this reason Donald Nugent is right on target when he lobs a few mortars into the so-called liberal camp.[27] In an amusing but dead-serious essay he argues that, even if we do not know when human life begins, "in a matter of life and death the only humane position is to give life the

[24] Cited in Byrn, p. 514.

[25] William J. Curran, "The Abortion Decisions: The Supreme Court as Moralist, Scientist, Historian and Legislator," *New England Journal of Medicine* 288 (1973) 950–51.

[26] Albert C. Outler, "The Beginnings of Personhood: Theological Considerations," *Perkins Journal* 27 (1973) 28–34, at 28.

[27] Donald Nugent, "Abortion: An Aquarian Perspective," *Critic* 31 (1973) 32–36.

benefit of any doubt." Liberalism's cozying to the abortion cause is, he believes, symptomatic of a more general disenchantment with liberalism. Anglo-Saxon liberalism is a tradition of rationalized self-interest. "Abortion is in a tradition of interests, and it is inapposite that its exponents present themselves as the paladins of human values."

LEGALITY AND MORALITY

The Court's decision opens on the larger question of the relationship between morality and law, or what may be called the morality of law. More specifically: what is the responsibility of law where abortion is concerned? What is the appropriate strategy, what the criteria, when moral sensitivity attempts to translate itself into social policy in a pluralistic society? These questions have been approached in a variety of ways in recent literature.

Gabriel Fackre approaches the question as an ecumenical peacemaker and suggests that three "perceptions" must be shaken and mixed if the Protestant and Catholic communities are to cease casting glances of hostility across an abyss.[28] The first is the dignity of fetal life. "The central thrust of this perception is the weightiness of any aggression against fetal life with its incarnationally derived dignity." The second is a certain sobriety or realism that realizes the need to translate visionary commitments into norms that take account of our sinfulness and temporality. Thus, just as we have a just-war doctrine to qualify our eschatological moral expectations, so too we need a doctrine of "just abortion." Finally, there is the perception of liberation, the movement from necessity to self-determination.

On the basis of these "perceptions," Fackre proposes a doctrine of just abortion with the following motifs. (1) The dignity of the fetus is to be honored and protected with a zeal commensurate with its development toward fulness of time. (2) The limits of that protection are determined by fetal peril to others who live in the land of ripened humanity, *plene esse*. (3) The definition of that peril should be worked out in each case by those affected by it: personal (mother, father), medical (physician, psychiatrist), social (moral resource or community representative). (4) The final decision about the future of fetal life rests with the one most intimately involved, the mother. (5) The dignity of the fetus and the stake of society is so great as to necessitate fetal law. The law should require the consultative process of no. 3, guarantee self-determination of no. 4, and assure the best medical care. (6) Fetal dignity is best served through raising the consciousness of the society about that dignity and

[28] Gabriel Fackre, "The Ethics of Abortion in Theological Perspective," *Andover Newton Quarterly* 13 (1973) 222–26.

attacking the social and educational conditions that nourish the abortion problem.

Briefly, then, Fackre endorses a law that requires and supports the constraints of a consultative process. Fackre was writing before the Court's decision, and when compared to that decision his proposals look downright stringent. Ultimately, however, Fackre's doctrine of just abortion contains both moral and legal ingredients. Whether the legal constraints he proposes (consultative process) are sufficient will depend to some extent on his moral position. For instance, the retarded and the aged certainly would not be reassured if their dignity were acknowledged by policy proposals similar to Fackre's. He might respond that fetuses are not the aged and retarded. Correct. But what are they? Here I find Fackre evasive. His "to be honored and protected with a zeal commensurate with its development toward fullness of time" is just vague enough to be comfortable with almost any legal implementation. And that eventually is the weakness of the legal conclusion. It is proposed as a doctrine of "just abortion" without a rigorous exposition of the claims that allow us to decide the issue of justice-injustice. In other words, it builds on and reflects an uncertain or at least undeveloped moral position. And therefore his conclusions lack the lively sense of being accommodations to our sinfulness and temporality. When this sense of tension is lacking, legal tolerance tends to get simply identified with moral propriety.

J. Claude Evans seeks to defuse what he calls "Protestant and Catholic polarities" on abortion by "taking abortion out of the statute books altogether, a position earlier endorsed by Robert Drinan, S.J." [29] He believes that proabortionists and antiabortionists could unite on this point. Somewhat unaccountably, then, he adds that all we need is some limiting law "perhaps stating that no abortions are permitted beyond 18-week gestation" and guaranteeing personal and institutional protection against abortion-on-demand. Evans' suggestion that the disputants can unite by taking abortion off the statutes is another example of an invitation to unity by unilateral surrender. The precise contention of very many disputants is that the state has the duty to protect infant life, both before and after birth, with legal sanctions.

This is the very point made by C. Eric Lincoln as he recounts his remarkable change of mind on abortion away from a position based rather exclusively on a woman's autonomy over her own body.[30] Without

[29] J. Claude Evans, "Defusing the Abortion Debate," *Christian Century* 90 (1973) 117–18.

[30] C. Eric Lincoln, "Why I Reversed My Stand on Laissez-Faire Abortion," *Christian Century* 90 (1973) 477–79.

detailing what the law should be, Lincoln insists that the state, as party to every marriage contract or implied contract[31] (and therefore burdened with certain responsibilities), does have something to say about the interruption of pregnancy. The state is the guardian of the public welfare and in that capacity exercises control over our bodies in many areas (e.g., drug and beverage control, medical practice, seat belts, inoculations, water treatment, helmets, etc.). The desire to privatize and individualize the abortion decision totally Lincoln sees as a retreat from personal and social accountability. He makes no secret that he is appalled at the present levels of bloodletting.

This same point is underscored by A. Jousten as he discusses the situation in Belgium.[32] The law, he argues, acts as a support for morality in order to guide the exercise of liberty and responsibility to the common good. Not all men are saints who spontaneously seek the good of others. However, the more complex and pluralized a society is, the more distinction there is between law and morality, without there being separation. And with distinction comes tension. Concretely, in the definition of the rights and duties of each, it is not always possible to take account of the individual interest. If the state tries to satisfy every individual interest, it renounces certain socially useful values in the process. In explanation of this, Jousten agrees with M. T. Meulders: "in the case where two individuals are at stake, and where one risks causing a grave harm to another, there is no longer question of a 'private' matter and the law may not turn away from this situation." [33]

After reviewing the pros and cons of liberalization, Jousten tends to side with those authors who oppose liberalization and believe the situation is best handled by trusting the honesty of physicians and the jurisprudential process without trying to codify all tolerable indications.

Harvard's Arthur J. Dyck argues that one who is for civil rights, sound population policy, and compassion for unwanted children need not be committed to a policy of abortion-on-request.[34] Quite the contrary. Where civil rights are concerned, Dyck notes that women's rights encounter an evolution in property, tort, and constitutional law favoring the recognition of the fetus as a living entity. It is now clearly recognized,

[31] By "implied contract" Lincoln refers to the situation of an unmarried woman consenting to intercourse. In this instance the partner may be liable for support, etc. Since in reasonable societies rights and responsibilities go in tandem, the consenting woman is involved in an implied contract.

[32] A. Jousten, "La réforme de la législation sur l'avortement," *La foi et le temps* 3 (1973) 47–73.

[33] Cited in Jousten, p. 54. Cf. M. T. Meulders, "Considérations sur les problèmes juridiques de l'avortement," *Annales de droit* 31 (1971) 507–19.

[34] Arthur J. Dyck, "Perplexities for the Would-Be Liberal in Abortion," *Journal of Reproductive Medicine* 8 (1972) 351–54.

for example, that the "unborn child in the path of an automobile is as much a person in the street as the mother."[35] Dyck is convinced that it would be a considerable step backwards "if governments, which have acknowledged all of these rights, were now to deprive the fetus of any legal protection of its most fundamental right, i.e., its right to life."[36] As for population growth, permissive laws do not significantly affect this in the long run, since population growth depends upon the number of children people want. For these and other reasons, Dyck favors laws that would permit abortion only where the life or the physical and mental health of the pregnant woman is seriously threatened.

The editors of *America*, obviously convinced that whatever the law ought to be, it should not be the simple abortion-on-request policy adopted in *Wade*, discuss resistance through amendment.[37] Two amendments are possible. First, the absolutist type resembling the 13th Amendment's prohibition of slavery: "No abortion—period." The difficulty here is that such an amendment goes beyond even Catholic formulations. And if "our" exceptions are written into law, then why not the exceptions of other groups? Secondly, there is the state's-rights type of amendment that leaves regulation to the individual states. The difficulty here is that the fight to preserve the sanctity of fetal life would have to be waged in fifty states. *America* asks: "Why should an enormous national effort be made to secure a constitutional amendment, the only result of which will be to guarantee 51 more struggles?" The most immediate answer to that question would be simply: because it is worth it.

But is it really? Albert Broderick, O.P., constitutional lawyer at Catholic University, has his doubts. In a very interesting article Broderick argues that the Court was simply substituting its own moral values for those of the community. In justifying its undervaluation of life, "the Court scorned current medical and biological evidence . . ., distorted history, distorted or misconstrued contemporary social and professional morality as represented in legislation of every state and the medical associations, positioned itself again as supreme arbiter of a nation's social ethics and theology. . . ." [38] How are we to face this revival of judicial supremacy? Broderick sees the amendment route as the

[35] Here Dyck is citing *Prosser on Torts*, 3rd ed., 1964, Sect. 56.

[36] In support of this, cf. "Declaration of the Rights of the Child," proclaimed by the General Assembly of the United Nations, Nov. 20, 1959. It states: "Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Cf. T. W. Hilgers and D. J. Horan, *Abortion and Social Justice* (New York: Sheed and Ward, 1972) p. 133.

[37] "Abortion: Deterrence, Facilitation, Resistance," *America* 128 (1973) 506–7.

[38] Albert Broderick, O.P., "A Constitutional Lawyer Looks at the *Roe-Doe* Decisions," *Jurist* 33 (1973) 123–33.

"by-way of frustration," because an amendment is practically impossible of enactment. Instead he discusses two alternative strategies. First, the very internal defectiveness of the decisions provides some hope that the Court will reverse itself. Therefore, the first strategy is to provide it with every opportunity for doing so. Broderick is not optimistic here, but more so than he is about the heavily-loaded amendment process. Secondly, he argues that if a constitutional amendment is indicated, it ought to move in on judicial supremacy. An example he gives: allow Congress (through a majority of both houses) to override any decision of the Supreme Court which declares unconstitutional on 14th Amendment grounds legislation of the several states.

The Supreme Court's reasoning in *Wade* relied heavily on the right of privacy. Indeed, much prior campaigning had emphasized the abortion decision as private, and therefore not a matter for legislative regulation. Behind these and similar assertions is an entire philosophy of law. Paul J. Micallef traces two different approaches to the relation of law and morality, the positivistic and the Thomistic.[39] The former found its champions in Bentham and Mill and surfaced practically in the Wolfenden Report. It is clear that Micallef is unhappy with the distinction established, indeed almost canonized, by Wolfenden between crime and sin and then raised "to the compendious sphere of the relationship between law and morality." The relationship of human actions to criminal law, he argues, is not to be determined simply on the basis of the distinction between "the private act" and "its public manifestation."

In contrast to this analysis, Micallef carefully and thoroughly exposes Thomas' theory of law based on the common good of all persons. For Thomas, though law and morality are distinct, law has an inherently moral character due to its rootage in existential human ends. Once this has been said, the one criterion of legislation is feasibility, "that quality whereby a proposed course of action is not merely possible but practicable, adaptable, depending on the circumstances, cultural ways, attitudes, traditions of a people etc. . . . Any proposal of social legislation which is not feasible in terms of the people who are to adopt it is simply not a plan that fits man's nature as concretely experienced." [40]

Therefore, within Thomas' perspectives, all acts, whatever their nature, whether private or public, moral or immoral, if they have ascertainable public consequences on the maintenance and stability of society, are a legitimate matter of concern to society, and consequently

[39] Paul J. Micallef, "Abortion and the Principles of Legislation," *Laval théologique et philosophique* 28 (1972) 267–303.

[40] *Ibid.*, p. 294.

fit subjects for the criminal code. But it is feasibility that determines whether they *should be* in the penal code, and this cannot be collapsed into the private-public distinction. Therefore, while Thomas does not tell us whether abortion ought to be in the criminal code, his philosophy of law tells us what questions to ask. These questions were put very helpfully by the late John Courtney Murray. He wrote:

> A moral condemnation regards only the evil itself, in itself. A legal ban on an evil must consider what St. Thomas calls its own "possibility." That is, will the ban be obeyed, at least by the generality? Is it enforceable against the disobedient? Is it prudent to undertake the enforcement of this or that ban, in view of the possibility of harmful effects in other areas of social life? Is the instrumentality of coercive law a good means for the eradication of this or that social vice? And, since a means is not a good means if it fails to work in most cases, what are the lessons of experience in the matter?[41]

Micallef and Murray present a tidy account of Thomistic perspectives on law and morality. What makes the matter so terribly complicated is that at the heart of the feasibility test is the fact that there is basic disagreement on the moral character of abortion to start with.

Charles Curran faces these complications with insight and restraint. He summarizes very well the relationship of law and morality in pluralistic societies by walking a middle path between the "idealist" tradition (wherein the natural law simply translates into civil law and merely tolerates deviations) and the purely pragmatic tradition (wherein law merely reflects the mores of a particular society).[42] Laws must root in both prophetic ideal and pragmatic reality. Thus in pluralistic societies governments will acknowledge the right of the individual to act in accord with the dictates of his conscience, but "the limiting principle justifying the intervention of government is based on the need to protect other innocent persons and the public order." In determining what this means concretely, especially with regard to innocent persons, Curran adduces other important factors: enforceability and equity. Laws which are unenforceable or have discriminatory effects compromise their contribution to the over-all good of a society.

On the basis of this understanding of the relationship of law and morality, Curran believes that those who hold strongly antiabortion moral positions could arrive at any of three possible legal positions on abortion: almost absolute condemnation, modified regulation, no law at all. His own legal position, in light of the factors adduced above, is close

[41] J. C. Murray, S.J., *We Hold These Truths* (New York: Sheed and Ward, 1960) pp. 166–67.

[42] Charles E. Curran, "Abortion: Law and Morality in Contemporary Catholic Theology," *Jurist* 33 (1973) 162–83.

to that proposed in 1961 in the Model Penal Code drafted by the American Law Institute.

Roger Shinn, in a painstakingly fair article, attempts to relate social policies to personal decisions in a pluralistic society.[43] Shinn first asks: what morality is it *right* to legislate? Behind the question is, of course, Shinn's realistic thesis that it is both possible and desirable to legislate and enforce *some* morality. The crucial question concerns only *what* morality to legislate where abortion is concerned. Both opposing positions on this question (legal freedom of abortion, legal constraints) root their case in moral convictions. Shinn discusses these with remarkable objectivity and concludes that we have a profound conflict of convictions and values and that the most we can do is learn to live with these conflicts.

He then turns to the second question: what is it *possible* to legislate? Here Shinn emphasizes the fact that law must rest on a fairly broad shared conviction or, if there is not such consensus, on a very fundamental moral or constitutional principle that people are reluctant to deny. Without these broad bases—which do not exist in our society on the immorality of abortion—prohibitive laws will be futile. For this reason Shinn argues that the Court's decision is a reasonably adequate framework for this society at this point in history. Shinn is not arguing that the decision was good history, good logic, or good judicial practice; he suggests only that "the decision offers a better way of living with a profound conflict of moral convictions than most alternatives."

Perhaps Shinn is right. Perhaps the Court's decision is a better way of living with a profound conflict of values. But before this is too readily concluded, two cautions seem in place. First, what represents a better way of living with a profound conflict will depend to some rather intangible extent on what one supports as the direction of the solution of this conflict. And this gets us right back to moral positions. For instance, if I grant that there is presently conflict in moral positions rendering strongly prohibitive laws impracticable, but if I believe (as a moral position) that nascent life is human life deserving of protection and possessed of the rights we attribute to other human beings, and if I hope that others will eventually share this conviction, then I might easily believe that the Court's decision simply deepens the difficulty of ever arriving at this conclusion. Thus the decision is, in some sense, calculated to freeze the situation of present conflict, to settle for it without providing any hope of a resolution.

If, on the other hand, my moral position were that of Shinn, I would

[43] Roger L. Shimm, "Personal Decisions and Social Policies in a Pluralist Society," *Perkins Journal* 27 (1973) 58–63.

more readily see the Court's conclusion as the best oasis during moral conflict. What is his position? Shinn believes that "the fetus has *some* rights, especially in the later stages of pregnancy, but that the woman also has rights to freedom. . . ." On this basis he states his own preference for weighting the law on the side of the woman's rights, not because fetal rights are insignificant but because the "problems of defining the health of the mother are extremely difficult." If I held that moral position, then I might conclude with Shinn that the Court's "decision offers a better way of living with a profound conflict of moral convictions than most alternatives."

My point is that Shinn's acquiescence in the Court's decision traces back, to some extent, to his moral position. Therefore, in these terms, whether one can agree with this acquiescence depends on whether one is satisfied with Shinn's moral position. Shinn has not argued this position sufficiently to invite agreement. To say that the fetus has *some* rights—without explaining what these are, how strong they are, why, etc.—and then to weight the law in favor of a woman's rights, leaves many unanswered questions. Until Shinn has argued his moral position more thoroughly and persuasively (which he professedly did not want to undertake in this essay), his conclusion about the Court's decision as a way of living with conflict remains moot if not arbitrary. What Shinn should have said is that for those who hold his moral position the Court's decision "offers the better way of living with a profound conflict of moral values."

The second caution is closely connected with the first. What is the best way of accommodating legally to moral conflict should hardly be left exclusively to those who obviously side with one side of the conflict. This is as true of the Court's decision as it is of the traditional prohibitive legal stands. The reasoning of the majority of the Court left little doubt where this majority stood on the substantive issue of fetal value. For such a group to determine what is most equitable for the country is at least as objectionable as allowing the classical prohibitionist to make this determination. The better way of discovering the appropriate legal position at the present time of moral pluralism is to leave the matter to the state legislatures, even though this procedure itself is not without problems.

Papal and episcopal statements on abortion have abounded in the recent past, and since their context has been that of threatened or actual liberalization of abortion law, there is a decided, though far from exclusive, emphasis on the relation of morality and law. Pope Paul VI, in an allocution to Italian jurists, noted that the state's protection of human life should begin at conception, "this being the beginning of a new

human being." [44] This is an emphasis that reappears in nearly all the national episcopal statements.

When relating abortion to women's liberation, Pope Paul insists that true liberation is found in the vocational fulfilment of motherhood. There follows an extremely interesting analysis of the pertinence of relationships to human dignity and rights, an analysis that in its way anticipates some of the theology to be reported below (especially the *Etudes* dossier). The Pope notes:

> In such a vocation there is implicit and called to concretization the first and most fundamental of the relations constitutive of the personality—the relation between this determined new human being and this determined woman, as its mother. But he who says *relation* says *right;* he who says fundamental relation says *correlation between a right and an equally fundamental duty;* he who says fundamental human relationship says a universal human value, worthy of protection as pertaining to the universal common good, since every individual is before all else and constitutively *born of a woman.*[45]

If I read him correctly, the Holy Father is insisting that the relationship constitutive of the personality and generative of rights and duties is not basically and primarily at the psychological or experienced level—a point I shall touch on later.

The Belgian bishops make this very same point.[46] Relationships—and by this they obviously mean experienced relationships—important as they are, are not the source of the dignity and rights of the nascent child. Rather, this source is the personality in the process of becoming. They cite *Abortus Provocatus*, a study issued by the Center of Demographic and Family Studies of the Ministry of Health: "There is no objective criterion for establishing, in the gradual process of development, a limit between 'non-human' life and 'human' life. In this process each stage is the necessary condition for the following and no moment is 'more important,' 'more decisive,' or 'more essential' than another." [47] Therefore they are puzzled at the fact that at the very time we are eliminating discrimination between sexes, races, social classes, we are admitting at the legal level another form of discrimination based on the moment, more or less advanced, of life.

As for the law itself, the Belgian hierarchy is convinced that liberalized abortion law does not solve the real problems. Indeed, by seeming to, it

[44] Pope Paul VI, "Pourquoi l'église ne peut accepter l'avortement," *Documentation catholique* 70 (1973) 4–5; *The Pope Speaks* 17 (1973) 333–35.

[45] *Art. cit.*, p. 5.

[46] "Déclaration des évêques belges sur l'avortement," *Documentation catholique* 70 (1973) 432–38.

[47] *Ibid.*, p. 434.

leads society to neglect efforts on other fronts to get at the causes of abortion. Therefore they are opposed to removal of abortion from the penal code, because such removal would, among other things, imply the right to practice abortion and put in question one of the essential foundations of our civilization: respect for human life in all forms.

The Swiss bishops, after noting with other national hierarchies that God alone is the judge of consciences and that no one has the right to judge other persons, put great emphasis on corporate responsibility for the abortion situation.[48] Those who neglect the social measures for family protection, for aid to single women, etc. are more culpable than those who have abortions.

The Italian hierarchy sees abortion as part of a general trend of violence against man.[49] Its legalization will not only not eliminate the personal and social evils by getting at their causes; it will augment the harm in many ways—for example, by misshaping our moral judgments. The bishops of Quebec echo many of these same points and make it clear that what is at stake is the very idea on which our civilization is built: the conviction that all men are equal, whether young or old, rich or poor, sick or well, etc.[50] They associate themselves with all men who seek truly human solutions through establishment of a more just and humane society.

The German episcopate, after noting that protection of human life is an "absolutely fundamental principle," registers its opposition to the liberalization before the Bundestag.[51] Not only is the legislation morally unacceptable, but it will not solve the alleged difficulties it is supposed to solve. In the course of this interesting statement, the bishops turn to the relation of morality and law. Clearly, not every moral imperative should be in the penal code (e.g., envy, ingratitude, egoism). But where the rights of others are at stake, the state cannot remain indifferent. "Its primordial duty is to protect the right of the individual, to assure the common good, to take measures against the transgressions of right and violations of the common good, if necessary by means of penal law." In doing this, the state becomes a *constitutional* state.

But legislation is not enough. The difficulties leading to abortion must be overcome by other measures. It is here that genuine reform ought to occur. And in undertaking these reforms, the federal republic becomes a *social* state. "It is only when the state is disposed to recognize the principle according to which no social need, whatever it be, can justify

[48] "Déclaration des évêques suisses sur l'avortement," *ibid.*, p. 381.

[49] "Déclaration des évêques italiens sur l'avortement et la violence," *ibid.*, p. 245.

[50] "Déclaration des évêques du Québec," *ibid.*, pp. 382–84.

[51] "Le problème de l'avortement," *ibid.*, pp. 626–29.

the killing of a human being before birth, that it merits the name of social state. It is only when the state is disposed to protect the right to life of a human being before birth and to punish violations of this right, that it merits the name of constitutional state." [52] Only within these parameters and on these conditions should legislators withhold penal sanctions for conflict cases—cases that ought to be precisely determined in law.

More recently the Conference of German Bishops (Catholic) and the Council of the Evangelical Church (EKD, Protestant) produced a common statement on abortion.[53] The most remarkable thing about the document is its common endorsement by the leadership of the vast majority of Christians, Catholic and non-Catholic, in Germany. Once again there is insistence on the fact that a social state will approach abortion reform positively, scil., in terms that attempt to reorder social relationships in such a way that pregnant women receive the type of support that will prevent their seeing abortion as the only way out of difficult situations. The bishops underscore the fact that no society can long exist when the right to life is not acknowledged and protected. "The right to life must not be diminished, neither by a judgment on the value or lack thereof of an individual life, nor by a decision on when life begins or ends. All decisions that touch human life can only be oriented to the service of life."

The document resolutely rejects simple legalization of abortion in the first three months ("Fristenregelung") as a form of abortion reform. Rather, the task of the lawgiver is to identify those conflict situations in which interruption of pregnancy will not be punished ("straflos lassen"). By this wording the document insists that the moral law is not abrogated by legal tolerance but it remains to guide individual decisions in exceptional situations where the state decides not to punish abortion. Throughout, the document lays emphasis on the fact that positive law regulating abortion roots not merely in considerations of utility and party politics, but in basic human values ("Grundwerte menschlichen Zusammenlebens"). An excellent pastoral statement on all counts.

The Permanent Council of the French Episcopate calls attention to the difference between legislation and morality.[54] The task of the legislator is to see how the common good is best preserved in the circumstances. But in drawing up legislation, the government will necessarily express a certain concept of man; for this reason the bishops feel impelled to speak up. Recalling that abortion, no matter how safe and clean it is, always

[52] *Ibid.*, p. 628.

[53] "'Fristenregelung' entschieden abgelehnt," *Ruhrwort*, Dec. 8, 1973, p. 6.

[54] "Déclaration du Conseil permanent de l'épiscopat français sur l'avortement," *Documentation catholique* 70 (1973) 676–79.

represents a personal and collective human defeat, the bishops remind the legislators that in widening the possibilities for abortion they risk respect for human life, open the door for further extensions, and consecrate a radical rupture between sexuality, love, and fecundity. Ultimately, the remedy for the problem of widespread clandestine abortions in France is neither legal constraints nor liberalization. Women tempted to abortion must experience, really and personally, the fact that they are not alone in their distress. Any reform of abortion law must provide for this.

The statement of the Administrative Committee of the National Conference of Catholic Bishops of the United States in response to the Supreme Court's *Wade* and *Bolton* decision is the strongest, and in this sense most radical, episcopal statement I have ever encountered.[55] After detailing the Court's assignation of prenatal life to nonpersonhood, the pastoral states: "We find that this majority opinion of the Court is wrong and is entirely contrary to the fundamental principles of morality." The document continues: "Laws that conform to the opinion of the Court are immoral laws, in opposition to God's plan of creation. . . . " After citing the fundamental character of the right to life as guaranteed in the Declaration of Independence and buttressed in the Preamble to the Constitution, the bishops conclude that "in light of these reasons, we reject the opinion of the U.S. Supreme Court as erroneous, unjust, and immoral." While the statement contains no protracted discussion on the relation of law and morality, it is clear that the American bishops utterly reject the implied doctrine of the Court on the question.

Even this brief roundup probably justifies the conclusion of Michael J. Walsh, S.J., that we have here an "impressive example of the Magisterium in action." [56] It would be useful to list the common and dominant themes of this sprawling papal and episcopal literature. I see them as follows:

1) There is total unanimity in the recent teaching of the Pope and bishops on the right to life from conception. Furthermore, as Ph. Delhaye points out,[57] there is the pronounced consciousness that this teaching is the fulfilment of the commission received by Christ to teach and witness to the constant teaching of the Church.

2) There is repeated emphasis on the fact that we are dealing with a fundamental value, one at the very heart of civilization. The documents

[55] *Hospital Progress* 54 (1973) 83.

[56] Michael J. Walsh, S.J., "What the Bishops Say," *Month* 234 (1973) 172–75.

[57] Ph. Delhaye, "Le magistère catholique et l'avortement," *Esprit et vie* 83 (1973) 449–57 and 434–36. The first part of this two-part article contains a rather full dossier of papal and episcopal statements on abortion.

generally place the fight against abortion in the larger context of respect for life at all stages and in all areas.

3) It is the task of civil society to protect human life from the very beginning.

4) For human life is a continuum from the beginning. As Walsh puts it, "Essential continuity of a human being from conception to death is the presupposition of every episcopal argument." [58] In light of this we encounter terms such as "person in the process of becoming." And to this individual there is repeatedly ascribed the *droit de naître*, as Pope Paul puts it, a relatively recent rendering of the more classical right to life.

5) The protection provided for this *personne en devenir* must be both legal and social. With regard to the law, there is the practically unanimous conviction that legalization of abortion on a broad scale will not solve the many problems associated with abortion, but will rather bring further devastating personal and social evils, particularly through miseducation of consciences. Beyond that, the pastorals are rather reserved in their demands about legislation, except for the American statement, which Delhaye regards as "assez dur." By "social protection" I refer to the unanimous and strongly stated conviction of the episcopates that we must do much more, personally and societally, to get at the causes of abortion. If there is a single major emphasis in all of the documents, it is this.

6) In arguing their case for respect for nascent life and for its protection through public policy, the hierarchies suit the argument to the local situation, as Walsh notes.[59] For instance, the Americans appeal to American legal traditions and the declaration of the United Nations. The Scandanavians, in opposing further liberalization, are deeply concerned to protect individuals against pressurization.

7) The statements generally note that their teaching is not specifically Catholic, though the Church has always upheld it and though it can be illumined, enriched, and strengthened by theological sources.

8) While urging the teaching clearly and unflinchingly, the bishops manifest a great compassion for individuals in tragic circumstances and a refusal to judge these individuals. On the other hand, there is a rather persistent severity with society in general, whose conditions so often render new births difficult or psychologically insupportable.

In the finest piece of writing I have seen on abortion in some time, the editors of the *Month* propose a new strategy on abortion.[60] It is simply this: make abortion as unnecessary as possible. "If one assumes that in a

[58] *Art. cit.*, p. 174.

[59] *Ibid.*, pp. 173–74.

[60] "A New Catholic Strategy on Abortion," *Month* 234 (1973) 163–71.

pluralist society the law cannot be repealed, then all recommendations will be designed to mitigate the evil rather than eliminate it." This duty to ensure the conditions for humanized life falls in a special way on those who have refused the facility of abortion. It involves two steps, one short-term, the other long-term. The immediate response envisages practical care for mothers-to-be. The editors cite the remarkable pastoral of Bishops Eric Grasar and John Brewer (diocese of Shrewsbury) as an example. It deserves quoting.

> We recognize that, for one reason or another, a pregnancy can cause a problem, distress, shame, despair to some mothers. Perhaps, in our concern to uphold the sanctity of life, we have failed to show sufficient practical concern for the mother-to-be who feels herself to be in an intolerable situation. That is all over. The Diocese of Shrewsbury publicly declares its solemn guarantee. It is this: Any mother-to-be, Catholic or non-Catholic, is guaranteed immediate and practical help, if, faced with the dilemma of an unwanted pregnancy, she is prepared to allow the baby to be born and not aborted. This help includes, if she wishes, the care for her baby after birth. All the resources of the diocese are placed behind this pledge.[61]

As for long-term measures, the editors note that the motivations behind most abortion requests are social and economic. This being the case, it is absolutely essential that we so modify the social and economic conditions that these motivations will disappear. "Society should treat these requests as a *symptom of its own sickness.*"

In developing their presentation, the *Month* authors have an excellent treatment of fetal personhood. They note that a widespread contemporary view sees personhood as stemming from social interaction, from relationships. On this view humanity is an achievement, not an endowment. Thus the justification of abortion has reshaped the definition of what it means to be human. The authors reject the idea that achievement is to be preferred to potentiality, and for two reasons. First, no one believes this and no one acts on it, a fact evidenced in our treatment of children. They are prized and valued for their potentiality. Secondly, the preference of achievement over potentiality affirms the rights of the big battalions over the defenseless. "To weight the debate a priori in favor of the mother who can then deal with the fetus as though it were a malignant growth is to sanction a drastic exercise of power. In all other fields, we would recognize this and stop it at once. But here, and for most of us, the victims die unseen, and so consciences are easily tranquillised." [62] The authors see this as an unevangelical failure to rise to the love of the intruder, the unwelcome guest—as a racism of the adult

[61] *Ibid.*, pp. 169–70. [62] *Ibid.*, p. 167.

world. If one decides to read but a single article on abortion, this is in my judgment the one to read.

The realistic, temperate and persuasive study by the editors of the *Month* contrasts with Rachel Wahlberg's brief report of a conference on abortion held at Southern Methodist University.[63] Distinguishing between the abstract and the personal, she concludes that those not involved with a specific unwanted pregnancy tend to discuss the philosophical, medical, or moral questions. Abortion debates must move from these "ivory-tower formulations to the gut-level issues." This fairly common attitude, while it does contain an obvious truth, is, I believe, ultimately mischievous. It opposes the "person" and "immediate crisis" to moral discourse—as if morality had nothing to do with the personal dimensions of problem pregnancies and were unrelated to immediate crises. Morality is, more than inferentially, associated with ivory-towerism. Ms. Wahlberg has not really abandoned morality to deal with the "gut" issues. She has rather collapsed morality into the "gut" issues and thereby opted for her own form of morality, and one with enough only half-hidden assumptions to rock many a tower into response. But that brings us to the recent work on the morality of abortion.

THE MORALITY OF ABORTION

The study that has provoked the most interest on the Continent in many a year is the *Etudes* dossier.[64] It is a summary of the deliberations of a pluricompetent group gathered by Bruno Ribes, S.J., editor of *Etudes*. The report delves into many aspects of the abortion question. For instance, with regard to a desirable law, they recommend that the French law bear essentially on the objectivization and maturation of the decision, on "conscientization" of the responsibility involved. A permissive law will not lead to a collapse of public morality, if the experience of other countries is any indication.

But it is their moral probing that is especially interesting. Noting that the two positions on the humanity of the embryo (developmental vs. one continued vital process) have led to a dialogue of the deaf, they propose their own solution. It is based on a distinction between "human life" and "humanized life." Since we are essentially relational beings, it is in relation to others that we discover, exercise, and receive our singularity and proper being. The very existence of the fetus is a kind of injunction to the parents. Their recognition of fetal life gathers this injunction into a new call. The parents call the child to be born. It is this recognition and

[63] Rachel C. Wahlberg, "Abortion: Decisions to Live with," *Christian Century* 90 (1973) 691-93.

[64] "Pour une réforme de la législation française relative à l'avortement," *Etudes*, Jan. 1973, pp. 55–84.

call of the parents (and beyond them, of society) that *humanizes*. Prior to this event the fetus is a "human being" but is not humanized.

Refusal to humanize, the group argues, is intolerable; for it dissociates the biological from the human, the generating function from the humanizing. However, interruption of pregnancy is "socially justifiable" if it represents the refusal to bring about a dehumanization; for there are instances where genuine humanization is impossible. The terms "dehumanization" and "inhuman situation" are not definable or codifiable except for the obvious cases: for instance, of fetal deformity which will deprive the fetus of all social relations. The authors conclude that no abortion situation is "socially justifiable" unless accompanied by an attestation of the impossibility for the parents to give birth without creating an inhuman situation.

Reactions to this study were many and swift. The Belgian bishops, as noted above, explicitly rejected such a distinction.[65] A subsequent issue of *Etudes* published the interesting reader response, especially on the distinction between *vie humaine* and *vie humanisé*.[66] Bruno Ribes repeated once again the contention that, while a person certainly cannot exist without the individuality he has prior to humanization, this individuality does not suffice to specify him. Ph. Delhaye regards the *Etudes* distinction as only the clearest formulation of an objection against which the episcopal texts are aimed.[67] He cites the Archbishop of Rouen as branding the distinction "inadmissable casuistry," as at once "subtle and coarse." Cardinal Renard, adverting to the distinction in a speech to journalists, noted that if the fetus can be humanized, it is because it is fundamentally human to start with.[68]

R. P. Corvez, O.P., believes that the thought of the *Etudes* group is clearly insufficient on the key point;[69] for human life is present in its essentials even without "recognition" of the parents. "The child is really man, even in the womb of his mother, sharing human nature before receiving a humanizing formation. It is humanity which humanizes. It is [human] nature which humanizes."

Michel Schooyans rightly claims that abortion discussions faithfully reflect the cultural climate in which they occur, and in the West they reflect the axioms and ideology of a consumer culture.[70] In this light he

[65] *Ibid.*, pp 434 ff

[66] Bruno Ribes, S J , "Dossier sur l'avortement L'Apport de nos lecteurs," *Etudes*, April 1973, pp 511-34

[67] *Art cit* , pp 449-57

[68] Alexandre C Renard, "Allocution prononcee par le Cardinal Renard," *Documentation catholique* 70 (1973) 183-84

[69] R P Corvez, O P , "Sur l'avortement," *Esprit et vie* 83 (1973) 97-102

[70] Michel Schooyans, "La liberalisation de l'avortement," *ibid* , pp 241-48

sees liberalization of abortion as a form of "the medicine of luxury." He then turns to the human being vs. humanized being of the *Etudes* study. After granting the importance of relationships as constitutive of personality, Schooyans accuses the authors of a surreptitious slip from a distinction to a division. The distinction, valid enough in itself, results from an analysis of a unique process, an integral one. But a corresponding *division* lacks any foundation, for in concrete reality there is no stage marking the passage from one mode of being to another. This point is repeated by Outler (below).

Schooyans should have stopped there, for his final reflections represent a painful collapse of theological courtesy. He accuses these attempts of sterilizing the gospel of its intransigence. "The premises," he contends, "are forged for the needs of the cause." There are references to theologians in the service of princes and so on. In this instance, to illustrate is to deplore.

That being said, I believe Schooyans is correct in asserting that a distinction is not a division. Furthermore, it seems that the notion "humanize" is being used in two different senses by the *Etudes* group. First, it refers to a recognition and call by the parents. As a first relation, that recognition is said to humanize. Secondly, there is reference to the "impossibility to humanize." Here "humanize" implies something more than the first relation of recognition and call. It refers to a quality of life after birth.

Ribes returned to the abortion discussion later and took a somewhat different approach.[71] The thought of some Catholics is changing on abortion because the context (cultural, political, sociological) is changing. He describes the situation in terms of a thesis (the classical position) and a growing antithesis (an ensemble of affirmations that modify or move away from the classical position). At the heart of the thought of many contemporaries, Ribes argues, is the refusal of undue generalization, a rejection of moral norms that seem independent of scientific, sociological, and political data. The good is ultimately the function of many approaches and currents; therefore the moral act must integrate diverse and sometimes contradictory principles.

Concretely, where abortion is concerned, it is obviously necessary to insist on the principle of respect for nascent life. But Ribes contends that this principle must be proposed along with others that are equally valid. His chief complaint is against "the enuntiation of a principle while appearing to neglect another *equally valuable* principle."[72] It is the responsibility of the individual to balance and compose the various

[71] Bruno Ribes, S.J., "Les chrétiens face à l'avortement," *Etudes*, Oct. 1973, pp. 405–23.
[72] *Ibid.*, p. 420 (emphasis added).

competitive principles in the situation. And when he does so, his decision is not simply the choice of the lesser evil; it relates to what is more human, therefore to the order of duties. This latter assertion is targeted at Gustave Martelet, S.J., who in interpreting *Humanae vitae* had argued that the choice of the lesser evil, while tolerable and understandable at times, never pertains to the order of objective values and hence to the order of duties.[73]

Ribes is, I believe, correct in his criticism of Martelet. Martelet's delineation of "objective values" pertains to an unreal, almost platonic world. Nevertheless, my impression is that Ribes has confused two things: motivation and justification. Motivation refers to the perception of a person about why an abortion is necessary or desirable. In our insistence on the immorality of abortion, we may well have tended to overlook these perceptions and their underlying causes. Justification refers to an assessment of the perception of the person in light of a value scale that transcends and challenges individual perceptions.

The confusion of motivation and justification reflects an inadequate distinction between the pastoral and the moral—a point to which I shall return below. In pursuit of this point, Ribes could be confronted with two alternatives. (1) The respect for nascent life prevails over other values in most situations—as the classical tradition maintains. (2) The respect for nascent life does not prevail over other values in most situations. These are moral statements. If Ribes denies the first statement, as he seems to, then he must hold the second. But if he does want to endorse the second statement, he should get into a thorough discussion about the relationships of values, not about the complex web of motivations and perceptions that are the personal filter for the assimilation of values. These latter are basically pastoral concerns. Contrarily, if Ribes accepts the first statement, then why all the tortured concern about "other principles" of equal value which can only be composed by the individuals? Briefly, what Ribes has failed to argue convincingly is that other principles are of *equal* value. He has shown only that they are perceived as such by many of our contemporaries.

In a long study Bernard Quelquejeu proposes that a change in method is called for in facing the contemporary abortion situation.[74] If we consult the concrete perplexed conscience, we may discover there a new principle, not yet perceived and formulated. This would provide the basis for a new attitude toward abortion. Quelquejeu then argues that any judgment that prescinds from the right to exercise one's sexuality isolates the problem out of context. Concretely, if the preceding will not

[73] Cited in Ribes, *ibid.*, p. 414.

[74] Bernard Quelquejeu, O.P., "La volonté de procréer," *Lumière et vie* 21 (1972) 57–71.

to conceive was reasonable and responsible, then interruption of pregnancy is justifiable. "To affirm that an accidental conception, not desired, is in itself enough to cancel out in every case, the will not to conceive—to the point of constituting an unconditioned obligation of procreation and education—is equivalent to denying this antecedent will, in its reasonable freedom. . . . " A biological fact is allowed to prevail over a reasonable will, a felt and well-founded freedom.

V. Fagone, S.J., will have none of this.[75] He admits that a concrete solution to an abortion problem has to be found in the general context of responsible procreation. However, equating an accidental pregnancy with a biological fact rests on a false supposition and vitiates the whole argument. Quelquejeu holds that if the will to procreate is absent, the fetus is merely a biological fact. Against this Fagone urges that the will not to procreate can claim rights after conception "only if the intention to procreate is required, ontologically, for the fruit of conception to be truly human." The ontological status of a being cannot depend on a subjective decision exterior to its being. Therefore Fagone contends that two things have been confused by Quelquejeu: the legitimacy of the will to procreate or not to procreate (a *moral* question), the relationship of parental will and intent to the constitution of fetal humanity (an *ontological* question). Furthermore, how in consistency could Quelquejeu rebut the contention that even a born child is only a "biological fact" as long as the will not to procreate still persists?

Bernard Häring evaluates the main theories about the moment of hominization and concludes that each of them has some probability.[76] He grants that the data of embryology seem to buttress the position of biologists, philosophers, and moralists who view the moment of fertilization as the most decisive moment in the transmission of human life. "They are convinced that everything is directed by a typically human life principle which we may call 'soul' or the life-breath of the person."

Häring believes, however, that the theories that give prime importance to implantation and/or to the final establishment of individualization cannot be simply ignored. When does this individualization occur? Häring discusses at length the theory favored by Teilhard de Chardin, Karl Rahner, and P. Overhage,[77] and strongly advocated by Wilfried Ruff, S.J., physician and professor of bioethics.[78] They believe that

[75] V. Fagone, S.J., "Il problema dell'inizio della vita dell'uomo," *Civiltà cattolica* 124 (1973) 531-46.

[76] Bernard Häring, *Medical Ethics* (Notre Dame: Fides, 1973) pp. 81 ff.

[77] Karl Rahner and P. Overhage, *Das Problem der Hominisation* (Freiburg, 1961).

[78] Wilfried Ruff, S.J., "Individualität und Personalität im embryonalen Werden," *Theologie und Philosophie* 45 (1970) 24-59, and "Das embryonale Werden des Menschen," *Stimmen der Zeit* 181 (1968) 331-55.

hominization of nascent life should be related to the development of the cerebral cortex; for it is the cerebral cortex that constitutes the biological substratum for personal life. Since, Häring argues, a considerable percentage of embryos turn out anencephalic (characterized by lack of essential parts of the typically human brain) and therefore simply incapable of any personal activity, and since the maternal organism automatically rejects nearly all cases of such embryos, it seems to follow that before the formation of the cerebral cortex "there exists merely a biological center of life bereft yet of the substratum of a personal principle." The basic structure of the cerebral cortex is outlined between the fifteenth and twenty-fifth day, or, as Häring notes, "at least after the fortieth."

What does Häring make of all this? First, he grants that the theory "which presents hominization as dependent on the development of the cerebral cortex has its own probability." That is, "before the twenty-fifth to fortieth day, the embryo cannot yet (with certainty) be considered as a human person." Secondly, Häring proposes this as a theory or opinion only, and not something that can be acted on until it gains greater acceptance by "those in the field." Or, as he puts it, "the theory . . . does not provide sufficient ground for depriving the embryo of the basic human right to life." [79] In other words, Häring believes that at present the fetus enjoys the favor of doubt and that fetal life must be protected *ab initio*, but that the uncertainties surrounding the very early stages of embryonic development "could contribute greatly to the resolution of those difficult cases involving conflict of conscience or conflict of duties."

Kevin O'Rourke, O.P., regards this opinion as "outmoded." [80] Whether or not that judgment is too strong depends on one's assessment of the development of the cerebral cortex. If cortical development is viewed as a qualitative leap determinative of *personal* existence, then the theory does indeed have its probability. If it is not viewed in this way, then another conclusion is warranted. On the basis of the evidence I have seen (though I have not seen it all, by any means), I am inclined to see individualization as the crucial developmental stage—and individualization seems to occur prior to the development of the cerebral cortex. Be that as it may, what calls for our protection is *personne en devenir*, a contemporary rendering of Tertullian's "he is a man who will become a man." To this Häring would certainly agree.

In a good review, Charles Curran ultimately rejects delayed hominization based on either relational analyses (Pohier, Quelquejeu, Beirnaert,

[79] *Op. cit.*, p. 84.

[80] Kevin O'Rourke, O.P., "Häring on Medical Ethics," *Hospital Progress* 54 (1973) 24–28.

Ribes's earlier writing) or cortical development (Ruff).[81] Against the relational school, Curran argues that there is no reason to draw the line, for example, at birth. "After birth these relationships could so deteriorate that one could judge there was not enough of a relationship for truly human existence." Furthermore, he contends, the relational criterion proposed does not accept a full mutuality of relationships. For instance, why not press the argument and say that before a truly human relationship constituting "humanized life" is present, the child must acknowledge and recognize the parents? Finally, the exclusively relational account of the origin of life encounters problems when dealing with the other end of the cycle: death. Has death occurred when relationships deteriorate or cease?

Against Ruff and Häring, Curran argues that the *basis* for personal relations and spiritual activity (which admittedly occur only after birth, and considerably thereafter) "is not qualitatively that much more present because there is now a cortex in the brain." Therefore the emergence of these organs is not a threshold that can divide human life from nonhuman life.

I find Curran's objections very persuasive. As for his own position, Curran argues that individual human life does not begin until after the possibility of twinning and recombination has been concluded.[82] Thereafter life may be taken only if necessary "to protect life or other values proportionate to life." Curran argues, and I agree, that this phrase ("other values proportionate to life") must be interpreted in a way consistent with our assessment of the values justifying the taking of extrauterine life. In summary: a useful survey and a carefully argued statement of his own position—one I find very close to my own.

In an excellent[83] article, Albert Outler also rejects as arbitrary all "magic moment theories" as to when the defenseless deserve to be defended.[84] Such magic moments, whether they be ensoulment, cortical development, viability, birth, achievement of rationality, or acquisition of language, are merely prolongations of the body-soul dualism that has caused so much mischief. Outler grants that the distinctions are

[81] Charles E. Curran, "Abortion: Law and Morality in Contemporary Catholic Theology," *Jurist* 33 (1973) 162–83.

[82] Cf. Andre E. Hellegers, "Fetal Development," THEOLOGICAL STUDIES 31 (1970) 3–9.

[83] I realize that terms of approval such as "excellent," especially in this context, very often betray the fact that the article in question corresponds to or reinforces the position of the commentator. Whether this is the case here, one will know only if he tests the essay, and I urge such testing.

[84] Albert C. Outler, "The Beginnings of Personhood: Theological Considerations," *Perkins Journal* 27 (1973) 28–34.

sometimes illuminating but that the radical disjunctions built on them do not make sense. In this he agrees with Schooyans.

From a theological perspective Outler sees terms such as "person," "personality," "personhood," and "self" as code words for a transempirical or self-transcending reality. This self-transcendence has been valued as a sign of life's sacredness in Christian tradition. It is not a *part* of the human organism nor is it inserted into a process of organic development at some magic moment. "It *is* the human organism oriented toward its transcendental matrix." Therefore Outler sees personhood as "a divine intention operating in a life-long process that runs from nidification to death." For this reason abortion must be seen as "a tragic option of what has been judged to be the lesser of two real evils."

Since abortion is now legal, the moral issue is more urgent and agonizing than ever. This shift from legal to moral grounds might be an advance, according to Outler, "*if* the value-shaping agencies in our society were agreed that abortion is a life-and-death choice; *if* there were legal and social supports for conscientious doctors in their newly appointed roles as killers as well as healers; *if* we had a general will in our society to extend our collective commitments to the unborn and the newly born; and *if*, above all, there were any prospects in our time for higher standards of responsible sexuality. What has actually happened, however, is that in our liberation from abortion as a 'crime,' many of us have also rejected any assessment of it as a *moral evil*—and this will further hasten the disintegration of our communal morality." [85]

Notre Dame's Stanley Hauerwas studies three questions that enlighten the abortion issue: When does life begin? When may life be taken legitimately? What does the agent understand to be happening?[86] Having answered in rather classical terms the first two, Hauerwas turns to the third question, which is at the heart of his interesting article. He contends that there is more "in an agent's deliberation and decisions that is morally important than is in the spectator's judgment." What is this more? Briefly, the agent's perspective. To illustrate how this perspective functions, he takes a situation earlier presented by James Gustafson.[87] It is a very tragic instance of pregnancy resulting from multiple rape in a situation of poverty, illness, and lack of employment. After very

[85] *Ibid.*, p. 32.

[86] Stanley Hauerwas, "Abortion: The Agent's Perspective," *American Ecclesiastical Review* 167 (1973) 102–20.

[87] James M. Gustafson, "A Protestant Ethical Approach," in John T. Noonan, ed., *The Morality of Abortion* (Cambridge: Harvard Univ. Press, 1970) pp. 101–22. For a different perspective on Gustafson's essay, cf. Frederick Carney, "The Virtue-Obligation Controversy," *Journal of Religious Ethics* 1 (1973) 5–19.

sensitively describing the values involved, Gustafson had concluded that abortion could be morally justified—or, more accurately (for Gustafson strongly resists being a spectator-judge), that if he were in the woman's position, he could see how it would be morally justified.

The special warrants for this exception Gustafson stated as follows: (1) pregnancy resulted from a sex crime; (2) the social and emotional conditions for the well-being of mother and child are not advantageous.

Hauerwas defends Gustafson's approach, not on the basis that abortion is a good thing, but rather because "abortion morally is justified under an ethical perspective that tries to pull as much good as possible from the situation." It might be a different thing if societal conditions and the woman's biography favored and supported carrying the pregnancy to term. "Yet Gustafson does not think such moral possibilities are present in this girl, at least not at this time." Behind this Hauerwas sees Gustafson's conviction that "the good and the right are found within the conditions of limitations. Present acts respond to the conditions of past actions, conditions which are usually irrevocable and unalterable." [88] Hauerwas agrees and states that our moral choices do not occur in ideal conditions where right and wrong are apparent, but rather the right must be wrenched from less than ideal alternatives.

I wish to pursue this point with Gustafson and Hauerwas, because further clarification may allow us to turn an ecumenical corner on the matter by bringing together two traditions that look rather sharply different but perhaps are really not. The point of concentration will be the phrase "moral justification." I would suggest that Gustafson has not "morally justified" abortion if we press that wording; for to do that he would, on his own terms, have to show what values are "higher in order to warrant the taking of life." I do not believe this has been shown. Gustafson–Hauerwas have rather shown that this girl in a real and understandable sense can do nothing else; that is, she has not (in her personal and societal situation) the resources to do what might in other conditions be the good thing to do. I should like to suggest that, if the emphasis falls on the woman's personal perspectives, strengths, and biography, then we are dealing with pastoral understanding or tolerance, not precisely with moral justification.

It is precisely in dealing with Gustafson's approach to abortion that Bernard Häring explains very well the distinction between moral theology and pastoral counseling.[89] Moral theology, he states, operates on a level "where questions are raised about general rules or considera-

[88] Gustafson, *op. cit.*, p. 115.

[89] Häring, *Medical Ethics*, pp. 112 ff.

tions that would justify a particular moral judgment." Pastoral prudence, however, looks to the art of the possible. Catholic tradition has always been familiar with the notion of "invincible ignorance" (surely a poor term because of its one-sidedly intellectual connotations and its aroma of arrogance). Häring rightly notes that this term refers to the existential wholeness of the person, the over-all inability to cope with a certain moral imperative. This inability can exist not only with regard to the highest ideals of the gospel, but also with regard to a particular prohibitive norm. On this basis Häring concludes that he would "not pursue the question once it had become evident that the woman could not bear the burden of the pregnancy."

Gustafson is thoroughly familiar with this discussion; for that reason it would be illuminating to have his further reflections on the point. In the altogether worthy cause of eliciting these reflections, I would like to continue to suggest, as a basis for discussion, that it seems more accurate to refer to Gustafson's conclusion in the case described not as "moral justification" but as "pastoral justification." For in dealing with concrete instances, are we not at the level where inprincipled values are assimilated by the individual in her situation, with her background, etc.? Behind Gustafson's use of "moral justification" is, perhaps, his strong reluctance to be a judge. But here I believe a distinction is called for. The moralist is a judge of necessity, a point made excellently by Hauerwas. But a moralist is not only a moralist in dealing with concrete situations. He is also a pastoral counselor, and *as such* is not a judge, if by "judge" we mean one who dictates what must be done regardless of a person's capacities and situation.[90] Could it be that because of his remarkable pastoral instincts Gustafson too quickly identifies the moral and pastoral role and therefore uses the term "moral justification" where something else is involved? Possibly.

Every priest who has heard confessions knows the difference between moral judgment and pastoral compassion, between the good that ought to be and the good that cannot be as yet, between aspiration and achievement. When some segments of the Protestant community say that every human choice stands in need of forgiveness, they are saying something unfamiliar to Catholic *moral* tradition (especially the manualist moral tradition) but not to Catholic *pastoral* practice. If Gustafson would speak more of the good that ought to be, and his Catholic counterpart would speak (as well he can) more of what cannot yet be and

[90] A balanced presentation of the counseling approach to abortion is that of Harry E. Hoewischer, S.J., "A Counselling Approach to the Problems of the Unwanted Pregnancy," *Inquiry* (Regis College), Oct. 1973 (no pagination given).

why, the twain could easily mate into a position identifiable as catholic, because human and compassionate, yet evangelically uncompromising and radical.

J. Robert Nelson writes that discussion of abortion among Christians would be considerably helped if "sanctity of life" were understood as including both *bios* (mere sustenance for mortal existence) and *zoe* (the qualitative dimension of life).[91] According to Nelson, *zoe* always has the higher value. If this is remembered, "Christians would never think of the fetus, at whatever stage of development, as a disposable 'thing'; nor would they have so strong a fixation on the preservation of the fetus 'at all costs' that they would be callous to either the pregnant woman's *zoe* or to the well-being of society."

Nelson's elaboration of "sanctity of life" is shot through with Christian insight and common sense. However, two points deserve comment. First, there is the meaning, or rather the implications, of the contention that *zoe* always has the higher value. Physical life is, to be sure, not the highest good for man, if one can use such language without plunging into dualism. But it is, as Schüller has recently insisted,[92] the most fundamental, and as such it is to be preferred over other conflicting goods which, even though they rank higher on a scale, are less fundamental.

Secondly, in terms of the basic moral issue, Nelson's treatment leaves the matter pretty much where it was; for the issue is precisely, how much *bios* can be sacrificed to *zoe* without undermining *zoe* itself? And on what warrants, with what controls, developed out of what form of moral reasoning? Nelson does not help here.

In a long and rather strange article Judith Jarvis Thomson tries to establish the moral justification for abortion by assimilating the procedure to a situation where one need not continue to provide his body as a source of lifesaving sustenance to someone who cannot be saved without it.[93] Thus, refusing to allow a pregnancy to continue can be the moral equivalent of refusing to be a Good Samaritan. If there are times when one may legitimately argue that the cost is too great to demand that one be a Good Samaritan, so too with continuing the pregnancy. "I have been arguing," she writes, "that no person is morally required to make larger sacrifices to sustain the life of another who has no right to demand them, and this even where the sacrifices do not include life itself."

[91] J. Robert Nelson, "What Does Theology Say about Abortion?" *Christian Century* 90 (1973) 124-28.

[92] Bruno Schüller, S.J., "Zur Problematik allgemein verbindlicher ethischer Grundsätze," *Theologie und Philosophie* 45 (1970) 1-23, and "Typen ethischer Argumentation in der katholischen Moraltheologie," *ibid.*, pp. 526-50.

[93] Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (1971) 47-66.

To the objection that the mother has special responsibilities and obligations to the child and that the child has certain rights, Thomson argues that we do not have special responsibilities for a person unless we have assumed them, explicitly or implicitly. This means that "if a set of parents do not try to prevent pregnancy, do not obtain an abortion, and then at the time of birth of the child do not put it out for adoption, but rather take it home with them, then they have assumed responsibility for it, they have given it rights, and they cannot now withdraw support from it...."[94] Contrarily, "if they have taken all reasonable precautions against having a child, they do not simply by virtue of their biological relationship to the child ... have a special responsibility for it." They may wish to assume this responsibility, but "if assuming responsibility for it would require large sacrifices, then they may refuse."

Thomson's essay stirred two formidable combatants into activity. Baruch Brody (M.I.T.) replies that Thomson has overlooked the distinction between our duty to save a life and our duty not to take a life.[95] The former duty is much weaker than the latter. In another article Brody sets out his own understanding of when it is legitimate to abort.[96] Hypothesizing that the fetus is a human being whose life may not be taken except in the most extreme circumstances, he seeks a rule that would best state what these circumstances are. After rejecting any justification based on fetal aggression, Brody concludes with a norm which states that it is permissible to abort to save the mother's life if the fetus is going to die anyway in a relatively short time and taking its life is the only way to save the mother. The whole rationale for taking some life to save others "is that he whose life will be taken loses nothing of significance and [he] is not therefore being treated unfairly." But he insists on tightening this rule by adding the requirement that taking the mother's life will not save the child, or even if it will, it has been determined by a fair random method that the mother, not the child, ought to be saved.

While Brody's reasoning will appear quaint to a world whose attitudes toward abortion have been profoundly influenced by a variety of pressure groups (sexual freedom, population control, women's liberation, etc.[97]), it strikes me as being a very useful attempt to deal with the morality of conflict situations in a disciplined and controlled way without falling into the standard traps of utilitarian analysis. Unfortunately, however,

[94] *Ibid.*, p. 65.

[95] Baruch Brody, "Thomson on Abortion," *Philosophy and Public Affairs* 1 (1972) 335–40.

[96] B. A. Brody, "Abortion and the Sanctity of Human Life," *American Philosophical Quarterly* 10 (1973) 133–40.

[97] Cf. David R. Mace, *Abortion: The Agonizing Decision* (Nashville: Abingdon, 1972) pp. 60–62.

the whole thing looks a bit too much like an academic game, since Brody begins by admitting that there are "others who claim, *with equally good reason*, that a fetus is not a human being. . . ." [98] His study would be much more persuasive if he had explored and validated that judgment.

Philosopher John Finnis also takes on Thomson.[99] He claims that Thomson has muddied the discussion by conducting it in terms of rights. The dispute is properly about what one "must" do, is "morally required" to do. After such determinations have been made, we will be able, by a convenient locution, to assert the child's right. Furthermore, Thomson's constant appeal to rights obscures the weak point in her defense of abortion. That point is seen in her contentions that (1) rights typically or essentially depend on grants, concessions, etc.; (2) special responsibilities likewise depend on grants, concessions, etc.; (3) therefore the whole moral problem here concerns one's *special* responsibilities. Finnis rejects utterly the idea that the mother's duty not to abort is an incident of a special responsibility she undertook. It is rather a straightforward incident of an ordinary duty everyone owes to his neighbor.

Finnis then sets out his own understanding of the morality of abortion, the moral "musts" and "mays." It builds along the lines of the analysis elaborated by Germain Grisez that there are basic human goods which demand, among other things, that we never choose directly against them. Finnis spends the rest of the article lifting up the considerations that reveal whether and when our choices must be characterized as directly against a basic good. His answer is that destruction of life is inescapably antilife and against a basic good when it is intended.

Finnis has scored some telling points against Thomson, a judgment I would defend in spite of a subtle response-article in which she attempts again to equate not saving with killing.[100] However, two points merit notice here. First, Finnis refers to "traditional nonconsequentialist ethics which has gained explicit ecclesiastical approval in the Roman Church these last ninety years. . . ." This overstates the matter, I believe. The moral formulations of the Church are, above all, practical guides for the formation of conscience and direction of the faithful. Since they are teaching statements, moral reasoning and various forms of persuasion will be, indeed must be, used. And moral reasoning does imply ethical structure. But because a structure or system may be implicit in the way a teaching is formulated, this should not be taken to mean that this system is being taught or approved. It remains, as did scholastic language in the

[98] *Art cit.* (n 96 above) p 133 (emphasis added)

[99] John Finnis, "The Rights and Wrongs of Abortion," *Philosophy and Public Affairs* 2 (1973) 117–45

[100] Judith Jarvis Thomson, "Rights and Deaths," *ibid.*, pp 146–59

past, a vehicle only more or less inseparable from the substance of the teaching. In this sense it is incorrect to refer to nonconsequentialist ethics as gaining "explicit ecclesiastical approval." Furthermore, there are those who would argue that if there are practical absolutes in the moral domain, their absoluteness can be argued precisely on consequentialist grounds.

Secondly and very substantially, in discussing those actions that must be seen as choices against a basic good, Finnis notes that "the 'innocence' of the victim whose life is taken makes a difference to the characterizing of an action as open to and respectful of the good of human life, and as an intentional killing. *Just how and why it makes a difference is difficult to unravel;* I shall not attempt an unraveling here." [101] This is a crucial point. If Finnis were to attempt to unravel this—as applied, for example, to capital punishment in the past—he would encounter a consequentialist calculus at work in creating this exception, one that ultimately allows for the destruction of an individual's life if it is a threat to the common good and there is no other way of preventing this threat. On the basis of this and other forms of exception-making in the development of traditional norms, one has to conclude that a form of consequentialism cannot be excluded.

In a tortuous and ultimately very vulnerable study, Michael Tooley rejects both the "liberal" position of Judith Thomson and the more classical views of Finnis and Brody.[102] The former position is weak because of the impossibility of establishing any cutoff points that are acceptable. The classical position is rejected because it rests on the "potentiality principle" (the fetus deserves protection not for what it is physiologically but because this physiology will lead to psychological differences later that are morally relevant).

Tooley attacks this principle through a strange analogy. Suppose it might be possible at some future date to inject kittens with a chemical that would cause them to develop into cats possessing a brain similar to that of humans (with psychological capabilities, thought, language, etc.). One would not argue that they have a right to life just because of this potentiality. "But if it is not seriously wrong to destroy an injected kitten which will naturally develop the properties that bestow a right to life, neither can it be seriously wrong to destroy a member of *Homo sapiens* which lacks such properties, but will naturally come to have them."

Tooley then elaborates his own position. Briefly, it contends that "an

[101] *Art. cit.*, p. 141 (emphasis added).

[102] Michael Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs* 2 (1972) 37–65.

organism possesses a serious right to life only if it possesses the concept of self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity." This concept of self is required by Tooley because right is defined in terms of a desire—and desires are limited by the concepts one possesses. Thus "an entity cannot desire that it itself *continue* existing as a subject of experience and other mental states unless it believes that it is now such a subject." On this basis Tooley accepts not only all abortions but even infanticide.

What is wrong with all this? Several things. First, a simple test of an analysis is the fit of its conclusions with the moral convictions of civilized men. To the best of my knowledge, most civilized men would recoil in sheer horror at the wholesale infanticide justified by Tooley's analysis. Secondly, in his animal analogy, Tooley has doubled his middle term ("potentiality"), well, monstrously. Finally, Tooley's key mistake is connecting inseparably rights and desires. He correctly notes that to ascribe a right is to assert something about the prima-facie obligations of other individuals to act or refrain from acting. But he then asserts that "the obligations in question are conditional ones, being dependent upon the existence of certain desires of the individual to whom this right is ascribed." Thus, he continues, if an individual asks me to destroy something to which he has a right, one does not violate his right to that thing if one proceeds to destroy it; for the owner no longer *desires* the object. On this basis desire, and therefore capacity to desire, is said to be essential to the possession of rights.

Here Tooley has forgotten that the notion of right is an analogous one, not a univocal one. Basically this analogy traces to one's understanding of moral obligation, its source and meaning. Here Finnis is absolutely correct. Before one can move securely within the vocabulary of rights and their limits, he must return to their source; for rights are a convenient locution for the existence of obligation. At the level of moral obligation, Tooley must examine why it is wrong to kill a person. To say that it is wrong because it is in violation of a person's right is patent circularity. In his deliberations I believe Tooley will soon discover two things: (1) that any viable analysis will apply to all men, neonates and uterine babies not excluded; (2) that material goods (as goods that are subordinate to persons and can become one's *property*) generate different moral assertions than human life itself. It is these different moral assertions that are the basis for the analogy of rights. For example, we speak of *jus connaturale* (a right natural to man, e.g., to his life) and *jus adventitium* (a right which arises from some positive event, e.g., from buying, selling, finding, etc.). There are other such distinctions. Tooley treats them as if they were all the same, and basically because he has not traced their origin to a systematic theory of moral obligation.

Therefore, when he says that the obligations connoted by the term "right" are "dependent upon the existence of certain desires of the individual to whom the right is ascribed," he is guilty of confusing apples and oranges, or better, of reducing all of them to prunes. One cannot, in other words, argue that what is true of one right is true of all rights. Tooley is correct in saying that I violate no right of ownership when I destroy property the owner desires destroyed. Scholastic philosophy has long been familiar with the axiom *consentienti non fit injuria* (no injustice is done to one who consents or waives his right). However, scholastic tradition has, no less than the Declaration of Independence, regarded certain rights as inalienable. If certain rights are alienable, others inalienable, then clearly one must return to the drawing boards if he treats them as all the same.

In a long and closely-argued review article, Paul Ramsey takes up the books of Daniel Callahan and Germain Grisez.[103] He criticizes as "idiosyncratic" Callahan's use of the notion of sanctity of life and his espousal of the developmental school's answer to the question about the beginning of life. Callahan's analysis, Ramsey argues, has eroded the notion of equal justice. Behind it all Ramsey sees an incorrect premise, scil., the idea that there can be inequality between life sanctities pitted against one another in conflict. Ramsey regards this as the major flaw in Callahan's defense of a legal policy of abortion-on-demand. Noting that Callahan regards the use made of his book on abortion as a "personal disaster," Ramsey contends that the book can and should be read in this abusive way and calls for a retraction of the structure of Callahan's moral argument.

I share Ramsey's discomfort with Callahan's analysis, an analysis to which he recently returned.[104] As I read his book (*Abortion: Law, Choice and Morality*), it seems that Callahan is still trying to have it both ways. His sanctity-of-life principle yields a "strong bias against abortion," instils "an overwhelming bias in favor of human life." One "bends over backward not to eliminate human life." Abortion is the last resort of a woman, "to be avoided if at all possible." And this as a *moral* position. And yet we find him saying that it is "possible to imagine a *huge* [my emphasis] number of situations where a woman could, in good and sensitive conscience, choose abortion as a moral solution to her personal and social difficulties." In other words, Callahan feels the wrong of abortion; yet he feels the desperation of its need. Armed with these, he states in his recent essay that the moral problem is *balancing* the right of the fetus with the right of the mother. However, his ultimate moral

[103] Paul Ramsey, "Abortion: A Review Article," *Thomist* 37 (1973) 174–226.

[104] Daniel Callahan, "Abortion: Thinking and Experiencing," *Christianity and Crisis*, Jan. 8, 1973, pp. 295–98.

position is hardly a balance; it comes close to eliminating one right altogether. Therefore Callahan ends up (since he cannot divest himself of his knowledge of and deep sensitivity to what is going on) cursing the rotten decisions imposed by a world most of us never made or chose.

What I miss here, then, is not sensitivity. Callahan's writings on abortion are utterly honest, appropriately corrective, and profoundly sensitive. I miss the moral reasoning that would explain his phrase "often necessary choice." Something is necessary, first of all, in terms of competitive values and available alternatives. But, unless I have misunderstood him, Callahan explains this necessity almost exclusively in terms of the woman's perception of it. Important as these perceptions are, they do not constitute the heart of an ethical or moral position on abortion. Rather, I believe that they pertain to an ethics of an individual's response to a morality of abortion—what above was called pastoral counseling. Does not a true morality of abortion have to provide the possibility for expansion of an individual's perspectives and value commitments? I think so.

Ramsey next turns to Germain Grisez. Grisez, it will be recalled, argued that the traditional understanding of the principle of the twofold effect was too restrictive. It demanded that in the order of physical causality the evil effect not precede the good. Grisez proposed that the intention of the agent remains upright (not choosing directly against a basic good) as long as the evil aspect is part of an indivisible process. The test of this indivisibility is whether no other human act need intervene to bring about the good effect.

Thus, as Ramsey interprets him, Grisez would allow abortion in a case of primary pulmonary hypertension where the woman could not oxygenate both herself and the fetus. However, in the instance of aneurysm of the aorta in which the wall of the aorta is so weakened that it balloons out behind the pregnant uterus, the physician must first kill the fetus (in a separable act) to get at the aneurysm. On Grisez's criterion, this second procedure would not be allowed. Ramsey sees this as too restrictive and not "confirmed by common sense or intuitive moral judgment."

The crucial question, Ramsey believes, is whether the target of the deadly deed is upon fetal life or upon what that life is doing to another life. "While the life is taken with observable directness, the intention of the action is directed against the lethal process or function of that life." Thus, in terms of its meaning, the action is describable as "removal," not precisely as "death-dealing." But Ramsey limits this to situations where both lives cannot be saved but only the mother's. "My view," he writes, "is that 'removal' is what *is done* and is justified in all cases where 'necessity' foredooms that only one life can be saved. . . . "[105]

[105] *Art. cit.*, p. 223.

Ramsey contends that Grisez's analysis would afford little or no guidance "where there is no necessity to do the intended action"; for every abortion could be arguably concerned with removal of the child, not its death. Therefore he equates Grisez's view to that of Judith Thomson, of all people. Here I think he has misread Grisez. Grisez insists throughout that indirectness is but a single condition of the twofold effect; proportion is another. For instance, Grisez repeatedly asserts that we do not take life for the sake of health.

Ramsey's limitation of his analysis to instances where only one life can be saved (the mother's) leads one to ask whether the really operative factor is the intention of the action as he has struggled to analyze it. Is it not more broadly the proportionate reason? That is, it seems better to sound reasoning to save one life than to lose two in a situation where the fetus cannot be saved anyway.

I am not contesting Ramsey's conclusions; that is not the point here. It is the form of moral reasoning that deserves attention. Ramsey argues that interruption of pregnancy, *direct* in its external observableness, is aimed at stopping the fetus from doing what it is doing to the mother. He is inclined to call this a justifiable direct abortion, but presumably an indirect killing. And he explicitly rejects the idea that fetal death must be indirect in Grisez's sense—an inseparable aspect of a single act. Fetal death could be, in other words, the result of a prior separable action.

Actually, it seems clear that directness and indirectness do not really function critically in Ramsey's analysis, though he continues to use the distinction;[106] for Ramsey repeatedly restricts abortion to those instances where only one (the mother) can be saved. This suggests that what is really the justification in the case under discussion is the broader principle of doing the lesser evil in a tragic conflict situation, the principle of proportionate reason. This has to be the meaning of Ramsey's phrase "what the fetus is doing to the mother." Otherwise why could we not extend this to other cases short of life-threats where pregnancy is a hardship (psychological, physical, economic), where the fetus is indeed "doing something to the mother" but something far short of a life-threat?

In this connection the Belgian bishops have an extremely interesting but somewhat ambiguous paragraph on the moral principles governing abortion situations.[107] They write:

> In the case—today fortunately quite rare due to the progress of science—where the life of the mother and that of the child are in danger, the Church, concerned to meet this situation of distress, has always recognized the legitimacy of an

[106] "I agree with Grisez that any killing of man by man must be 'indirect' " (*art. cit.*, p. 220).

[107] *Art. cit.* (n. 46 above) p. 443.

intervention, even if it involves the indirect loss of one of the two lives one is attempting to save. In medical practice it is sometimes difficult to determine whether this misfortune results directly or indirectly from the intervention. This latter [intervention], from the point of view of morality, can be considered as a whole. The moral principle which ought to govern the intervention can be formulated as follows: since two lives are at stake, one will, while doing everything possible to save both, attempt to save one rather than to allow two to perish.

I say the paragraph is ambiguous because there are at least two ways of reading it. (1) Intervention in these desperate instances is legitimate *providing it is indirect in character*. Its indirectness is determined by viewing it "as a whole." (2) Intervention to save one where the alternative is to lose two is *for this very reason* (the desperate alternatives) *indirect*. The first rendering is close to that of Grisez. If the second is the proper reading, it comes very close to the analysis of Peter Knauer. One can only ask what meaning the terms "direct" and "indirect" have if the crucial moral principle is to be formulated as in the last sentence of the episcopal statement; for what seems obviously at the heart of this principle is the conflict model of human choice, a model ultimately governed by the principle of the lesser evil. I have tried elsewhere, though with considerably less than total satisfaction, to explore the very thorny problem of the moral relevance of the direct-indirect distinction.[108]

In discussing this very question, William May appeals to the writings of Joseph Fuchs, S.J.[109] After pointing out that a person becomes morally good when he intends and effects premoral good (life, health, culture, etc.), Fuchs asks: "What if he intends and effects good, but this necessarily involves effecting evil also?" The answer given by Fuchs is: "We answer, if the realization of the evil through the intended realization of good is justified as a proportionately related cause, then in this case only good was intended."

As a gloss on this citation May states: "At first it might seem (and unfortunately has so seemed to Richard McCormick . . .) that Fuchs is saying that we may rightfully intend and effect a premoral evil (e.g., death) provided there is some proportionate good that will be achieved." May denies that this is the way Fuchs is to be read, and for two reasons. First, Fuchs insists that *only* good is intended in an act that has evil effects as well as good consequences. "He refuses to say that the evil effected was properly intended in the moral sense." Secondly, May

[108] Richard A. McCormick, S.J., *Ambiguity in Moral Choice* (Milwaukee: Marquette Univ., 1973).

[109] William E. May, "Abortion as Indicative of Personal and Social Identity," *Jurist* 33 (1973) 199–217.

points out that Fuchs insists that the evil must be a part or element of *one* human act. "He is saying, in short, that the act in question must be describable as one ordered of itself to the good and that the act in question is itself the means to the end."

Here two points. First, Fuchs is saying, I believe, that premoral evil may indeed be intended—as the word "intend" has been used traditionally in applications of the twofold effect, scil., in a psychological sense. He is saying it is not intended "in the moral sense." At this point, however, one must ask what it means to intend something "in the moral sense." It seems to be nothing more than a convenient and post-factum way of saying that the good pursued was fully proportionate to the evil effected within the choice. If there is true proportion, then, as Fuchs notes, "only good was intended." This is much more a post-factum ascription than an analysis of human intending.

Secondly, there is question of what is meant by saying that the evil must be a part or element of *one* human act. When I criticized Fuchs on this very point,[110] he answered[111] that an action can be taken in three ways: physically, psychologically, humano-morally. This last is the only description of an action that suffices for its moral assessment. But taken in a humano-moral sense, the *one* choice or action includes also its intended results and foreseen circumstances. What is intended in a choice (not necessarily achieved) pertains to the *oneness* of that action. Thus, in the famous case of Mrs. Bergmeier, the action was not simply adultery, as a means to a good end. Rather, it was sexual union with a certain intended effect and in certain circumstances. Viewed in this way, the extramarital intercourse was a part of *one* action which included the intended good also. I have some problems, or at least further questions, about this; but it is what Fuchs means; and it is a bit different from the interpretation given Fuchs by May.

In an interesting article Louis Dupré grapples with this very problem.[112] He first argues that inchoate personhood is present in fetal life from the beginning but that it must be evaluated differently according to a developmental scale. He then rejects the direct-indirect analysis as a "purely verbal solution" to the abortion problem. "I prefer," he writes, "to consider abortion always a direct killing of human life and then to ask under which circumstances it could be licit." What are these circumstances? As a general rule, Dupré seems satisfied with the norm that it is permissible to kill "only to prevent a person from

[110] Cf. THEOLOGICAL STUDIES 33 (1972) 72 ff.

[111] Personal communication.

[112] Louis Dupré, "A New Approach to the Abortion Problem," THEOLOGICAL STUDIES 34 (1973) 481-88.

inflicting a *comparable* type of harm to others." However, the implications of that norm depend on one's reading of "comparable." What values are comparable to life? In making this assessment, he contends that "the degree of development inevitably enters into the evaluation of the life value." He then goes on to suggest that personal liberty is a value comparable to that of life to many people and that a minimum degree of mental health is a condition for personal liberty. Thus he moves away from the traditional position.

I find Dupré undecided and ambiguous about what is the really decisive norm in abortion decisions. He presents two considerations as central: the developmental evaluation of personhood and the values comparable to life itself. But what constitutes the heart of his opening of perspectives is not clear. At one point he states that "an identical risk to a woman's health decreases in moral weight as the pregnancy progresses. What would constitute a sufficient factor during the first two days after conception no longer does so after two months." This suggests that what justifies the abortion is a sliding scale of evaluation of fetal life. But then he immediately adds that "no abortive action, early or late, becomes ever permissible under our principles *unless* a value comparable to life itself is at stake." This means that *any* abortion is justified because the competitive value is comparable to life itself. Which of these two considerations is decisive?

Dupré's own example illustrates this unclarity. He notes: "In cases of rape of an adolescent, the presumption of serious mental damage appears strong enough to warrant the general use of an abortifacient at least during several hours following the coitus. But the same presumption cannot be taken for granted at a later stage of development . . . . " Now the problem here is that according to Dupré "serious mental damage" can qualify as justifying abortion only because it is a value comparable to life itself. That point can be defended, and perhaps successfully. But then, why relate it to a stage in fetal growth? An equivalence is, after all, an equivalence—unless serious mental damage is a value comparable to life when compared to some lives but not to others. This seems to be what Dupré would have to hold, but I fail to see how this avoids eroding the notion of equal rights, an erosion Dupré wants desperately to avoid.

Frederick Carney (Perkins School of Theology) believes that Dupré has confused two concepts of person, concepts that lead to unacceptable results when substituted for each other.[113] The first concept centers in the attribution of rights and responsibilities. When this notion of person is used, we are speaking of a few basic concerns common to all men, such

[113] Cf. *Beginning of Personhood*, ed. Donald G. McCarthy (a booklet of the Institute of Religion and Human Development, Houston, Texas) pp. 36-40.

as life and liberty, and the relation of individuals to each other in respect to these concerns is one of moral and legal equality.

The second concept of person describes the development of individuals and highlights special competencies or achievements. Here the relationship of individuals is one of disequality. Carney believes that Dupré's approach makes the abortion decision hinge on the second concept of person (personality development) rather than on the first.

> There are other problems in which the second concept of person is very appropriate, for example, admission to a college, or the assignment of awards for some achievement. For these problems Dupré's concept of person seems to me to be the central one. But in the consideration of the basic protections of social life the second concept just cannot function in any appropriate way. In fact, I would say it will undermine our social life to try to substitute that concept as Dupré apparently wishes to do.

There are, Carney argues, instances within the first concept of personhood when it is legitimate to take life, but these are never instances of a balancing of capacities, merits, or achievements over against basic rights.

Carney then proposes his own approach. Rather than beginning with biological facts (e.g., conception, quickening, viability, birth) to which we assign decisive importance for personhood, he suggests we begin with moral theory. That is, rather than first defining personhood and then attributing rights, he wants first to attribute rights and then assign personhood to those to whom rights are attributed.

What are the reasons for wanting to put anybody within the category of individuals possessing rights? Carney finds three types of reasons for such attribution. First, there is the notion of fairness. If "x" is a rightholder and "y" is like "x" in all relevant characteristics, why should "y" not be a rightholder? This is a kind of deontological argument. Secondly, there is a teleological argument, one concerned with ends. What individuals fundamentally are or are destined to be cannot be fully acknowledged and enhanced without the attribution of basic rights. The third reason is from revelation, a theological argument. One believes that God wills that certain beings be protected in this fundamental way and therefore assigns basic rights to these beings.

Carney's suggestion is extremely interesting. Starting with biological fact is quite legitimate, as he notes. But it has not proved very helpful in achieving acceptable clarification and consensus in the body politic. If clarification and consensus in the body politic is what Carney wants from a switch in approach, then I seriously doubt that he is going to get it; for the supposition underlying such a switch is that people come out this way or that on abortion because of the rational persuasiveness of the

arguments made. That can be doubted.

At any rate, a reading of recent episcopal and theological literature will lead to the conclusion that both approaches suggested by Carney are used, both by those who support the classical position on abortion and by those who would modify it. For instance, Pohier attempts to move away from the traditional position by showing two things:[114] first, that there are reasons in reproductive biology—for example, the number of spontaneous miscarriages—for saying that the fertilized ovum is not "être humain déjà"; secondly, that God's providential concern for life and man's share in this responsibility are not necessarily best described and supported by an absolute position on abortion.

If one impression is inseparable from this interesting literature, it is that abortion is a moral problem far more complex and anguishing than any one-dimensional approach (e.g., right to privacy, woman's right to dispose of her body, absolute prohibition of abortion etc.) would suggest.

PERSONAL REFLECTIONS

Exposure to such a rich and varied literature inevitably leaves one with some more or less settled reactions and opinions. The compositor of these "Notes" would order his as follows.

Moral Position

Human life, as a basic good and the foundation for the enjoyment of other goods and rights, should be taken only when doing so is the lesser of two evils, all things considered. In this Outler is, I believe, correct. "Human life" refers to individual life from conception, or at least from "the time at or after which it is settled whether there will be one or two or more distinct human individuals" (Ramsey). As this qualifier receives the continued discussion by theologians that it deserves, the benefit of the doubt should ordinarily be given to the fetus. To qualify as the lesser of two evils there is required, among other things, that there be at stake a human life or its moral equivalent. "Moral equivalent" refers to a good or value that is, in Christian assessment, comparable to life itself (cf. Dupré and Curran). This is the *substance* of the Christian tradition if our best casuistry in other areas (e.g., just warfare) is carefully weighed and sifted; for the permissible exceptions with regard to life-taking (self-defense, just war, capital punishment, indirect killing) are all formulations and concretizations of what is viewed in the situation as the lesser human evil.

This position represents an achievement which, in terms of existing evidence, it would be unscientific to deny and uncivilized to abandon. I

[114] Jacques-Marie Pohier, O.P., "Réflexions théologiques sur la position de l'église catholique," *Lumière et vie* 21 (1972) 73-107.

am comfortable with it as a normative statement. Recent attempts to extend exceptions through notions of delayed hominization and gradual personhood are, it seems, but contemporary analogues of the earlier theories about delayed animation. To this commentator they appear strained, though continued discussion is certainly called for. On this matter I am in agreement with Curran.

The determination of the moral equivalent of life is both difficult and dangerous.[115] It is difficult because it is very difficult to compare basic human values. Furthermore, such comparisons are a shifting thing reflecting our change in value perceptions.

It is dangerous for several reasons. First, because such evaluation is vulnerable to unrecognized cultural biases. Cultures are more or less civilized, more or less violent, more or less hedonistic, etc., and hence will be more or less human in their value judgments. We can never completely transcend the distorting influences embedded in our culture. Secondly, it is dangerous because such formulations are hard put to resist abusive interpretation. In general, it can be said that while the casuistry of the tradition shows that there are other values comparable to human life, the thrust of the tradition supports an inclination (and only that) to narrow rather than to broaden the comparable values. To make this comparison with prudence in our time calls not only for honesty and openness within a process of communal discernment, but also for further careful studies of past conclusions and present evaluations.

Pastoral Care

The position thus delineated is a *moral* position, to be equated neither with pastoral care nor with a legal position, but to be totally dissociated from neither. Pastoral care deals with an individual where that person is (cf. Häring) in terms of his perceptions and strengths. Although it attempts to expand perspectives and maximize strengths, it recognizes the limits of these attempts.

There are two aspects profoundly affecting the determination of where many people are. First, we live in a society with structures that often do not support and aid women with unwanted pregnancies, a society that heavily contributes to the factors that make pregnancies unwanted—a society with not only broad areas of structural poverty, repression, injustice, but also with subtle escalating pressures against childbearing. Secondly, perception of the existence and value of fetal life differs. Wertheimer is probably right when he notes that it is the severely limited possibilities of natural relationships with the fetus that generate the

[115] For some extremely interesting suggestions on comparable values where abortion is concerned, cf. James J. Diamond, "Pro-Life Amendments and Due Process," *America* 130 (1974) 27–29.

unlimited possibility of natural responses to it.[116] In combination, these facts mean that many people will perceive the abortion problem above all in terms of the inconvenience, hardship, or suffering a prohibitive position involves, and will tend to find that position unacceptable *for that reason.*

Since the sum total of these influences, then, is an attitude that increasingly tends to frame the moral question almost exclusively in terms of the sufferings resultant on a prohibitive moral position, it is important to distinguish two things: (*a*) whether a moral position is right and truly embodies the good; (*b*) whether standing by it and proposing it as the object of aspiration, both personal and societal, entails hardships and difficulties. In a highly pragmatic, technologically sophisticated, and thoroughly pampered culture the latter point (certainly a fact) could lead many to conclude that the moral position is erroneous. This must be taken into account in any sound pastoral procedure.

Abortion, like any humanly caused disvalue, is sought not only for a reason, but within a culture which either sanctions or not the reason, and alters or not the conditions, that give rise to the abortion. One of the most important functions of morality is to provide to a culture the ongoing possibility of criticizing and transcending itself and its limitations. Thus genuine morality, while always compassionate and understanding in its meeting with individual distress (pastoral), must remain prophetic and demanding in the norms through which it invites to a better humanity (moral); for if it ceases to do this, it simply collapses the pastoral and moral and in doing so ceases to be truly human, because it barters the good that will liberate and humanize for the compromise that will merely comfort.

Legal Regulation

Law is analogous to pastoral practice in that it must look not merely to the good, but to the good that is possible and feasible in a particular society at a particular time. However, just as sound pastoral care takes account of individual strength and limitation ("invincible ignorance") without ceasing to invite and challenge the individual beyond his present perspectives, so the law, while taking account of the possible and feasible at a particular time, must do so without simply settling for it. Simple accommodation to cultural "realities" not only forfeits altogether the educative function of law, but also could leave an enormous number of people without legal protection. For this reason I find the legal positions of both Grisez and Callahan unpersuasive. Grisez has not sufficiently attended to the feasibility dimension of legislation and therefore his

[116] Roger Wertheimer, "Understanding the Abortion Argument," *Philosophy and Public Affairs* 1 (1971) 67–95.

position seems to represent a confusion of morality with legislation. Callahan, on the other hand, has by implication weighed only this dimension and therefore his position seems to represent a total dissociation of the moral and the legal, and an ultimate undermining of the moral by the legal, as the statement of the German bishops (both Catholic and Evangelical) notes.

Thus there is and probably must be this side of eternity a constant tension between the good and the feasible. A healthy society attempts to reduce this tension as much as possible. But it is only more or less successful. This leads me to three observations where abortion law is concerned.

First, the feasibility test (of law) is particularly difficult in our society. Ideally, of course, where we are concerned with the rights of others and especially the most fundamental right (right to life), the more easily should morality simply translate into law. But the easier this translation, the less necessary is law. In other words, if this represents the ideal, it also presupposes the ideal. And we do not have that, above all because the moral assessment of fetal life differs. And ultimately law must find a basis in the deepest moral perceptions of the majority or in principles the majority is reluctant to modify (Shinn). This means that it is especially difficult to apply the test of feasibility to an abortion law, for the good itself whose legal possibility is under discussion is an object of doubt and controversy. Given this situation, a totally permissive law in the present circumstances would tend only to deepen further the doubt and confusion, and in the process to risk unjustifiably further erosion of respect for human life. On the other hand, a stringently prohibitive law (such as the Texas law declared unconstitutional in *Wade*) in our circumstances would have enormous social costs in terms of other important values.

Secondly, no law will appear to be or actually be adequate (whether permissive or prohibitive) if it does not simultaneously contain provisions that attack the problems that tempt to abortion. Our mistake as a nation and that of many countries has been just that: to leave relatively untouched the societal conditions and circumstances that lead to abortion, and to legislate permissively, usually on the basis of transparently fragile slogans created by a variety of pressure groups. This has been shown to be destructive in every other area of human planning. It can be no less so here.

Thirdly, and as a consequence of the above considerations, in designing present legislation we are confronted at the present time with a choice of two legal evils. No choice is going to be very satisfactory, because the underlying conditions for truly good legislation are lacking. What is to be done when one is dealing with evils? Clearly the lesser evil should be chosen while attempts are made to alter the circumstances

that allow only such a destructive choice. How one compares and weighs the evils, where he sees the greater evil, will depend on many factors, not excluding fetal life. That is why a moral position on fetal life, while distinguishable from a legal position, will have a good deal to say about what one regards as a good or tolerable legal position, at least at the present time. But here again we reach an impasse, for there is profound disagreement at the moral level. For instance, given the moral position I find persuasive, I believe that the most equitable law would be one that protects fetal life but exempts abortion done in certain specified conflict situations from legal sanctions (cf. the joint Catholic-Protestant statement from Germany). In other words, I believe that the social disvalues associated with such a law (a degree of unenforceability, clandestine abortions, less than total control over fertility) are lesser evils than the enormous bloodletting both allowed and, in some real and destructive sense, inescapably encouraged (*teste experientia*), by excessively permissive laws. However, I realize that very many of my fellow citizens do not share this judgment.

What, then, is to be done? In our pluralistic atmosphere, legal provisions tracing back to almost *any* moral position (whether it be that of Vatican II or that of the Supreme Court—this latter I use deliberately because the legal conclusions so obviously reflect a moral position, though they need not do so) are going to be seen and experienced as an imposition of one view on another group. In such an impasse, the only way out seems to be procedural. Two procedures recommend themselves. First, the matter should be decided for the present through the state legislatures, where all of us have an opportunity to share in the democratic process. We have learned in our history that while this process is often halting and frustrating, sometimes even corrupt, still it provides us with our most adequate way of living with our differences—a way certainly more adequate than a decision framed by a Court that imposes its own poorly researched and shabbily reasoned moral values as the basis for the law of the land.[117]

Secondly, I used above the phrase "for the present." It is meant to suggest that our societal situation is such (both in terms of the conditions provoking abortion and in terms of the pluralism about its moral character) that any legal disposition of the question now must be accompanied by hesitation and a large dose of dissatisfaction. This means that it is the right and the duty of conscientious citizens to

[117] Philip B. Kurland, professor in the law school at the University of Chicago, wrote recently: "The primary defect of the Burger Court so far revealed is the same defect that was observed in the Warren Court. It has failed to account properly for its judgments. It has issued decrees but it has not afforded adequate rationales for them; it has attempted to rule by fiat rather than reason" (*University of Chicago Magazine*, July/August 1973, pp. 3–9, at 9).

continue to debate this matter in the public forum. The values at stake are fundamental to the continuance of civilized society. For this reason, to settle for the *status quo* is to settle for societal sickness. Much as we are individually and corporately tired of this subject, continued rational discussion is essential. It is one means—but only one—that will allow us, as a nation, to arrive at a position that is compatible with the fundamental moral principles undergirding our republic.

Whatever the proper answer to the legal question, one final point must be made. We sometimes think of certain problems like abortion as pertaining to individual morality, and others like poverty and racism as being social morality. The Supreme Court decision only reinforced this perspective. The contemporary emphasis is on the need to solve the so-called "bigger" and "less domestic" problems. Catholics, it is averred, have for too long been fascinated by and preoccupied with micromorality.

The matter is far more complex than this. As the literature brought under review here has shown, economic insecurity, racism, oppression, and abortion share a common root: the quality of the society in which we live. In this perspective abortion is a *social* problem of the first magnitude in so far as the factors so often involved in abortion decisions are societal in character. Similarly, poverty and racism are *individual* problems in so far as we bear as individuals responsibility for their existence and continuation. To say anything else would be unchristian; for it would deny that we are, by our Christian being, *individual members of a community* who have, as a community, responsibilities toward individuals and who have, as individuals, responsibilities toward the community. These responsibilities, while distinguishable, are continuous. Abortion exists because of a cluster of factors that make up the quality of a society. It will disappear only when that quality is changed. Hence true abortion reform must begin here. Unless and until it does, any law on abortion will be more or less inhumane.[118]

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[118] In a review such as this a good deal of literature is necessarily overlooked, some of it because it was published as this survey was going to press. An instance of this is Sissela Bok, "Ethical Problems of Abortion," *Studies* (Hastings Center) 2 (1974) 33–52. Cf. also John T. Noonan, "Responding to Persons: Methods of Moral Argument in Debate over Abortion," *Theology Digest* 21 (1973) 291–307; Peter A. Facione, "Callahan on Abortion," *American Eccelesiastical Review* 167 (1973) 291–301; G. Caprile, "Il magistero della Chiesa sull'aborto," *Civiltà cattolica*, May 19, 1973, pp. 359–62; "Déclaration des juristes de France sur l'avortement." *Documentation catholique* 70 (1973) 749; Francis Dardot, "L'Adoption, une alternative méconnue à l'avortement," *Etudes*, May 1973, pp. 701–14; A. Théry, "L'Avortement dans la législation française," *Esprit et vie* 83 (1973) 293–95; Michael Alsopp, "Abortion—the Theological Argument," *Furrow* 24 (1973) 202–6; Stefano Tumbas, S.J., "Ci sarà anche un aborto 'cattolico'?" *Palestra del clero* 52 (1973) 662–71.