

THE TRADITION OF PROBABILISM AND THE MORAL STATUS OF THE EARLY EMBRYO

CAROL A. TAUER

College of St. Catherine, Minn.

WITHIN THE PAST few decades, a number of Catholic theologians have raised questions about the moral status of the human zygote and early embryo. Richard McCormick describes the embryo during the first two weeks as "nascent human life" but does not consider it an "individual human life" until later;¹ Charles Curran concurs, stating that "truly human life" comes into being two to three weeks after fertilization;² Albert Di Ianni proposes that the bodily continuity of a human existence begins only several weeks after conception;³ and Karl Rahner asserts that during the first few weeks the existence of a human subject is seriously doubtful.⁴ Such speculations have arisen within the context of an authoritative Church teaching: the Catholic Church, in its official magisterium, asserts that human life must be given equal protection at all stages from fertilization through adulthood.⁵

In raising questions about this authoritative teaching, theologians rely on three types of material. They examine the history of Catholic teaching on prenatal life, a tradition which is somewhat less uniform than is often recognized. They investigate the implications of philosophical theories of human nature, especially the Thomistic anthropology which is traditional in the Church and believed to be most consistent with its doctrinal position. And they study the relevance of the biological facts uncovered by contemporary scientific research, some of which appear to raise problems for the Church's current position. Theologians have found good reasons for calling present Church teaching into question, and hence appear to be justified in their speculations.

¹ Richard A. McCormick, S.J., "Notes on Moral Theology: 1978," *TS* 40 (1979) 108-9; and transcript of meeting of Ethics Advisory Board, Department of Health, Education, and Welfare, Oct. 9-11, 1978 (Springfield, Va.: National Technical Information Service, 1978) 425.

² Charles Curran, "In Vitro Fertilization and Embryo Transfer," no. 4 in *Appendix: HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer* (Washington, D.C.: U.S. Government Printing Office, 1979) 15-16.

³ Albert Di Ianni, "Is the Fetus a Person?," *American Ecclesiastical Review* 168 (1974) 323-24.

⁴ Karl Rahner, S.J., "The Problem of Genetic Manipulation," *Theological Investigations* 9 (New York: Seabury, 1972) 236.

⁵ Sacred Congregation for the Doctrine of the Faith, *Declaration on Abortion* (Washington, D.C.: U.S. Catholic Conference, 1975).

While the teaching of the magisterium is also supported by a variety of types of evidence (biological, philosophical, and theological), its position finally appears to rest on one line of argument. This argument, which is actually the crucial point in the magisterial presentation, has been largely ignored by theologians who have offered dissenting opinions. For it does not depend either on biological information or on metaphysical theories. Rather, it is based on a theory of practical decision-making which was developed within Catholic moral theology. This theory, which provides methods for attaining practical certainty in the face of moral doubt, has a long history within the Catholic tradition. Its application is evident in official Catholic Church teaching on abortion, and in the latest document on abortion issued by the Roman magisterium it plays a central role.⁶

The speculations of Catholic theologians do not appear to address directly this argument of the magisterium, and thus it might seem that their questioning of the official teaching is unwarranted. However, in my analysis of the magisterial position within its historical context, I shall argue that the magisterial argument inaccurately interprets and applies the traditional methods for resolving moral doubt. While the traditional systems do have pertinence for the case under consideration, the official documents present an incorrect interpretation of their application to the problem of early prenatal life. Since this inadequacy is present in the magisterial argument, the conclusion of that argument is called into question. Hence theologians are justified in dissenting from the full weight of that conclusion, which is the current official teaching of the Church.

QUESTIONS RAISED BY CONTEMPORARY THEOLOGIANs ABOUT STATUS OF EARLY PRENATAL LIFE

The discoveries of reproductive biology have had significance for Catholic theologians like Rahner, Häring, McCormick, and Curran. It is primarily these discoveries which have led them to question whether an individual human life is present during the first two or three weeks after fertilization. The biological facts which they cite are summarized in a comprehensive review article by James J. Diamond.⁷ Diamond claims that, in the light of the biological evidence, "hominization" cannot possibly be said to occur before 14 to 22 days after conception. According to Diamond, the change in life form which takes place between 14 and 22 days is a radical and categorical one.⁸

⁶ Ibid.

⁷ James J. Diamond, M.D., "Abortion, Animation, and Biological Hominization," *TS* 36 (1975) 305-24.

⁸ Ibid. 316.

Three aspects of this change have been regarded as both biologically significant and morally relevant. The first is the capacity for twinning and recombination, a capacity which is lost after differentiation occurs. Laboratory experimentation with animal embryos shows that the early cell mass can be teased into two halves, each of which will develop into a separate and normal embryo and adult, much as in the process of natural twinning. Conversely, if two individual embryonic cell masses are conjoined at an early stage, only one embryo and adult will result.⁹ While laboratory experimentation would not be appropriate in the case of human embryos, both twinning and recombination occur naturally in the human case. André Hellegers cites knowledge of at least six human "chimeras" whose genetic karyotype of XX-XY indicates that each is the product of the fusion of a male with a female embryo.¹⁰

The possibility of twinning and recombination is viewed as highly significant by many theologians. Curran, for example, invokes this phenomenon to support his view that truly human life is not present until two to three weeks after conception:

My own particular opinion is that human life is not present until individuality is established. In this context we are talking about individual human life, but irreversible and differentiated individuality is not present from the time of fecundation. The single fertilized cell undergoes cell division, but in the process twinning may occur until the fourteenth day. This indicates that individual human life is not definitely established before this time. Likewise in man there is also some evidence for recombination. . . . Thus I would argue that individuated human life is not present before this time.¹¹

The stage of individuation has been seen as a morally relevant marker because it appears that only individuals can be wrongfully killed or otherwise injured. A being that is not yet fixed as an individual does not seem to have claims on us. It certainly cannot be a person or a self, as selves neither split nor fuse.¹² In other terms, such a being cannot have a human soul, if one accepts the metaphysical notion of the soul as an indestructible, indivisible supposit. For if two early embryos were to fuse, and if each had a soul before fusion, then what would become of the extra soul? Souls (like selves) cannot fuse, nor can they be destroyed; neither can a soul split if one embryo divides into two or more.

The second aspect of biological change which is taken to be significant

⁹ Ibid. 312.

¹⁰ André Hellegers, M.D., "Fetal Development," *TS* 31 (1970) 5.

¹¹ Charles Curran, "Abortion: Law and Morality in Contemporary Catholic Theology," *Jurist* 33 (1973) 180.

¹² Philip Devine, *The Ethics of Killing* (Ithaca: Cornell University, 1978) 83.

is the change from a cellular form of human life to a form which begins to display the differentiation characteristic of the human organism, not merely human cells which lack the structure of a human organic whole.¹³

Di Ianni is impressed by this data, suggesting that "at the earliest stages we are dealing with not the presence of a human body but with the *formation* of a human body."¹⁴ Philip Devine believes that at this period we are involved with "bits of human biological material which are neither human organisms, nor parts of human organisms, but things which are becoming human organisms."¹⁵

The unusual character of the zygote and early embryo leads Devine to say that this stage of development presents us with a conceptual anomaly which is bound to produce, if not a category mistake, at least conceptual discomfort.¹⁶ It is this discomfort which leads McCormick to refer to the stage only as "nascent human life,"¹⁷ and which motivates Häring to propose a special sort of status for the early embryo:

Between the fertilization . . . and implantation and final individualization of the embryo there is a gray area. To disturb or to interrupt the life process during this phase is, in my eyes, not an indifferent matter. But it seems to me that it does not have the same gravity or malice as the abortion of an individualized embryo, that is, of the embryo after successful implantation or specifically at a time when twinning is no longer possible.¹⁸

A third fact sometimes viewed as morally significant is the large proportion of embryos lost before and during the process of implantation. Estimates of this loss vary widely, and better studies need to be done, but 56 percent appears to be a reasonable approximation.¹⁹ Rahner cites the high percentage of embryo loss as a basis for raising questions: "Will [today's moral theologian] be able to accept that 50 percent of all 'human beings'—real human beings with 'immortal' souls and an eternal destiny—will never get beyond this first stage of human existence?"²⁰

Besides the theologians who have questioned the official Church teaching largely on scientific grounds, there are many who have investigated the bearing of philosophical anthropology on the issue of human prenatal life. These theologians approach the matter from various perspectives,

¹³ Diamond, "Abortion" 321.

¹⁴ Di Ianni, "Is the Fetus a Person?" 324.

¹⁵ Devine, *Ethics of Killing* 83.

¹⁶ *Ibid.*

¹⁷ McCormick, "Notes 1978" 109.

¹⁸ Bernard Häring, "New Dimensions of Responsible Parenthood," *TS* 37 (1976) 127-28.

¹⁹ Cf. Henri Leridon, *Human Fertility: The Basic Components* (Chicago: University of Chicago, 1977) 81.

²⁰ Rahner, "Problem of Genetic Manipulation" 226, n. 2.

some being strongly influenced by existentialism, phenomenology, and other contemporary schools of thought, while others study the implications of traditional approaches, particularly that of Thomism.

Joseph Donceel is a foremost representative of the latter group. In his view the hylomorphic theory of human nature proposed by Aquinas requires that the body-soul composite form one human substance. In such a theory the human soul is the life principle and substantial form of matter, or of a body, which is also at a human level of development. The human soul, which is a rational soul, can only exist in a highly organized body, probably one which already possesses the basic structures of the human cerebral cortex.²¹ Donceel is adamant on the inconsistency of hylomorphism, which is the anthropology given official approval by the Church, with the Church's apparent moral teachings: "Hylomorphism cannot admit that the fertilized ovum, the morula, the blastocyst, the early embryo, is animated by an intellectual human soul. . . . Even God cannot put a human soul into a rock, a plant, or a lower animal, any more than he can make the contour of a circle square."²² Thus theologians appear to find good reasons, both biological and philosophical, for questioning official Church teaching on the treatment of early prenatal human life.

TEACHING OF MAGISTERIUM ON PRENATAL LIFE

Catholic Church teaching on prenatal life, while generally consistent over the centuries, has undergone subtle changes which have significance in the current debate. From the earliest days of the Christian community abortion was condemned.²³ Also from the earliest centuries, however, a distinction was made between the unformed and the formed fetus, a distinction stemming from the Septuagint translation of Exodus 21:22.²⁴ Both St. Jerome and St. Augustine, for example, taught that abortion is not homicide until the scattered elements are formed into a body.²⁵

A parallel line of discussion, that of the process of ensoulment, gradually came to be assimilated to the concept of the formed fetus. In early Christian times three theories of the origin of the human soul were

²¹ Joseph Donceel, S.J., "Immediate Animation and Delayed Hominization," *TS* 31 (1970) 79-80.

²² *Ibid.* 82.

²³ The *Didache* (A.D. 100 or earlier) stated (2, 2): "You shall not slay a child by abortion. You shall not kill what is generated." Cf. John T. Noonan, Jr., "An Almost Absolute Value in History," in Noonan, ed., *The Morality of Abortion* (Cambridge: Harvard University, 1970) 9.

²⁴ For a discussion of the implications of the Septuagint versus the Palestinian translation, see David M. Feldman, *Marital Relations, Birth Control, and Abortion in Jewish Law* (New York: Schocken, 1975) 254-59.

²⁵ Noonan, "An Almost Absolute Value" 15.

debated. Traducianism claimed that the human soul was generated along with the body at conception. The theory of pre-existence took the Platonic view that the soul had a premundane existence and joined the body at or after conception. Creationism held that the soul was created at some moment *ex nihilo* and then infused by God into the developing embryo. Various versions of the creationist view located the time of infusion from conception (the Pythagoreans) to birth (the Stoics).²⁶

In his canonical collection (ca. 1140), Gratian adopted the creationist theory and also asserted that the soul is not infused until the fetus is formed. From that time until 1869, canon law distinguished between the unensouled and the ensouled fetus in its treatment of the gravity of abortion and the penalties to be imposed.²⁷ The creationist theory received additional support from Aquinas, who found it compatible with the Aristotelian view of biology which he integrated into his theological writings: "The embryo has at the beginning only a sensitive soul. This disappears and a soul more perfect succeeds to it at once sensitive and intellectual. . . . Since [the intellectual soul] is an immaterial substance, it cannot be caused through generation, but only through creation by God."²⁸ It has always been accepted Catholic teaching that the presence of the human soul conferred human status. As its departure marked the death of the human being, so its assumption into the body marked the beginning of the life of the human being. After the definitive influence of Gratian and Aquinas, the creationist version of the origin of the soul also became part of Catholic doctrine. It was reiterated at the Council of Trent,²⁹ described by Pope Pius XII as *fides catholica*,³⁰ and taken for granted in catechisms studied by the faithful.³¹

Since the presence of the soul conferred human status, the time at which the soul was infused by God was a time of great moral significance. Though there has been disagreement through the centuries about when this time is, its significance for Catholic moral teaching has never been seriously questioned. After the infusion of the soul, abortion is homicidal, whereas before that time it could be characterized as contraceptive.³²

²⁶ George Huntston Williams, "Religious Residues and Presuppositions in the American Debate on Abortion," *TS* 31 (1970) 15.

²⁷ Noonan, "An Almost Absolute Value" 38-39.

²⁸ *Summa theologiae* 1, q. 76, a. 3, and q. 118, a. 2.

²⁹ Donceel, "Immediate Animation" 89.

³⁰ Denzinger-Schönmetzer (ed. 32) 2327 (3896); cited in Rahner, *Hominization: The Evolutionary Origin of Man as a Theological Problem* (New York: Herder and Herder, 1965) 94.

³¹ Cf., e.g., *A Catechism of Christian Doctrine, Baltimore Catechism Revised, No. 3* (Paterson, N.J.: St. Anthony Guild, 1941) 41.

³² Noonan, "An Almost Absolute Value" 20-23.

When the distinction between the ensouled and the unensouled fetus was removed from canon law (1869), the Catholic Church seemed to be stating dogmatically that the soul is infused at the earliest possible time, that is, at fertilization. It is often assumed that this is the Church's teaching, an assumption which is reinforced by moral pronouncements of the magisterium. For example, Vatican II stated: "From the moment of its conception life must be guarded with the greatest care,"³³ a directive which is reiterated verbatim by the American bishops in the regulations for Catholic health facilities. In case they might be misunderstood, the bishops add: "An abortion, . . . in its moral context, includes the interval between conception and implantation of the embryo."³⁴

It must be noted, however, that these statements are moral judgments, not metaphysical or ontological assertions. The commission of Vatican II which developed the statement on prenatal life avoided defining abortion, since it did not consider itself, or the Church, the competent body for deciding the moment after which a full human being is present. It intended to make a moral point "without touching upon the moment of animation" or ensoulment.³⁵

Similarly, the most recent statement of the Catholic Church's official teaching on prenatal life explicitly recognizes philosophical uncertainty about the beginning of an individual human life. Hence it acknowledges the legitimacy of the ontological speculations cited earlier: "This declaration expressly leaves aside the question of the moment when the spiritual soul is infused. There is not a unanimous tradition on this point and authors are as yet in disagreement."³⁶ In this document, titled a *Declaration on Abortion*, the Sacred Congregation for the Doctrine of the Faith seems to welcome continuing philosophical discussion as to the moment of infusion of the soul, and hence the beginning of human life. But at the same time it takes a moral position which does not appear to permit debate on the morally appropriate treatment of early embryonic life: "From a moral point of view this is certain: even if a doubt existed concerning whether the fruit of conception is already a human person, it is objectively a grave sin to dare to risk murder."³⁷ Thus the Congregation, while welcoming metaphysical or ontological inquiry, gives notice to theologians that the moral issue is essentially closed.

³³ Pastoral Constitution on the Church in the Modern World, no. 51 (Walter M. Abbott, S.J., ed., *The Documents of Vatican II* [New York: Guild, 1966] 256).

³⁴ U.S. Catholic Conference, *Ethical and Religious Directives for Catholic Health Facilities* (Washington D.C.: U.S. Catholic Conference, 1977) 4.

³⁵ *Expensio modorum*, Partis secundae, Resp. 101; cited in Häring, *Medical Ethics* (Notre Dame: Fides, 1973) 76.

³⁶ *Declaration on Abortion* (n. 5 above) 13, n. 19.

³⁷ *Ibid.* 6 (emphasis added).

RELATIONSHIP OF QUESTIONING THEOLOGIANS TO MAGISTERIAL TEACHING

If the theologians who are debating the status of early prenatal life are focused solely on the metaphysical or ontological aspects of the question, then their discussion is completely within the spirit of the *Declaration on Abortion*. If their investigation of biological facts, and the relationship of these facts to metaphysical theories, is intended to establish that a particular stage of development is the time of ensoulment, then their studies are encouraged by the *Declaration*. However, unless and until there is certainty about the moment of ensoulment, the *Declaration* clearly does not encourage speculation about the moral permissibility of various courses of action. It explicitly states that as long as there is doubt, one may not risk taking a possibly human life.

In the writings of the authors previously cited, there is evidence that they do propose moral implications which may be drawn from their ontological arguments. These implications relate to two types of situations: the question of abortion, and the issue of research in *in vitro* fertilization and other technologies involving early prenatal life.

Häring, in speaking of the (ontologically) gray area between conception and final individualization, infers that interrupting the life process at this period does not have the same gravity as an abortion after successful implantation of the embryo. In fact, he considers this distinction to be "an even more evident qualitative difference" than the difference between preventing conception and preventing the implantation of the early embryo.³⁸ Diamond specifically links the issue of homicide to what he calls hominization. It is only after an individual human organism is present, that is, after 14 to 22 days of development, that the question of homicide arises. In Diamond's view, a destruction of the cell mass before differentiation begins cannot even constitute a risk of killing a human being.³⁹ Donceel, convinced by his philosophical arguments that the embryo is not ensouled at conception, believes that termination of early embryonic life would be permissible for very grave reasons. He notes that abortion becomes the "unspeakable crime" mentioned by Vatican II only when it is really infanticide, which cannot be held of early abortions.⁴⁰ Thomas Wassmer argues that, in the light of the Thomistic anthropology, early abortion in rare cases, such as rape, incest, and a predictably defective infant, could be justified.⁴¹

Theologians have drawn similar inferences regarding the morality of

³⁸ Häring, "New Dimensions" 127-28.

³⁹ Diamond, "Abortion" 321.

⁴⁰ Donceel, "Immediate Animation" 105.

⁴¹ Thomas Wassmer, S.J., "Questions about Questions," *Commonweal* 86 (1967) 418.

research involving early prenatal life. Curran's views on individualization led him to recommend to the Ethics Advisory Board of the Department of Health, Education, and Welfare that embryos of less than two weeks' gestation could ethically be utilized in basic research.⁴² McCormick, a member of that board, hesitated to draw such a broad conclusion; but he did join the board in approving a policy which would allow this research if it were directed to, or were a corollary of, research aimed at establishing the safety and efficacy of *in vitro* fertilization with embryo transfer (a method for achieving pregnancy with certain types of infertility).⁴³ Rahner states a position which appears to be directly at odds with the stand asserted by the Sacred Congregation when he says: "Given a serious positive doubt about the human quality of the experimental material, the reasons in favour of experimenting might carry more weight . . . than the uncertain rights of a human being whose very existence is in doubt."⁴⁴

When Di Ianni asks that theologians and philosophers "draw a safe line at some point well before the end of the sixth week,"⁴⁵ he too speaks directly counter to the Congregation. For the Congregation has already drawn a safe line, at the time of fertilization. According to its argument, the only safe line is the one that is the safest.

Have the theologians cited ignored this claim? While engaging in legitimate ontological speculation, they do appear to propose moral positions which are contrary to the teaching of the *Declaration*.

PERMISSIBILITY OF DISSENT FROM AUTHORITATIVE CHURCH TEACHING

Undoubtedly the theologians who have raised questions about the moral treatment of early prenatal life are aware that they are questioning an authoritative teaching of the Catholic Church. Many of them have written on the issue of the permissibility of dissent from an official moral teaching of the magisterium. While a large proportion of these discussions arose within the controversy about contraception, the discussions are general enough to apply to other moral issues.

As recently as Vatican II, the Constitution on the Church (*Lumen gentium*) in its well-known section no. 25 required "religious submission of will and of mind" towards a noninfallible but authoritative statement by the magisterium.⁴⁶ Rahner has commented extensively on this section,

⁴² Curran, "In Vitro Fertilization" 26.

⁴³ Department of Health, Education, and Welfare, "Protection of Human Subjects; HEW Support of Human *In Vitro* Fertilization and Embryo Transfer: Report of the Ethics Advisory Board," *Federal Register* 44 (June 18, 1979) 35055-58.

⁴⁴ Rahner, "Problem of Genetic Manipulation" 236.

⁴⁵ Di Ianni, "Is the Fetus a Person?" 324.

⁴⁶ Dogmatic Constitution on the Church, no. 25 (*Documents of Vatican II* 48).

observing that its demand for an accepting silence on the part of theologians leaves many questions unanswered.⁴⁷ He sees two problems. The first is that the Church has erred at times in its moral teachings in the past, and corrections of such errors cannot be made unless theologians raise objections. The ten cardinals who compose the Sacred Congregation for the Doctrine of the Faith have no special training in theology beyond their seminary days and cannot be expected to understand all aspects of the questions they are considering.

The second issue is the actual response of Church authority to worldwide dissent on *Humanae vitae*. Rahner believes that the nature of this response supports his claim that *Lumen gentium* (and documents which make similar statements) is inadequate:

If . . . the statements of *Lumen gentium* . . . on this matter were valid without qualification, then the world-wide dissent of Catholic moral theologians against *Humanae vitae* would be a massive and global assault on the authority of the magisterium. But the fact that the magisterium tolerates this assault shows that the norm of *Lumen gentium* . . . does not express in sufficiently nuanced form a legitimate praxis of the relationship between the magisterium and theologians.⁴⁸

Häring notes that Vatican II did address the right to dissent in other of its documents. He speaks of dissent as a prophetic ministry within the Church, one needed to prevent "ossification of doctrines" and "temptations of ideologies." In his view, a "common dedication to truth is possible only if there is freedom of inquiry and freedom to speak out even in dissent from official documents." Failure to do this early enough has often resulted in unfortunate errors and setbacks in the past.⁴⁹

In a survey article McCormick cites Rahner, André Naud, and Avery Dulles to support his own position.⁵⁰ For Naud, doubt and search have a necessary role, and bishops and theologians must speak freely on controversial questions, both before and after Roman declarations.⁵¹ Dulles fears that moral theology is currently being stifled by magisterial declarations, much as scriptural investigation was during the nineteenth century.⁵² (Note the explicit appeal to authority in the conclusion of *Humanae vitae*.⁵³)

⁴⁷ Rahner, "Theologie und Lehramt," *Stimmen der Zeit* 198 (1980) 353-75.

⁴⁸ *Ibid.* 373.

⁴⁹ Häring, *Free and Faithful in Christ 1: General Moral Theology* (New York: Seabury, 1978) 280-81.

⁵⁰ McCormick, "Notes on Moral Theology: 1980," *TS* 42 (1981) 74-121.

⁵¹ André Naud, "Les voix de l'église dans les questions morales," *Science et esprit* 32 (1980) 167.

⁵² McCormick, "Notes 1980" 119.

⁵³ Pope Paul VI, *Humanae vitae* (Washington, D.C.: U.S. Catholic Conference, 1968) 17-18.

McCormick writes elsewhere of his fears that a literal interpretation of *Lumen gentium* could endanger theology as a profession and as a charism in the Church; for that document contains “no references to modifying official formulations, extending them into new circumstances, adapting them to new culture, . . . a key creative task of theology as a discipline.”⁵⁴

Curran believes that the Church’s own understanding of the status of its authoritative but noninfallible teaching permits dissent. Not only have errors been made in the past, but in principle “in specific moral judgments on complex matters one cannot hope to attain a degree of certitude that excludes the possibility of error.”⁵⁵ Such errors cannot be corrected unless dissent is permitted and even encouraged.

In a highly analytical article on the status of moral truths, Gerard Hughes argues that even moral truths propounded as irreformable by the Church’s magisterium must in principle be inadequate. These truths are timeless only in the sense that “At no future time can it turn out that what was infallibly taught *was* false.”⁵⁶ In order to prove his claim of inadequacy, Hughes stipulates that each possible moral judgment be expressed in what he calls normal form: “A is right (wrong, permissible, etc.),” where A is a nonmoral description of a type of action, and the moral judgment is entirely contained in the predicate. Now there is no way to give a “timeless” description A of any type of action (e.g., artificial contraception), hence the subject in the normal form of any moral judgment will have to be continually changed. But then two formulations of the same moral judgment, one more adequate to a contemporary development than another, will yield contradictory results in practice in at least one case. Thus the less adequate formulation will require change in its actual content, and according to Hughes, “Irreformability in morals cannot . . . mean that the moral predicate which is deemed appropriate to some action A (say, that it is right, or wrong, or permissible) can never be altered.”⁵⁷ While Hughes does not say so, it appears clear that greater adequacy in the formulation of moral judgments can only be obtained if these judgments may be discussed—whether or not they have been presented by the magisterium as irreformable.

Thus there appear to be sound arguments supporting the legitimacy of dissent from authoritative moral teachings, not only the noninfallible pronouncements but even those which are reputedly irreformable. These arguments have been put forward and supported by many of the theo-

⁵⁴ McCormick, “Theology as a Dangerous Discipline,” *Georgetown Graduate Review* 1, no. 4 (April/May 1981) 2.

⁵⁵ Curran, “Abortion” 173.

⁵⁶ Gerard J. Hughes, “Infallibility in Morals,” *TS* 34 (1973) 418 (emphasis added).

⁵⁷ *Ibid.* 426.

gians who raise questions about the moral treatment of early prenatal life and who see in these arguments a justification for their speculations.

MAGISTERIAL ARGUMENT AS APPLICATION OF TRADITIONAL METHODS
FOR RESOLVING MORAL DOUBT

The Certainty of the Magisterial Conclusion

While dissent on authoritative moral teaching may be legitimate, it is curious that theologians who dissent from the official position on the treatment of early embryonic life do not seem to address the crucial point in the magisterial argument. The *Declaration on Abortion* attaches great importance to the moment of ensoulment, acknowledges that we are uncertain as to this moment, but then goes on to a *certain* moral conclusion. According to the *Declaration*, ensoulment "is a philosophical problem from which our moral affirmation remains independent. . . . It suffices that this presence of the soul be probable (and one can never prove the contrary) in order that the taking of life involve accepting the risk of killing a man, not only waiting for, but already in possession of his soul."⁵⁸ And according to the *Declaration*, taking such a risk is gravely sinful: "From a moral point of view this is certain: even if a doubt existed whether the fruit of conception is already a human person, it is objectively a grave sin to dare to risk murder."⁵⁹ In its argument, the Sacred Congregation follows the traditional view of Catholic moral theology that one may never act when in doubt. According to Häring, "Practical doubt is equivalent to a verdict of conscience forbidding the act until the doubt has been cleared up practically," that is, until there is no positive argument favoring the opposing position.⁶⁰ For if one acted in doubt, one would be expressing a willingness to perform an act that could be wrong. As Häring notes, this position requiring certainty has been held and taught by all teachers in the Church from St. Paul on.⁶¹

Many of the contemporary theologians who raise doubts about the nature of early embryonic life suggest that these doubts might allow some leeway in terms of what actions are morally permissible. But if one may never act when in doubt, then the Sacred Congregation appears to be correct in categorically forbidding any harmful interventions toward early prenatal life.

⁵⁸ *Declaration on Abortion* 13, n. 19.

⁵⁹ *Ibid.* 6.

⁶⁰ Häring, *The Law of Christ 1: General Moral Theology* (Westminster, Md.: Newman, 1963) 170-71.

⁶¹ *Ibid.* 171. In his more recent work on moral theology, *Free and Faithful in Christ*, Häring is somewhat critical of this position, and thus moves away from the traditional view (1, 290).

Resolution of Doubt by Probabilistic Methods

However, there is another aspect of the Catholic tradition on handling doubts that must be considered. It is not always possible to resolve one's doubts directly, particularly in a situation of conflicting moral obligations, and so Catholic moral theology developed methods for arriving at what it called indirect certainty. In order to reach indirect certainty, one could invoke general principles such as "A doubtful law does not bind," principles which were considered to be *certain* moral principles. One could be certain of not being obligated by a doubtful law, and thus could act with the assurance of not sinning. For the proper application of such principles, there had to be some degree of probability that the application of the law truly was in doubt; and various systems for the moral evaluation of this probability were proposed.

In its use of the terms "doubt," "certain," and "probable," the Sacred Congregation suggests that its moral argument has roots in this portion of historical Catholic moral theology. In order to assess the Congregation's argument, it is necessary to review this theological tradition.

In the Catholic moral tradition the word "probable" is used with a broad denotation. An opinion is termed probable if one "has good and solid reasons for thinking that a certain line of action is morally correct." The characterization applies even if one "is aware at the same time that there are better, sounder, and more cogent reasons for thinking that it is not."⁶² Thus, conceptually, the term "probable" may refer to a fairly small probability. The Sacred Congregation espouses this usage in saying "It suffices that this presence of the soul be probable (and one can never prove the contrary)."⁶³

While "probable" as a term may refer to small probabilities, it would be foolhardy to assert that one would be acting morally on the basis of a small probability that one's opinion is correct. Prudence dictates that one have a certain level of assurance that one's position is sound before applying the maxim "A doubtful law does not bind." The tradition includes extensive discussion and debate as to what degree of assurance or probability is needed to enable one to act with impunity.

Within this debate various schools of thought emerged and gradually acquired the status of alternative systems for moral decision-making. Each of these systems considers the question of when one is at liberty with regard to a possible law, that is, when one is under no obligation to observe the law. The following are the positions of the systems which

⁶² Henry Davis, *Moral and Pastoral Theology 2* (New York: Sheed and Ward, 1943) 78.

⁶³ *Declaration on Abortion* 13, n. 19.

have had most influence:⁶⁴

Probabiliorism: It is wrong to act on an opinion which favours liberty, unless the opinion is more probable than that which is in favour of the obligation.

Equiprobabilism: [When] conflicting opinions in regard to the existence of a law are equally or nearly equally probable, one may follow the opinion in favour of liberty, but when the opinion in favour of a law is certainly more probable than the contrary, it is unlawful to follow the less probable opinion in favour of liberty.

Probabilism: If there exists a really probable opinion in favour of liberty, . . . although the opinion in favour of the law is more probable, I may use the former opinion and disregard the latter.

None of the systems cited represents the official teaching of the Catholic Church. They are among the “several systems [which have been] permitted to be taught in the Church, and each system is held and defended by able theologians.”⁶⁵ Since St. Alphonsus Liguori developed the system of equiprobabilism to mediate between the more extreme systems of probabiliorism and probabilism, this system seems to have had privileged status among theologians, a status enhanced when Alphonsus was declared a doctor of the Church and patron of confessors and moralists.⁶⁶ In his discussion of systems for resolving doubt, Häring, for example, clearly supports a form of equiprobabilism.⁶⁷ However, in pastoral counseling, especially in the confessional, probabilism has been highly favored because of its sensitivity to individual conscience. Philip Kaufman believes that this stance is demanded of the conscientious confessor,⁶⁸ and even Häring appears to approve probabilism in the pastoral setting when he says: “In the tribunal of penance the confessor is never permitted to refuse absolution to any penitent who holds and follows an opinion proposed by prudent and learned moralists, even though the confessor himself looks upon it as false.”⁶⁹ In making the strong statements contained in the *Declaration on Abortion*, members of the Sacred Congregation do not indicate the system to which they subscribe. They seem to say that no matter how probable it is that the zygote or early embryo is not yet a human person, if there is any probability that it is, then destroying it is a grave sin. For note the clause “it suffices that this presence of the soul be probable (and one can never prove the contrary),” recalling the historical use of “probable” to refer to

⁶⁴ Davis, *Moral* 82, 86, and 91.

⁶⁵ *Ibid.* 79.

⁶⁶ Philip S. Kaufman, O.S.B., “An Immoral Morality? Probabilism and the Right To Know of Moral Options,” *Commonweal* 107 (1980) 494.

⁶⁷ Häring, *Law of Christ* 1, 187; and *Free and Faithful in Christ* 1, 287–90.

⁶⁸ Kaufman, “An Immoral Morality?” 494.

⁶⁹ Häring, *Law of Christ* 1, 187–88.

small probabilities. In fact, the assertion suggests that in principle one could never find reasons strong enough to counter the possibility that the soul might be present at these early stages. The Sacred Congregation's conclusion appears to be based on a criterion more stringent than those of any of the systems previously described. At first glance it appears that the writers have adopted rigorism, a system which holds that "it is not allowed to follow even the most probable opinion for liberty."⁷⁰ According to this system, if there is even a slight probability that a law may be binding, then one is obligated to observe the law. However, rigorism has been condemned by the Catholic Church as a system to guide decision-making, specifically by Pope Alexander VIII in 1690, when he rejected the proposition "It is not lawful to follow a probable opinion, even if it is the most probable among probable opinions."⁷¹

Doubt about the Status of Prenatal Life Interpreted as a Doubt of Fact

In examining the tradition more closely, though, one finds that the Sacred Congregation has not subscribed to rigorism; for the tradition of Catholic moral theology makes a distinction between a doubt of law and a doubt of fact. Francis Connell, in the *New Catholic Encyclopedia*, defined these terms as follows: "A doubt of law . . . is concerned with the existence or scope of a certain law. . . . A doubt of fact . . . is concerned with the performance or nonperformance of some particular act relating to the fulfillment or nonfulfillment of the law. . . ."⁷² According to many moral theologians, systems like probabilism and equiprobabilism may be applied only to a doubt of law, when it is the doubtful existence or scope of a law that is in conflict with liberty.⁷³ Other theologians change the maxim cited earlier, "A doubtful law does not bind," to "A doubtful obligation does not bind," and allow at least some doubts of fact to be resolved by probabilistic systems.⁷⁴ But even when some doubts of fact are included, those which involve questions of human life and justice are not; in these situations, what moralists call the safer course must be followed, not the course favoring liberty. Possible harm to another person or possible infringement of his or her rights are viewed as risks which cannot be chosen on the basis that there is some (perhaps substantial) probability that the harm or wrong will not occur; for in these cases there is a law of either justice or charity which with certainty forbids one to

⁷⁰ F. J. Connell, "Morality, Systems of," *New Catholic Encyclopedia* 9 (New York: McGraw-Hill, 1967) 1133.

⁷¹ Cited in Häring, *Law of Christ* 1, 186.

⁷² Connell, "Doubt, Moral," *New Catholic Encyclopedia* 4, 1024.

⁷³ Cf. McCormick, "The Removal of a Fetus Probably Dead To Save the Life of the Mother" (Ph.D. dissertation, Gregorian University, Rome, 1957) 200, n. 5.

⁷⁴ *Ibid.* 200–202, n. 5.

bring about the harmful results and thus forbids one to risk bringing them about.⁷⁵ In Henry Davis' words, "Every man has a right that I should not take the risk of injuring or killing him."⁷⁶

In applying the decision-making methods of Catholic moral theology to the problem of the uncertain ontological and moral status of the human zygote and embryo, the principle just developed seems to be pertinent. Moralists of that tradition appear to agree that one may never resolve a factual doubt which endangers the life of a human being by using a probabilistic method of decision-making. Typical examples presented to illustrate this point are: a hunter is not certain whether the movement in the bushes is that of an animal or a human being; a druggist has reason to think that one of a number of similar bottles on the shelf actually contains poison. In these cases, the hunter may not shoot and the druggist may not dispense the preparations.⁷⁷ The typical examples cited are situations which do demand caution; it seems that an ethicist of any tradition or viewpoint would require that the doubts in these cases be resolved before the hunter or druggist be at liberty to act.

Thus it does not seem justifiable to charge the Sacred Congregation with following rigorism. Rather, the Congregation mandates that the safer course be followed in a situation which resembles the cases just described. In these cases a doubt of fact exists and human life is at risk. Such examples have traditionally been used to illustrate the principle that one *must* at times choose the safer alternative. It appears that the Congregation is following this principle in requiring that the safer alternative be chosen relative to the treatment of early prenatal life. The Congregation appears to regard the existing doubt as a doubt of fact where human life is endangered.

RESPONSE OF QUESTIONING THEOLOGIANS TO MAGISTERIAL METHOD OF RESOLVING DOUBT

While the *Declaration on Abortion* apparently makes a legitimate application of the principles of Catholic moral theology for achieving certainty, this argument with its certain conclusion ("From a moral point of view this is certain: even if a doubt existed . . . , it is objectively a grave sin . . ."⁷⁸) has been largely ignored by the theologians who question its teaching.

Both McCormick and Curran discuss probabilism,⁷⁹ with Curran stat-

⁷⁵ Cf. Wassmer, "Questions" 417; Connell, "Morality, Systems of" 1132-33; Häring, *Law of Christ* 1, 183; McCormick, "Removal of a Fetus" 327-50.

⁷⁶ Davis, *Moral* 2, 99.

⁷⁷ Connell, "Morality, Systems of" 1133; McCormick, "Removal of a Fetus" 351.

⁷⁸ *Declaration on Abortion* 6.

⁷⁹ Cf. McCormick, "Personal Conscience," *Chicago Studies* 13 (1974) 241-52; Curran, "Abortion" 180; McCormick, "Notes on Moral Theology 1977: The Church in Dispute," *TS* 39 (1978) 126-28.

ing that a thorough study of its application to early embryonic life is needed. McCormick makes use of probabilism in balancing the sufficiency of the doubt about the status of the early embryo against the tragic consequences which result from a rape situation. However, neither of these authors directly addresses the argument proposed by the Sacred Congregation. In his *Medical Ethics* Häring utilizes his theoretical work on probabilistic methods and often speaks of the probability of a particular opinion, even referring to the degree of certainty or probability possessed by a teaching of the magisterium.⁸⁰ While some of these references relate to prenatal life, none of them touches on the actual method of argumentation used by the Sacred Congregation. (Though the *Declaration on Abortion* was issued after Häring's book, its approach reflected the standard teaching and did not offer anything new or surprising. Furthermore, in an article published two years after the *Declaration*, Häring questioned the authoritative moral teaching on prenatal life without even adverting to the fact that that teaching is based on an application of traditional methods for resolving doubt.⁸¹)

Kaufman quotes Häring's formulation of the limitation on applying probabilistic methods to doubts of fact, "If the life of our neighbor is liable to be imperiled by actions of ours, we must choose the safest course of action so as to avoid this evil effect,"⁸² and draws from it what would appear to be a valid conclusion: probable opinions justifying abortion on demand, therefore, cannot be followed.⁸³ Almost none of the theologians who present probable opinions on prenatal life, even if limited to the earliest weeks after fertilization, attempt to show why Häring's formulation may not apply.

The Jesuit theologian Thomas Wassmer, who espouses a Thomistic theory of delayed infusion of the soul, is an exception to the general avoidance of the crucial point in the magisterial argument. Wassmer considers the use of probabilistic methods for determining the appropriate moral treatment of early prenatal life, and addresses the argument of the *Declaration* seven years before its publication.⁸⁴ He asks whether it really is the case that one may *never* use probabilistic methods to resolve a factual doubt if human life might be endangered. Finding evidence in the tradition that this is not the case, Wassmer suggests that there are times when one may not be required to follow the safer course.

Wassmer's evidence consists of counterexamples designed to show that Catholic moralists have traditionally permitted liberty in some situations of factual doubt about human life. These instances are cases where other

⁸⁰ Häring, *Medical Ethics* 37, 84-85, 93, and 101.

⁸¹ Häring, "New Dimensions" 125-29.

⁸² Häring, *Law of Christ* 1, 185; quoted in Kaufman, "An Immoral Morality?" 494.

⁸³ Kaufman, "An Immoral Morality?" 494.

⁸⁴ Wassmer, "Questions" 416-18.

possible evils are weighed against the risk of destruction of a human life, and where the risk taken is actually quite small. Wassmer's first example appears medically absurd, but it can be seen to serve his purpose:

Moralists will allow a woman to use a douche after rape as late as 10 hours after the assault on the grounds that conception has been known to take place within that length of time. . . . The safer course would be to consider that impregnation and conception took place at the earliest possible time after the assault, or even during the assault.⁸⁵

Now a douche suggests a vaginal douche, which might affect sperm that were present but would never interact with a fertilized egg. However, earlier moralists did discuss the use of an intrauterine douche which might also flow into the Fallopian tubes. This douche supposedly was to kill sperm that were present and could be used (from the moral point of view) for the period of time which was estimated as the time needed for fertilization to be completed. Up to that time it was likely that no fertilized egg was present to be affected by the douche. Of course, for medical reasons, intrauterine douche would never be recommended or even discussed today; but the example is one in which traditional moralists allowed one to act despite a factual doubt about the presence of what they presumably considered a human life, i.e., a fertilized egg.

Wassmer's second example involves a terminally-ill patient. If "there is no [*sic*] probability of a return to rational consciousness," then most traditional Catholic moralists would allow extraordinary means of life support to be terminated, resulting in the patient's death. Since Wassmer interprets this case as one where there is a doubt of fact regarding return to rational consciousness, he must mean there is "almost no probability" that this will happen.⁸⁶ The theologians cited take the position that the grave burden of indefinitely supporting an unconscious life justifies the termination of treatment; presumably these theologians would not require absolute certainty in the medical prognosis regarding the return to consciousness. The remote possibility that consciousness could return presents a factual doubt, and terminating treatment is not the safer course. Thus it appears that moral theologians do not require one always to follow the safer course simply because human life is at stake.

Wassmer uses these examples because he wants to compare them with the situation in which he is interested, abortion in early pregnancy. Along with the Sacred Congregation, Wassmer holds that the ensoulment of the embryo confers personhood. Without ensoulment the life which is present is not that of a human being. But according to Wassmer, and other questioning theologians, it is doubtful that the early embryo is

⁸⁵ *Ibid.* 417-18.

⁸⁶ *Ibid.* 418.

ensouled. Even though this uncertainty is a factual doubt in a case where human life is at stake, Wassmer argues, it may not be obligatory to take the safer course and forbid all abortions. The examples used for comparison suggest that other evils which are imminent (e.g., damage to the mother's health, the birth of a predictably defective infant, trauma resulting from a pregnancy due to rape) may allow one to take a less safe course or to have an early abortion despite factual doubt about the embryo's possessing a soul.⁸⁷

The Sacred Congregation takes an opposite position on the morality of such abortions, claiming that even though the presence of the soul is uncertain, one may never take the risk of destroying the life of a human being. While the Congregation does not discuss doubts of fact versus doubts of law, by its rigorous application of the moral tradition on doubt it indicates that it also considers the doubt in question to be a doubt of fact. Since the rigorist position on doubts of law has been condemned, the Congregation could hardly be adopting that position.

IS THE UNCERTAINTY ABOUT ENSOULMENT A FACTUAL DOUBT?

The Assumption That the Doubt Is Factual

As shown in the preceding section, the only theological criticism which directly addresses the application of the probabilistic tradition in the *Declaration* does so by questioning the absoluteness of that tradition. Wassmer's argument maintains that there are times when probabilism has been, and thus may be, applied to doubts of fact even if human life could be at risk. Thus, according to Wassmer, the conclusion of the Congregation is not by any means a certain one, as it is claimed to be.

Wassmer does agree with the Congregation, however, on a crucial assumption: the question of whether the zygote or early embryo possesses a human soul is a factual matter. It is this assumption which I wish to question, arguing that it is neither conceptually plausible nor consistent with the Catholic moral tradition on systems for handling doubt. Now if the moral decision to be made hinged on a doubt of law rather than a doubt of fact, then, according to the tradition, probabilistic methods could be applied, and the stringent position of the *Declaration* would not be warranted by the arguments presented.⁸⁸ And if the argument in the

⁸⁷ *Ibid.* 416–18.

⁸⁸ It could, of course, still be promulgated by Church authority. But that mode of presenting moral positions is ineffective and self-defeating in the contemporary world. Note Häring, *Medical Ethics*: "In moral matters not predicated by divine revelation but resulting from shared experience and co-reflection, the magisterium (especially in our critical times) cannot speak without giving its reasons and the pastoral meaning of its position. In the realm of purely natural morality, that is, natural law, the believer is bound to the extent that the directives manifest rational insights and reflect man's shared experience and co-reflection" (37). Also see Hughes, "Infallibility" 427–28.

Declaration is not sound, then the theologians who question some of its conclusions are justified in offering alternative formulations of our duty towards early prenatal human life. They may even be obligated to present such alternatives, especially in relation to conflict situations where other important human values are endangered.

Concept of the Factual

In contemporary philosophy the word "fact" is customarily defined either as a state of affairs in the world or as a true proposition about a state of affairs in the world. While philosophers may be interested in debate as to which conceptualization is preferable, such issues are irrelevant to our discussion. However, the debate does assume a point which is pertinent: the states of affairs in question obtain within our spatiotemporal world and the truth of a factual proposition is verifiable, in principle at least, by empirical methods. Frederick Suppe, a noted philosopher of science, thus presents a standard definition of "fact" when he says: facts are what empirically true propositions state or assert about the world.⁸⁹

Suppe's definition restricts facts to states of affairs which are empirically observable within the spatiotemporal world. In this conceptualization facts are the result of the ordinary observation of physical entities and events in everyday life, or else the product of scientific observation and study of these phenomena. Attempts to extend the notion of "fact" beyond this domain appear to lead to conceptual confusions. For example, when Raphael Demos, a philosopher of religion, holds that religion as well as science has its facts, he has to recognize that it has a different definition of "fact."⁹⁰ Just what this definition is, is not clear; but certainly it does not include empirical verifiability. John Hick, another philosopher of religion, attempts to include some religious or philosophical beliefs in the category of the factual by claiming that they *are* empirically verifiable. In his essay on the immortality of the human soul, he claims that this issue is a factual one because it will be verifiable after death.⁹¹ But that understanding of empirical, hence of factual, appears to be a highly idiosyncratic one.

In his article "Is the Fetus a Person?" Albert Di Ianni calls the status of the fetus a "human fact," a type of fact which supposedly can be inferred from a combination of empirical facts and value judgments.⁹²

⁸⁹ Frederick Suppe, "Facts and Empirical Truth," *Canadian Journal of Philosophy* 3 (1973) 201.

⁹⁰ Raphael Demos, "Are Religious Dogmas Cognitive and Meaningful?", in Ronald E. Santoni, ed., *Religious Language and the Problem of Religious Knowledge* (Bloomington: Indiana University, 1968) 271.

⁹¹ John Hick, "Theology and Verification," in Santoni, ed., *Religious Language* 367-71.

⁹² Di Ianni, "Is the Fetus a Person?" 312.

This sort of fact does not describe a state of affairs at all, but rather is a proposition which is taken to be true because it follows from empirical facts when seen in the light of particular value commitments or assumptions. Di Ianni holds that a statement such as "The fetus at eight weeks is a person" belongs to the category of human facts, because its truth depends not only on empirical data but also on the relative weight given to the values involved. If one attaches a greater value to human life itself than to privacy and autonomy, then one will choose to recognize the statement as true; if one's value priorities are the reverse, then one will not. The *truth* of the given statement thus depends at least partly on the values one wishes to support.⁹³

Category of the Theoretical

In order to avoid such conceptual muddles, which arise from dividing propositions into the two classes of factual and evaluative, a third category, that of "theory," is helpful. A theory is a body of concepts and propositions which attempts to provide an adequate explanation for what is empirically observed. While a theoretical proposition is descriptive, it goes beyond the empirical as it fulfils its explanatory function. Many of the propositions of natural science are theoretical in nature; they are devised and tested as causal explanations of empirical regularities. Analyses of theory in the scientific context suggest that metaphysical and often religious propositions belong in this category, since they too are devised as explanations for phenomena that are observed.⁹⁴

Surely the assertions of Plato about the existence of the Forms and the nature of the human soul are properly characterized as theoretical rather than factual statements. Such a characterization does not detract from the possible truth of these assertions, but rather suggests that the method of establishing this truth is different from that used in the case of factual (or empirical) statements. Similarly, assertions in Christian theology about the mode and time of ensoulment during the human gestational process appear to partake of the character of theory rather than of fact. The facts of biology may lend themselves better to one theory than another, but they do not prove any theory. The most that can be said is that some theories appear to be incompatible with the biological facts.

⁹³ Ibid. 316-17.

⁹⁴ Cf., e.g., Marx W. Wartofsky, "The Mind's Eye and the Hand's Brain: Toward an Historical Epistemology of Medicine," in H. Tristram Engelhardt, Jr., and Daniel Callahan, eds., *Science, Ethics and Medicine* (Hastings-on-Hudson: Hastings Center, 1976) 183-84; and Peter Achinstein, *Concepts of Science* (Baltimore: Johns Hopkins, 1968) 121-29.

Coherence of the Congregation's Argument

The Sacred Congregation is concerned about the time at which the human embryo becomes ensouled, and from its utilization of the moral tradition on handling doubts of fact, it indicates that it regards the time of ensoulment as a factual matter. Yet it explicitly states: "It is not up to the biological sciences to make a definitive judgment on questions which are properly philosophical . . ., such as the moment when a human person is constituted. . . ."⁹⁵ Furthermore, the Congregation clearly asserts that there is no way that this time can be established by methods available to us within our spatiotemporal world, saying: "It suffices that this presence of the soul be probable (*and one can never prove the contrary*)."⁹⁶ Thus the Congregation seems to recognize that the time of ensoulment is really *not* a factual matter, since *in principle* it cannot be ascertained.

Consistency with the Traditional Understanding of Doubts of Fact

At first glance it might appear that a resolution of this apparent contradiction is easily achieved. While contemporary philosophical analysis may wisely suggest distinguishing facts (as empirical) from theories (as explanatory or metaphysical), Catholic moralists have had no intention of making this distinction. When they speak of doubts of fact, they mean to include doubts about theoretical as well as empirical assertions. Thus the Congregation is true to the tradition in treating the irresolvable doubt concerning the time of ensoulment as a doubt of fact.

Now it is true that Catholic moralists of the past did not attempt to define a fact, believing that the concept was easily understood. So, in order to infer their intentions, it is necessary to examine the examples which they used as illustrations. Consider first the four examples cited earlier in this article. The issues involved are all factual in the precise contemporary sense; for in principle one can determine by empirical methods whether the thing in the bushes is a human being or an animal, whether a bottle contains poison or not, whether there is a fertilized ovum present in the Fallopian tube, and (by simply waiting) whether a person will recover from coma or illness. Other frequently-cited examples also involve states of affairs that are empirically verifiable: whether liquid to be used for baptism is true water, whether the revolver chamber selected before one fires in "Russian roulette" contains the cartridge, whether a liquid to be used for saying Mass is truly grape wine, whether an accused person is guilty of the alleged crime (a fact that must be

⁹⁵ *Declaration on Abortion* 6.

⁹⁶ *Ibid.*

proven beyond a reasonable doubt before a conviction is justified).⁹⁷ In no source could even one example be found which involves doubt on a point of metaphysical theory.

The only evidence available to us for judging the meaning of "fact" intended by Catholic moralists is their examples. Since these examples all appear to involve empirically verifiable states of affairs, it thus is consistent with the tradition to claim that the doubt about the time of ensoulment of the human embryo is not a doubt of fact.

Possibility That Safer Course Must Always Be Followed If Human Life Is at Risk

Another resolution of the Congregation's apparent contradiction is possible. Perhaps no doubt, not even a doubt of law, may be resolved by probabilistic methods if human life or some other basic human right is at stake. It may be that moral theologians of the Catholic tradition have simply neglected to point this out, while at the same time adhering to the restriction.

Reference to several striking controversial issues should be sufficient to respond to that proposal. Historically, probabilistic methods have not only been used by theologians but have been recognized by the Church's magisterium as a legitimate way of handling doubts of law in some cases where the right to life or another basic human right is involved. Two of these types of cases present situations in which we now believe that an opinion favoring liberty is clearly incorrect. The first is the castration of boys for the purpose of preserving high-pitched voices for religious choirs. A probable opinion permitting this practice was supported by the fact that 32 popes over a period of 300 years accepted the use of *castrati* in the Sistine Choir.⁹⁸ A second situation is the acceptance of slavery. Affirmations by popes from Martin I in 650 through the instruction of the Holy Office in 1866, which reaffirmed the moral justification for certain types of slavery, rested on probable opinions. Actually, slavery was taught to be *certainly* justified; the application of probabilism lay in the opinions as to the sorts of slavery that were acceptable (e.g., enslavement of the offspring of noncelibate clerics, enforced in 655; and permanent enslavement of Saracens and other "pagans," permitted during the Crusades).⁹⁹

⁹⁷ Cf. Connell, "Morality, Systems of" 1132-33; Edwin Healy, S.J., *Moral Guidance* (Chicago: Loyola University, 1943) 33-34; McCormick, "Removal of a Fetus" 327-95; Häring, *Law of Christ* 1, 180-85; Davis, *Moral* 2, 99; and Wassmer, "Questions" 417-18.

⁹⁸ Bruno Schüller, S.J., "Remarks on the Authentic Teaching of the Magisterium of the Church," in Curran and McCormick, eds., *Readings in Moral Theology No. 3: The Magisterium and Morality* (New York: Paulist, 1982) 26-27.

⁹⁹ Kaufman, "An Immoral Morality?" 495-96.

In a textbook of moral theology once widely used in Catholic schools and colleges, Edwin Healy cites the use of probabilism made by the Church's magisterium as the best evidence for its validity.¹⁰⁰ The ways in which the Church has consistently applied this method thus provide a standard for its authentic application. Castration and slavery offer examples of situations where probabilism was utilized over a long period of time. There are additional examples which show that the Church has consistently relied on probable opinions in order to determine the scope and application of the natural and divine law against killing. In making judgments about the morality of capital punishment and the extent to which one may kill or disable in self-defense, the Church invokes theological opinions which have only a certain probability. In difficult life-and-death situations which arise in medical ethics, such as the termination of extraordinary means of treatment and the specification of those means, again probable opinions are cited; and in that most difficult case of warfare, the formulation of the conditions which justify entering into and waging a war can only be based on probable opinions.

Thus the Church indicates that where there is a doubt of law involving human life or human rights, probable opinions will often offer the only possible guidelines. Such a situation differs from that in which there is a *certain* law or obligation which involves definite rights on the part of others. A probable invasion of these rights, based on a doubt of fact, would be morally wrong.

Deviation from the Tradition in the Congregation's Argument

Thus the two proposed ways for resolving what appears to be a deviation from the tradition in the *Declaration on Abortion* do not succeed. In the context of the moral tradition for handling doubts of fact, only empirically verifiable uncertainties are cited as examples. This is particularly clear in the situations where human life is at risk and probabilistic methods may not be used. On the other hand, it cannot be true that one must have a comparable certainty regarding doubts of law when basic human rights are at stake; for the magisterium has consistently allowed and utilized probabilistic methods for handling such doubts.

Therefore it appears that the Congregation is not true to its own moral tradition in teaching in the *Declaration* "This is certain: even if a doubt existed . . . , it is objectively a grave sin to dare to risk murder," and to conclude that interruption of prenatal life at any time after fertilization, and for any reason, is morally prohibited.¹⁰¹

¹⁰⁰ Healy, *Moral Guidance* 31.

¹⁰¹ *Declaration on Abortion* 6.

CAN A DOUBT OF THEORY BE A DOUBT OF LAW?

The doubt about the time of ensoulment of the embryo is of a theoretical nature; so it does not seem to fit either category of doubt proposed by the moral theologians. It is not a fact in the sense in which these moralists use that term, and yet it is not directly a doubt about a law. I shall argue, however, that it is related to doubts of law in such a way that it is most appropriately handled within that category in the tradition of systems for resolving doubts. Three arguments support this conclusion.

Relationship of Law and Theory

The first argument is based on an analysis of sentence types. A moral law, such as "Thou shalt not kill," is an imperative which does not have any truth value; one simply states it. A doubt of law is really a doubt as to whether a formulated law actually is part of the body of natural and/or divine law. Thus the doubt might be about statements like "God has commanded that thou shalt not kill," or "God has commanded that thou shalt not kill human beings except in self-defense," or "God has commanded that thou shalt not kill early human embryos." But these statements, which do have truth value, are theoretical statements. They express a state of affairs which is not empirically verifiable. As such, they have the same epistemological status as "From conception the human embryo has a rational soul." So any doubt of law is actually doubt about the truth of a theoretical proposition concerning what God commands or the moral law demands, and such theoretical propositions have never been considered to be factual in nature.

A second argument is related to the first. While every doubt of law may be a theoretical doubt, it is of course not true that every theoretical doubt is a doubt of law. For example, doubts about assertions describing the nature and life of angelic beings do not seem to translate even remotely into doubts of law. However, in the case we are considering, the theoretical doubt about the time of ensoulment is discussed precisely because of the significance it has for the application of the law "Thou shalt not kill" and other laws protecting basic human rights. The question of ensoulment is morally relevant only because it is part of an attempt to specify the scope of the law "Thou shalt not kill." Since the Congregation is presenting a moral position, which it explicitly recognizes in saying "From the moral point of view this is certain," then in this context the theoretical question about the ensoulment of the embryo is equivalent to a moral question about the scope of the law forbidding killing. The doubt which exists is therefore a doubt of law, an uncertainty about the scope of the natural and divine law against killing. And as we have seen, the Church has traditionally used probabilistic methods in determining the scope and application of that law.

Uncertainly Existing Subjects and Doubtful Rights

The third argument is a response to the objection that the law against killing has already been interpreted by the magisterium in a way that is certain. A simple formulation of the interpreted law is "Thou shalt not kill directly an innocent human being." There is no doubt about this law. Rather, the doubt we are considering occurs because of uncertainty as to whether a particular living being belongs in the category of human being, and this uncertainty is not a doubt about the law.

In his study "The Removal of a Fetus Probably Dead To Save the Life of the Mother," McCormick examines an analogous situation.¹⁰² In the case he considers, the death of an intrauterine fetus is probable but cannot be ascertained with certainty. This situation is clearly factual in nature, even though the factual doubt is unresolvable with currently available medical and scientific techniques. McCormick states the standard position, that the fetus' right to life, which is a certain right, may not be endangered by acting on a probable opinion regarding a matter of fact. According to the certain law which applies, a direct attack may not be made to remove the fetus, even though the mother's life may be at stake.

However, McCormick then reviews the opinion of L. Rodrigo, a moralist who is an authority on probabilistic methods. The criterion Rodrigo appeals to is: "Rights of an uncertain subject (uncertain by uncertainty of the subject's existence) are automatically uncertain rights."¹⁰³ (A comparable case in law might be that of a person who vanished some years ago. Because of uncertainty that this subject still exists, the law declares that his or her rights are now uncertain, and for many practical purposes no longer exist.¹⁰⁴) Rodrigo argues that such uncertain rights may be "violated" for a sufficient reason.

Here a situation which is undeniably factual, i.e., whether a fetus is still alive, is transformed by the nature of the case to one where rights, or the application of a law, are in doubt. Thus a doubt of fact is practically equivalent to a doubt of law, and acting on the basis of a probable opinion may be justifiable.

The situation of a zygote or early embryo is one where the existence of a human subject is even more clearly and irresolvably in doubt. This doubt cannot be resolved even in principle, and there is solid positive evidence that a subject does not exist. If the rights of a probably (but not

¹⁰² McCormick, "Removal of a Fetus" (see n. 73 above).

¹⁰³ *Ibid.* 395-97.

¹⁰⁴ Cf., e.g., Minnesota statutes 567.142, 576.143, 576.144, and 576.15, in *Minnesota Statutes Annotated 37; Cumulative Annual Pocket Part* (St. Paul: West Publ. Co., 1982) 106-7.

certainly) dead fetus are uncertain, then how much more so are the rights of a fertilized egg, a cell mass, a blastocyst? The theoretical doubt about the existence of a subject translates into uncertainty about rights, and hence into a doubt of law, even more clearly than the factual doubt about the death of McCormick's fetus.

Rahner has invoked this principle in his writings on genetic and reproductive research, arguing: "The reasons in favour of experimenting might carry more weight, considered rationally, than the uncertain rights of a human being whose very existence is in doubt."¹⁰⁵ And McCormick, in the position he took as a member of the Ethics Advisory Board of DHEW, appeared to be applying similar reasoning. Holding that early human embryos are "nascent" human beings but most likely not actual human beings, he apparently concluded that the rights of these beings were uncertain enough to justify not granting them full moral and legal protection. McCormick was thus able to join other members of the Ethics Advisory Board in approving certain types of research involving *in vitro* fertilization of human zygotes.¹⁰⁶

These three arguments indicate that the theoretical doubt about the time of ensoulment of the human embryo is, in this context, equivalent to a doubt of law. The doubt is not one which endangers rights which are certain; rather, the existence of rights, or the scope of a law, is what is uncertain.

PROBABILITY OF OPINION ALLOWING SOME LIBERTY IN TREATMENT OF ZYGOTES AND EARLY EMBRYOS

If the doubts which exist in this situation are doubts about the scope of the law "Thou shalt not kill," then probabilistic methods are applicable to the moral question of the treatment of early embryos. While the system of probabilism appears to be acceptable in Catholic theology, a more cautious approach would suggest using equiprobabilism. Recall that an opinion is termed "probable" if there are "good and solid reasons" for holding it. According to equiprobabilism, one may act with impunity if the opinion favoring liberty is at least as probable as the restrictive opinion—in other words, if the reasons are at least as solid.¹⁰⁷

Reasons for Holding That Ensoulment Does Not Occur at Fertilization

Although the Sacred Congregation claims that the presence of the soul is always probable (i.e., from fertilization on), contemporary biological data indicate that it is actually highly improbable that the zygote and

¹⁰⁵ Rahner, "Problem of Genetic Manipulation" 236.

¹⁰⁶ Cf. McCormick, "Notes 1978" 108-9; and DHEW, "Protection of Human Subjects: Report of the Ethics Advisory Board" 35055-58.

¹⁰⁷ Cf. Davis, *Moral* 78 and 86.

early cell mass are ensouled. The phenomenon of twinning and especially that of recombination offer strong positive evidence that the human soul is not yet present in the early embryo; for, in the traditional Catholic understanding, the soul is indivisible and indestructible, and souls cannot split, fuse, or disappear. The soul is the principle of selfhood, which, like it, is a unique and indivisible marker.¹⁰⁸

Additional biological evidence cited above adds substantial support to the opinions of Catholic theologians who argue that the zygote and early embryo are not human beings and are not yet ensouled. The biological data are interpreted within a variety of philosophical theories, but perhaps the most convincing arguments are those made in terms of the philosophy of Aquinas, since his anthropology has been given official sanction by the Church.¹⁰⁹

Theologians like Donceel and Wassmer utilize a traditional form of the Thomistic anthropology, while Rahner expresses its insights in more contemporary language.¹¹⁰ It is the antidualistic orientation of the Thomistic theory which is most significant for our purposes. In this theory the human being is regarded as a body-soul composite wherein the human soul acts as the life principle of the body, or as the form which makes the being what it is. A human soul or form can only be joined to matter (or a body) which is human, because it cannot provide human life or humanness to a lower level of material life. Thus, for the soul to be present, the matter must have achieved a suitably advanced level of development. Since the human soul is characteristically rational, it appears necessary that the physical structures be developed to the level where there is some capability for supporting minimal rational activity.

Philosophers and theologians who are committed to this nondualist anthropology thus find "good and solid reasons" for not attributing ensoulment to the early embryo. In fact, it seems extremely improbable that matter which is not yet even formed into an organic human body could be united to a human soul. Through the centuries there is testimony of theologians and also of the magisterium which supports their view. For example, St. Alphonsus said: "Some are mistaken who say that the fetus is ensouled from the first moment of its conception, since the fetus is certainly not animated before it is formed. . . ."¹¹¹ The Catechism of the Council of Trent, published in 1566 and reprinted as recently as 1923, stated:

As soon as the Blessed Virgin gave her consent to the Angel's words . . . at once

¹⁰⁸ See discussion and citations earlier in this article.

¹⁰⁹ Cf. Pope Leo XIII, "The Study of Scholastic Philosophy," in *The Great Encyclical Letters of Pope Leo XIII* (New York: Benziger, 1903) 34-57.

¹¹⁰ Donceel, "Immediate Animation"; Wassmer, "Questions"; Rahner, *Hominization*.

¹¹¹ Quoted in Donceel, "Immediate Animation" 91.

the most holy body of Christ was formed and a rational soul was joined to it. . . . Nobody can doubt that this was something new and an admirable work of the Holy Spirit, since, in the natural order, no body can be informed by a human soul except after the prescribed space of time.¹¹²

And in a decree of the Holy Office dating from 1713 we find: "If there is a reasonable foundation for admitting that the fetus is animated by a rational soul, then it may and must be baptized conditionally. If, however, there is *no reasonable foundation*, it may by *no means* be baptized. . . ." ¹¹³ Thus both theological and magisterial opinion, up until the nineteenth century, were open to the view that the ensoulment of the early embryo is highly improbable, if not impossible. In the latter part of the nineteenth century the magisterium and most theologians came to accept the notion of immediate ensoulment, and Häring remarked in 1966 that this situation still obtained.¹¹⁴ But a detailed survey of the literature conducted by H. M. Hering in 1951 showed this assessment to be wrong. Hering found that the theory of delayed animation had strong defenders, "especially among the philosophers, who are wont to investigate the matter more profoundly than the moralists and the canonists."¹¹⁵

If those who investigate the matter "more profoundly" find reasons to hold that ensoulment is not immediate, if this belief has been widespread and taught by the Church through many centuries, and if the arguments currently presented are highly convincing, then we surely have a body of good and solid reasons which appear to be at least as sound as those supporting a contrary position. Donceel finds the evidence so overwhelming as to say:

We do not know exactly when man first appeared on earth, at what stage of the evolutionary process hominization occurred. But we know that *Dryopithecus* and *Propliopithecus* were not yet human beings. . . . I do not know when the human soul is infused into the body, but I, for one, am certain that there is no human soul, hence no human person, the first few weeks of pregnancy.¹¹⁶

Weight of the Congregation's Mandate of the Safer Course

The Sacred Congregation appears to rest its case on what is called a negative doubt,¹¹⁷ for it claims that immediate ensoulment is probable because "one can never prove the contrary."¹¹⁸ But the questions raised

¹¹² *Ibid.* 89.

¹¹³ *Ibid.* 90 (emphasis added).

¹¹⁴ Häring, *Law of Christ 3: Special Moral Theology* (Westminster, Md.: Newman, 1966) 205.

¹¹⁵ H. M. Hering, O.P., "De tempore animationis foetus humani," *Angelicum* 28 (1951) 92.

¹¹⁶ Donceel, "Immediate Animation" 101.

¹¹⁷ Cf. Häring, *Law of Christ* 1, 170-71.

¹¹⁸ *Declaration on Abortion* 13, n. 19.

about immediate ensoulment are not based on a merely negative doubt, namely, that it is impossible to prove that the soul *is* present. As shown above, the doubt is a positive doubt, one based on positive reasons which indicate that immediate ensoulment is truly improbable.

The Congregation does not recognize the use of probabilistic methods to determine the scope of the law "Thou shalt not kill" when applied to prenatal human life. In the way it presents its position, the Congregation appears to be saying that if there is the slightest chance that some type of being falls under the law, then we may not kill it. But such a position becomes ludicrous if one considers all the sorts of beings that have been proposed as coming under the law. At the present time, there are reputable ethicists who argue that dolphins, chimpanzees, wild game, and endangered species are included within the scope of the law against killing. Many vegetarians claim that it is wrong to kill animals for use as food, unless one were in a situation where no other means of sustenance was available.¹¹⁹ In his essay "Animals and the Value of Life," Peter Singer actually makes an argument which resembles that of the Sacred Congregation:

I am not certain that it would be wrong in itself to kill the pig; but nor am I certain that it would be right to do so. Since there is no pressing moral reason for the killing—the fact that one might prefer a dish containing pork to a vegetarian meal is hardly a matter of great moral significance—it would seem better to give the pig the benefit of the doubt.¹²⁰

Thus Singer also recommends taking the safer course where there is a doubt about a matter of life and death.

These arguments may well have merit, but I do not know of any Catholic moralist who demands that we refrain from killing every being which is presented to us as possibly falling within the scope of the law. A small probability that it may be wrong to kill beings of type X does not put us under a strict obligation not to kill them. Yet the Sacred Congregation seems to be positing that sort of obligation towards human zygotes and embryos; for the Congregation supports its assertion that the presence of the soul is probable only by saying that "one can never

¹¹⁹ Cf., e.g., Charles Hartshorne, "The Rights of the Subhuman World," *Environmental Ethics* 1 (1979) 49–60; Tom Regan, "Do Animals Have a Right to Life?," in Tom Regan and Peter Singer, eds., *Animal Rights and Human Obligations* (Englewood Cliffs, N.J.: Prentice-Hall, 1976) 197–204; Peter Singer, "Equality for Animals?," chap. 3 of *Practical Ethics* (Cambridge: Cambridge University, 1979) 48–71; David Paterson and Richard D. Ryder, eds., *Animal Rights: A Symposium* (London: Centaur, 1979); and Tom Regan, "The Moral Basis of Vegetarianism," *Canadian Journal of Philosophy* 5 (1975) 181–214.

¹²⁰ Peter Singer, "Animals and the Value of Life," in Tom Regan, ed., *Matters of Life and Death* (New York: Random House, 1980) 252.

prove the contrary." Such an argument would involve the fallacy of argument from ignorance if it were not seen as an application of traditional methods for resolving "factual" doubts. It applies equally well to many forms of animal life. In fact, if one relies on empirical data which support the possible presence of a rational soul, there is better positive argument available for animals like mature dolphins than there is for human zygotes, morulae, and blastocysts.

Summary: Acceptability of Probable Opinions on Treatment of Early Prenatal Life

I have argued that the doubt about the time of ensoulment of the human embryo is not a doubt of fact in the context of the Catholic moral tradition on resolving doubts of fact, and that within the Catholic tradition, doubts of law, even those which impinge on human life and other basic rights, have been and often must be resolved by probabilistic methods. I have further argued that the theoretical doubt as to the time of ensoulment of the human embryo is here equivalent to a doubt of law, since the theoretical issue is debated precisely in order to determine the scope of the natural and divine law against killing. Thus, in the *Declaration on Abortion*, the Sacred Congregation was actually considering the scope of the law "Thou shalt not kill"; and its argument, which rejects consideration of even the most probable opinion favoring liberty, is inconsistent with the Catholic moral tradition. I have shown that there are "good and solid reasons," which appear to be at least as strong as those supporting the contrary position, for not including early human embryos under the full weight of the law against killing. Especially when there are compelling, or even adequate, reasons for terminating an embryonic life, the application of probabilistic methods would permit some early abortions. The reasoning of the Congregation in forbidding all abortions, including the destruction of zygotes, is linked to the stringency of the moral tradition regarding factual doubts in relation to human life. But the thesis that ensoulment is a matter of fact within this context cannot be substantiated.