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Karin Clark,

Anthony Fisher,

John Keown

Warwick Neville,

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# Early Induction of Labor: Legal and Ethical Considerations

by

**Karin Clark, LL.M.; Anthony Fisher, OP, LL.B., D. Phil.;  
John Keown, D., Phil.; Warwick Neville, LL.B., STD**

*Mrs. Clark is barrister & solicitor of the Supreme Court of Victoria, Australia. Fr. Fisher is lecturer in health care ethics and law, Australian Catholic University. Dr. Keown is fellow and tutor, Queen's College, Cambridge, United Kingdom. Dr. Neville is affiliated with the Research Department, Australian Catholic Bishops' Conference, Canberra.*

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This paper addresses legal and ethical issues concerning the early induction<sup>1</sup> of labor in relation to children in utero who are said to be diagnosed as having "lethal abnormalities." It has its genesis in differing medical advice being given to Catholic hospitals in Australia following the diagnosis of children in utero as having certain kinds of disabilities. Although our remarks are directed to and arise in, an Australian context, the principles involved have wider application.

We are aware that, in the absence of authoritative and binding teaching by the Magisterium in relation to certain bioethical issues, there is scope for differing perspectives to be advanced within Catholic theological circles as to what is licit or morally permissible.<sup>2</sup> We are concerned, however, that on occasion, a position which is advanced as morally permissible may have two consequences: first, while held in good conscience as morally licit, it may nonetheless expose those involved in it to potential criminal or civil liability.<sup>3</sup> Secondly, what might be presented as, theoretically, morally licit conduct may have unforeseen psychological<sup>4</sup> and spiritual<sup>5</sup> consequences sufficient to counsel caution or to make the

choice immoral.

We presuppose the basic proposition of Catholic teaching that, in the absence of a diagnosis requiring surgical correction of an anomaly, the induction of labor simply because a child suffers some defect is a direct abortion and, therefore, a grave offense.<sup>6</sup> In particular, we note the following statements from the 1995 encyclical letter, *The Gospel of Life (Evangelium Vitae)*:

The deliberate decision to deprive an innocent human being (*innocuum hominem*) of his life is always morally evil (*semper morali iudicio malum est*) and can never be licit either as an end in itself or as a means to a good end. (n.57)

...Procured abortion is *the deliberate and direct killing, by whatever means it is carried out, of a human being in the initial phase of his or her existence, extending from conception to birth.* (n.58) [emphasis in text]

It is true that the decision to have an abortion is often tragic and painful for the mother, insofar as the decision to rid herself of the fruit of conception is not made for purely selfish reasons or out of convenience, but out of a desire to protect certain important values such as her own health or a decent standard of living for the other members of the family. Sometimes it is feared that the child to be born would live in such conditions that it would be better if the birth did not take place. Nevertheless, these reasons and others like them, however serious and tragic, *can never justify the deliberate killing of an innocent human being.* (n. 58) [emphasis in text]

Therefore, by the authority which Christ conferred upon Peter and his Successors, in communion with the Bishops...*I declare that direct abortion, that is abortion willed as an end or as a means, (sive uti finem intentum seu ut instrumentum) always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being (innocentis hominis).*

No circumstance, no purpose, no law whatsoever can ever make licit an act which is intrinsically illicit (*natura illicitum*), since it is contrary to the law of God which is written in every human heart knowable by reason itself, and proclaimed by the Church. (n.62) [emphasis in text]<sup>7</sup>

This holds true “no matter the age or condition of that person.”<sup>8</sup> Further, this Memorandum eschews the suggestion found in some literature that



pregnancy is a pathological condition inimical to a woman's well-being or an artificial condition akin to artificial life support.

It is as well, at the outset, to state that, subject to a definitive statement from the Magisterium on the question, for the reasons listed hereunder, we consider that the early induction of labor in relation to a child in utero, diagnosed with a terminal condition which is nonthreatening to the life or health of his or her mother, for the reason only that the child has a terminal condition, is always morally illicit.<sup>9</sup> On a strict interpretation of the law in Australia, such an induction may also be illegal.

At the outset, some comment must be made on the terminology commonly employed in this discussion. First, the terminology of "futility" has been applied traditionally to *treatment* administered to persons, not to the persons themselves or their lives. Secondly, although not uncommon in medical parlance, the adjective "lethal" has usually been applied to inanimate objects, such as "weapons", or to force or actions, not to people or to children in utero. Traditionally persons are diagnosed with "terminal" conditions, not "lethal" ones. Thirdly, the use of such loaded terminology in the present discussion only prejudices the argument in favor of the conclusion that the child, whose life is dismissed as "futile", whose condition is tagged as "lethal" and a "threat" to the mother, should be eliminated. Such misleading language should be avoided in this discussion.<sup>10</sup>

This Memorandum considers the following matters relevant to the formal issue of early induction: status of the unborn child, duties to the mother, duties to the child in utero, the question of futility, and fetal sentence.

### **Status of the Unborn Child**

The public policy of every jurisdiction in Australia, and generally in the Anglo-Australian common law world, is designed to protect the life of the unborn child.<sup>11</sup> That same public policy is reflected in the United Nations *Declaration on the Rights of the Child* (1959) and in the *Convention on the Rights of the Child* (1989).<sup>12</sup> The primary test articulated in this Convention is stated in the following terms: "...the best interests of the child shall be a primary consideration" (*Article 3.1*). That same test is applied, even without reference to the Convention, in courts throughout the Commonwealth.<sup>13</sup> Applying that test to the present discussion, the question, framed rhetorically, becomes "How is it in the best interests of a child with a disability in utero to be 'better off dead'?"<sup>14</sup>

In each Australian state and territory, laws prohibit or severely restrict both a mother and a third party inducing an abortion. The letter of

the law, while restrictive, has not always respected fully the personhood of the unborn child; nor has the practice of the law in relation to abortion always been to apply the express provisions of the criminal statutes which prohibit abortion. As was stated in the submission to the High Court of Australia on behalf of the Australian Catholic Health Care Association and the Australian Catholic Bishops' Conference in proceedings involving a claim for damages for "wrongful birth" (September, 1996):

In the common law world, there is a complex mass of decisions relating to unborn children. These decisions are often difficult to reconcile. Their incoherence derives from the obvious fact that the unborn child is an individual organism of the human species and the objective, in certain respects, is to ensure that it does not have the rights of other human beings. The common law has not treated the unborn child as a legal person for all purposes....Modern knowledge entitles and strongly suggests that the Courts recognise, at least for the purposes of the most basic protection, that the unborn fully share the one thing in common in reality: being living individuals of the human species.<sup>15</sup>

The submission referred to lists a plethora of authorities from many jurisdictions which recognize duties of care owed to the unborn child and rights exercisable by him or her at or after birth. An extract of that submission is attached (see Appendix A). To them should be added the recent decision of the Court of Criminal Appeal (NSW) in *Reg. v F*<sup>16</sup> in which an unborn child was held to be a person for the purposes of determining whether a driver who caused her death could be charged with and convicted of culpable driving. Further cases and argument concerning the status of the child in utero, the duty owed to him or her, and the duties owed to his or her mother, are set out in the extensive study sponsored by the Australian Medical Association, the Medical Protection Association of Australia, the Royal Australian College of Obstetricians and Gynaecologists, the National Association of Specialist Obstetricians and Gynaecologists and the Australian College of Paediatrics prepared by John Seymour of the Australian National University Faculty of Law and a team of specialist medical and legal authors, *Fetal Welfare and the Law*. That report states, in relation to "highly invasive fetal therapy":

In assessing a pregnant woman for fetal surgery...the diagnosis of fetal compromise must be reliable, the natural history of the fetal condition in the absence of surgical intervention must predict a poor fetal outcome and, most



importantly the risks of the surgical procedure to the pregnant woman must be low.<sup>17</sup>

Although concerned formally with fetal therapy, these principles apply generally to the ultimate "therapy" of induction. For the purposes of the present discussion, we simply note the report's emphasis upon the primacy of reliable diagnosis, and that the interests of the child in utero and the mother must be assessed appropriately.

### **Duty of Care to Mothers and Children In Utero**

Two points may be made. First, the law does not, in general, impose a duty to provide medical treatment which is not medically indicated. Assuming that the child's condition is fatal for the child but untreatable, and that child's condition poses no threat to the life or health of his or her mother, any "treatment" would not be medically indicated for either child or mother and there is no duty to treat either.<sup>18</sup> Secondly, in the provision of medical treatment to the mother the law requires, *inter alia*, that she be advised of the range of physical and psychological consequences which would likely flow from the early induction of labor in relation to a child in utero in circumstances where, although the condition diagnosed in relation to the child is likely to be terminal for that child, that condition poses no threat to the life or health of the mother.<sup>19</sup>

Further, in the event that the diagnosis in relation to the child in utero was incorrect and an induction was performed, the likely severe psychological and other distress suffered by the mother (and father) could very likely result in those who had counseled or participated in such a course of conduct being sued in negligence. Liability would probably extend beyond the medical practitioners who performed the procedure to others who had contributed to the decision-making process. In addition, or in the alternative, to claims in tort, claims could be made for breach of contract between the patient(s) and the medical practitioner pursuant to which the practitioner (and the health care facility) agreed to provide certain services, which have not been so provided.<sup>20</sup> Further, whether or not the diagnosis of a terminal condition is accurate, those involved in inducing early labor for this reason may commit the offense of abortion and, if the child is born alive and then dies, the offenses of, *inter alia*, murder, manslaughter, or child destruction.<sup>21</sup>

The concept of futility being applied to a pregnancy in which a child is said to be diagnosed with one or more "lethal abnormalities", is inapt for another reason. If a claim was to be brought by the mother and/or the surviving child,<sup>22</sup> and/or the deceased child's legal representatives

against the treating doctors, health care staff, advisors and the relevant Catholic institution, a possible first line of inquiry would be to consider authoritative statements from within the Catholic community in relation to appropriate medical practice concerning so-called "lethal abnormalities." One such document, already referred to, is the National Conference of Catholic Bishops of the United States Committee on Doctrine statement, "Moral Principles Concerning Infants with Anencephaly"<sup>23</sup> ("the NCCB statement"). Those principles make plain that "the rights of a mother and her unborn child deserve equal protection because they are based on the dignity of the human person whatever the condition of that person."

In any litigation, a "best practice" standard in negligence and the terms implied in the contract between the health care provider and the mother and child could be measured against Church documents such as the *Catechism of the Catholic Church*, *Evangelium Vitae*, *Charter for Health Care Workers*, *Ethical and Religious Directives for Catholic Health Care Services (infra)*, and the NCCB statement, not only in relation to anencephaly but also in relation to any other "lethal abnormalities." To the degree that any procedure resulting in the early induction of labor breached the principles set out in these documents, it could well contribute to a finding of negligence, or breach of contract, against those who carried out or advised such a procedure.

### **Ethical Considerations<sup>24</sup>**

The parameters for this discussion were set in 1974 by the Congregation for the Doctrine of the Faith in the Declaration on Procured Abortion (*Questio de abortu*) and reaffirmed in 1995 by John Paul II in *Evangelium Vitae*. It is as well to recall the following from that encyclical:

Prenatal diagnosis, which presents no moral objections if carried out in order to identify the medical treatment which may be needed by the child in the womb, all too often becomes an opportunity for proposing and procuring an abortion. This is eugenic abortion, justified in public opinion on the basis of a mentality - mistakenly held to be consistent with the demands of "therapeutic interventions" - which accepts life only under certain conditions and rejects it when it is affected by any limitation, handicap or illness.

On a more general level, there exists in contemporary culture a certain Promethian attitude which leads people to think that they can control life and death by taking the decisions about them into their own hands. What really happens in this case



is that the individual is overcome and crushed by a death deprived of any prospect of meaning or hope. We see a tragic expression of all this in the spread of euthanasia - disguised or surreptitious, or practiced openly and even legally. As well as for reasons of a misguided pity at the sight of a patient's suffering, euthanasia is sometimes justified by the utilitarian motive of avoiding costs which bring no return and which weigh heavily on society. Thus it is proposed to eliminate malformed babies, the severely handicapped, the disabled, the elderly, especially when they are not self-sufficient, and the terminally ill.<sup>25</sup>

Against this background, if it be the case that no medical or surgical treatment is indicated which would cure the genetic or physical anomaly diagnosed in relation to the child, and given that that anomaly poses no threat to the life or health of the mother, and given that mothers are not incubators or artificial life support systems, and given that pregnancy is normal, and that healthy unborn children (even sick ones) are ordinarily in utero, one is hard-pressed to see that continuation of the pregnancy can be categorized as "futile". For the same reason, it is bizarre to suggest that there is some moral equivalence between the withdrawal of extraordinary treatment in relation to a terminal illness and the continuation of a pregnancy in relation to which the child in utero has been diagnosed as having a terminal condition when that abnormality poses no threat to the life or well-being of the mother.<sup>26</sup>

Further, if there is nothing wrong with depriving a terminally ill unborn child of basic necessities of life, there is nothing wrong with doing likewise with an identically affected newborn. For what is the difference between taking the unborn child from the safe environment of his or her mother's womb and exposing the child to the world, and taking an identically affected newborn from his or her incubator or special care unit and exposing the child in the hospital grounds? Morally and legally, the intention is to kill the child; equally so in relation to the non-medically indicated induction of a child with, say, anencephaly, at 16, 18 or 22 weeks' gestation. In such cases, the induction will kill the child (by whatever means - dilation and evacuation or the effects of prostaglandin[s]), and it will be the intention that it do so, whereas the induction of labor of such a child at term will not necessarily do so.<sup>27</sup>

The suggestion that continuing a pregnancy in case of diagnoses of children with terminal conditions and comparing it or relating it to the withdrawal of extraordinary treatment warrants another comment. As is well known, treatment need not be provided to a person who is terminally



ill where to do so is either futile or unduly burdensome. In this connection, the remarks of the NCCB Committee for Pro-Life Activities are apposite:

Financial and emotional burdens are willingly endured by most families to raise their children or to care for mentally aware but weak and elderly family members. It is sometimes argued that we need not endure comparable burdens to feed and care for persons with severe mental and physical disabilities, because their "quality of life" makes it unnecessary or pointless to preserve their lives.

But this argument - even when it seems motivated by humanitarian concern to reduce suffering and hardship - ignores the equal dignity and sanctity of all human life.

....It is one thing to withhold a procedure because it would impose new disabilities on a patient, and quite another thing to say that patients who already have such disabilities should not have their lives preserved. A means considered ordinary or proportionate for other patients should not be considered extraordinary or disproportionate for severely impaired patients solely because of a judgment that their lives are not worth living.<sup>28</sup>

The point to be made here is that if the analogy with extraordinary treatment has any merit at all, presumably it would have to be shown that the continuation of the pregnancy is either futile or unduly burdensome to the child or to the mother. It is especially inapt so to describe a pregnancy. It would lead to mothers describing themselves as being "futilely pregnant."<sup>29</sup>

Dr. Peter Cataldo, of the Pope John Center, commenting on the NCCB statement, observes, *inter alia*:

It can also be concluded from the NCCB statement that the mother's womb cannot be regarded as a useless life support system that may be terminated because in general there is no moral obligation to provide useless treatment. Given the inestimable human dignity of the anencephalic child, the uterine environment in which he or she lives is not useless since it is supporting nothing other than a fully human individual.<sup>30</sup>

Cataldo comments further, in the light of the *Ethical and Religious*

*Directives for Catholic Health Care Services* issued by the U.S. Bishops,<sup>31</sup> and the NCCB statement, that the psychological state of the mother does not qualify as a proportionate reason for terminating the life of the infant by inducing labor either before or after viability. He states:

The emotional trauma of the mother is a response to the condition of anencephaly, but the statement [of the NCCB] shows that the act in terminating a pregnancy is in itself directed at the infant not the mother: "Anencephaly is not a pathology of the mother, but of the child, and terminating her pregnancy cannot be a treatment of a pathology she does not have."<sup>32</sup>

Jarvis states the obvious:

The possible psychological effect arising from screening should also be borne in mind. Patients need to be adequately counseled before they enter a screening programme, whilst patients may need significant reassurance should investigations ultimately prove to be negative, *whilst other patients may suffer adverse psychological effects related to late termination of pregnancy.*<sup>33</sup> (emphasis added)

More expansively, in the light of a significant body of medical literature, Dr. McCullagh discusses the issue of "unresolved grieving." One citation from that discussion may suffice to indicate the inappropriateness of early induction on the basis that a woman is better off without carrying to term a child diagnosed with a fetal anomaly:

It was once thought that a woman would rapidly "get over" a stillbirth or a neonatal death, because she had not "known" the baby or known it for very long. Nothing, of course, could be further from the truth, as every woman who has experienced such a loss would well recognize.<sup>34</sup>

Induction of labor in relation to a child in utero diagnosed with a fetal anomaly which is non-life threatening to the health or welfare of the mother also raises the specter of fetal sentience and the pain and suffering imposed upon the child in utero in the course of induction.<sup>35</sup> The physical pain inflicted upon a child in utero must be a consideration in the determination of appropriate treatment.<sup>36</sup>

A final consequence of holding as licit early induction of labor in relation to a child in utero when his or her terminal condition poses no

threat to the life or well-being of his or her mother is that it immediately admits an exception to the prohibition against the intentional taking of innocent human life. As such it would establish a precedent for exceptions to the prohibition set out in paragraph 3 (*supra*) from *Evangelium Vitae*. As noted earlier, we are of the view that the early induction of labor concerning a child in utero, diagnosed with a terminal condition which is non-threatening to the life or health of his or her mother, is not morally licit and in common law jurisdictions such as Australia may be illegal.

Historically, of course, there are many examples where courts have sanctioned ever-expanding exceptions to basic principles, such as the prohibition against intentional killing or the inviolability of every person. One example will suffice. In the infamous case of *Buck v Bell*, the United States Supreme Court, in the course of authorizing the forced sterilization of mentally disabled persons said:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to avoid our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for imbecility, society can prevent those who are manifestly unfit from continuing their kind.<sup>37</sup>

As bizarre as these remarks are, an echo of them was still heard in 1976. In considering competing claims by the State and the individual in relation to reproductive rights, it was held that mental retardation was an identifiable category or type and that persons so diagnosed are in fact different from the general population. They may rationally be accorded different treatment for their benefit and the benefit of the public.<sup>38</sup> Sheila McLean comments on this case saying that the "compulsory prevention of the birth of a defective child or of a child whose parents could not properly care for it could be justified as reflecting a compelling state interest and therefore as not breaching the Fourteenth Amendment to the [U.S.] Constitution."<sup>39</sup>

It seems to us that an argument which proposes that a child, diagnosed in utero with a terminal condition which is not threatening to the life or health of his or her mother, should suffer certain death from early induction, is of a kind which could open the way for a slide in criteria from induction of labor concerning children with a terminal condition to the induction of labor for children with any kind of disability. Further, to grant such an exception allows for a slide from induction (for any reason) to



destructive abortion. The possibility for such "developments" should never be countenanced.

### Conclusion

For the reasons set out above, we are of the view that the early induction of labor in relation to a child diagnosed with a terminal condition, for the reason only that the child has a terminal condition, is not morally licit.<sup>40</sup> It may also expose those who counsel and perform it to criminal and civil liability.<sup>41</sup>

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### Appendix A

#### Sample Legal Authorities on the Status of the Unborn Child.

There is a growing body of law which recognize duties of care owed to the unborn child and rights exercisable by it at or after birth. See *Watt v. Rama* [1972] VR 353; *X and Y v. PAL* (1991) 23 NSWLR 26; *Lynch v. Lynch* (1991) 25 NSWLR 411; *Burton v. Islington Health Authority* [1993] QB 204, (1992) 3 All ER 833.

Moreover, it has been held that murder or manslaughter can be committed where unlawful injury is deliberately inflicted either to a child in utero or to a mother carrying a child in utero in certain circumstances. *Attorney General's Reference (No. 3 of 1994)* [1996] 2 WLR 412 at 426-427, 2 All ER 10 at 22 (CA); see also *R. v. Martin* (Supreme Court of Western Australia, Owen J, 8 December, 1995, unreported); *R. v. Rinley* (Western Australian Court of Criminal Appeal, 4 April, 1996, unreported); *R. v. Lippiatt* (District Court of Queensland, Judge Hoath, 24 May, 1996, unreported). See also the judgment of Slicer J in *Re K, ex parte The Public Trustee of Tasmania* (Supreme Court of Tasmania, [1996] 5 Tas R 365) which contains many references to various decisions and statutory provisions which deal with the status (in various contexts) of the unborn child. These decisions are not coherent with each other.

The same incoherence is reflected in those cases in which the standing of third parties to protect the interests of the unborn child is in issue. For example, see *Attorney-General (Old) (Ex rel Kerr) v. T* (1983) 46 ALR 275; *In the Marriage of F and F* (1989) FLC 92-031; *Paton v. Trustees of British Pregnancy Advisory Services* [1979] QB 276 (1978) 2 All ER 987; *Tremblay v. Daigle* (1989) 62 DLR (4th) 634 ( a father has no

standing to restrain the abortion of his unborn child); *Planned Parenthood of Central Missouri v. Danforth* (1976) 428 US 52; *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) US 120 L Ed 2d 674, (1992) 112 S Ct 2791 (a father is not to be notified of the intended abortion of his unborn child); *C v. S* [1988] QB 135, (1987) 1 All ER 1230 (when is a child "capable of being born alive")' *Re F In Utero* [1988] Fam 122, (1988) 2 All ER 193 (a court has no jurisdiction to make an unborn child a ward); *In re S (adult refusal of medical treatment)* [1993] Fam 123, (1992) 4 All ER 671 (a health authority is entitled to apply for declaratory relief to override the refusal of a mother to consent to an operation to avert medical risk to herself and her child in utero); *Rance v. Mid-Downs Health Authority* [1991] 1 QB 587 (parents not entitled to abort a child capable of being born alive nor are they entitled to recover the cost of raising and caring for a child born with spina bifida); *R v. Tait* [1989] 3 All ER 682 (a threat to a mother to kill her child in utero by bringing about a miscarriage does not constitute the offense of making a threat to kill); *Whitner v. State of South Carolina* (no. 24468: Supreme Court of South Carolina, 15 July, 1996) (a mother who ingested crack cocaine during her pregnancy, and whose child was born with cocaine metabolites in the child's system, pleaded guilty to criminal child neglect); *Wall v. Livingstone* [1982] 1 NZLR 734 (a doctor is not entitled to challenge the opinion of other medical practitioners to abort a child in utero).

*Cf. Convention on the Rights of the Child*, 1989 (Preamble: "...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"; *Article 6* "1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child"); and generally see Nancy Rhoden "The New Neonatal Dilemma: Live Births from Late Abortions" (1984) 72 *Georgetown Law Journal* 1451-1509.

## References

1. We take "early induction" to mean the medically induced delivery of a child at any stage prior to his or her anticipated complete gestation period. See generally the following representative materials germane to this study, *Williams Obstetrics* 20th Edition (Stamford, CT: Appleton & Lange, 1997) Section V, "Abnormal Labor" and Section XI "Fetal Abnormalities: Inherited and Acquired Disorders"; G.J. Jarvis, *Obstetrics and Gynaecology: A Critical Approach to the Clinical Problems* (Oxford: Oxford University Press, 1994), Ch. 16 "Prenatal Diagnosis" and Ch. 19 "The Induction of Labour"; A. Boué, *Fetal Medicine: Prenatal*



*Diagnosis and Management* (Oxford: Oxford University Press, 1995); A. Goldworth, W. Silverman, D. Stevenson & E. Young (eds.) *Ethics and Perinatology* (New York: Oxford University Press, 1995); P. McCullagh, *The Fetus as Transplant Donor: Scientific, Social and Ethical Perspectives*, (Chichester: John Wiley & Sons, 1987); *id.* *Brain Dead, Brain Absent, Brain Donors: Human Subjects or Human Objects?* (Chichester, John Wiley, 1993); B. Ashley, OP, *Theologies of the Body: Humanist and Christian* (Braintree, MA: The Pope John Center, 1985 & 1995); D.A. Shewmon, "Anencephaly: Selected Medical Aspects," *Hastings Center Report* (October/November, 1988) 11-19; J.E. Smith, "Ethical Aspects of Tissue and Organ 'Donation' by Preborn and Anencephalic Infants" in *Critical Issues in Contemporary Health Care* (ed. R.E. Smith)(Braintree, MA: Pope John Center, 1989) 253-268.

2. On the subject of "authoritative teaching" generally, see the useful remarks of J.A. DiNoia, OP, in "Authority, Public Dissent and the Nature of Theological Thinking," *The Thomist* 52 (April, 1988) 185-207. Fr. DiNoia is Executive Director of the United States National Conference of Catholic Bishops Committee on Doctrine.

3. Similar issues of potential criminality and civil liability arise in relation to the withdrawal of the nonburdensome or nonfutile provision of nutrition and hydration, that is, "comfort care", from persons with a terminal illness or who are classed as "permanently unconscious."

4. Generally, see, for example, P. Doherty (ed.) *Post-Abortion Syndrome: Its Wider Ramifications*, (Dublin: Four Courts Press, 1995); E. Joanne Angelo, "Women and Health Care: A Catholic Perspective," in *The Splendor of Truth and Health Care* (ed. R.E. Smith)(Braintree, MA: The Pope John Center, 1995) 127-145.

5. Cf. the following remarks from *Veritatis Splendor* (n.71)(emphasis in original):

Human acts are moral acts because they express and determine the goodness or evil of the individual who performs them. [*Summa Theologiae*, I-II, q.1, a.3] They do not produce a change merely in the state of affairs outside of man but, to the extent that they are deliberate choices, they give moral definition to the very person who performs them, determining his *profound spiritual traits*. This was perceptively noted by St. Gregory of Nyssa:

All things subject to change and to becoming never remain constant, but continually pass from one state to another, for better or worse... Now, human life is always subject to change; it needs to be born ever anew... But here birth does not come about by a foreign intervention, as is the case with bodily beings...;it is the result of a free choice. Thus, *we are* in a certain way our own parents, creating ourselves as we will, by our decisions.

[Gregory of Nyssa, *Life of Moses*, II, 2-3, PG 44, 327-328.]



6. *Catechism of the Catholic Church*, pars. 2270-2275; *Evangelium Vitae*, nn. 58-63; *Donum Vitae*, I.1; *Quaestio de abortu*, nn. 12 & 20.

7. *Evangelium Vitae AAS*, Vol. LXXXVII, (2 May 1995), 401 at pp. 465, 467 & 472. Cf. *Veritatus Splendor*, n. 52:

....The negative precepts of the natural law are universally valid. They oblige each and every individual, always and in every circumstance. It is a matter of prohibitions which forbid a given action *semper et pro semper*, without exception, because the choice of this kind of behaviour is in no case compatible with the goodness of the will of the acting person, with his vocation to life with God and to communion with his neighbour. It is prohibited - to everyone and in every case - to violate these precepts. (emphasis in original)

8. "Moral Principles Concerning Infants With Anencephaly," Statement of NCCB Committee on Doctrine, 20 September 1996: text in *Origins* Vol. 26 (10 October, 1996) 276.

9. Cf. the remarks in *Donum Vitae*, I.2, cited further in a discussion of prenatal diagnosis in the *Charter for Health Care Workers* issued by the Pontifical Council for Pastoral Assistance to Health Care Workers (1995): "Prenatal diagnosis is gravely contrary to the moral law when it contemplates the possibility, depending on the result, of provoking an abortion. A diagnosis revealing the existence of a deformity or a hereditary disease should not be equivalent to a death sentence." *Charter for Health Care Workers*, para. 61. See further, *Evangelium Vitae*, n.14.

10. For a discussion of inappropriate terminology, see the remarks of Pope John Paul II in *Evangelium Vitae*, n. 58 where he notes the use of "ambiguous terminology", such as "interruption of pregnancy" in relation to abortion, and insists on calling "things by their proper names without yielding to convenient compromises or to the temptation of self-deception."

11. The history of the law on abortion in England, which is directly relevant to the law on abortion in Australia - and many other common law jurisdictions - is set out in J. Keown, *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803-1982* (Cambridge: Cambridge University Press, 1988). For a thorough-going philosophical analysis of abortion, see P. Lee, *Abortion & Unborn Human Life*, (Washington, D.C.: The Catholic University of America Press, 1996). More generally, see B. Ashley, OP and A. Moraczewski, OP, "Is the Biological Subject of Human Rights Present from Conception?" in *The Fetal Tissue Issue: Medical and Ethical Aspects*, (P. Cataldo and A. Moraczewski, eds.) (Braintree, MA: The Pope John Center, 1994) 33-59 and W.E. May, "The Sacredness of Life: An Overview of the Beginning," *The Linacre Quarterly* 63 (February, 1996) 87-96.

12. "...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." *Convention on the Rights of the Child* (1989), Preamble. See also Article 6 of the same Convention and similar provisions in the *International Covenant on Civil and Political Rights* (1966)(Article 6) and the *Universal Declaration of Human Rights* (1948).

13. See, for example, *Secretary, Department of Health & Community Services v. JWB and SMB* (1992) 175 CLR 218 and cases cited therein.

14. The notion of death being in someone's best interests has been shown to be philosophically incoherent by, among others, R.M. Hare. Generally, see his *Essays on Bioethics* (Oxford: Clarendon Press, 1993). Of course, the description of someone being "better off dead" is found more usually in the debate over euthanasia. For example, see the instructive essays by Gilbert Meilaender, "Terra es animata: 'On Having a Life'," *Hastings Center Report* 23 (July-August, 1993) 25-32 & R. Destro, "Guaranteeing the 'Quality' of Life through Law: The Emerging Right to a 'Good' Life," in *Guaranteeing the Good Life: Medicine & the Return of Eugenics*, (ed. R.J. Neuhaus) (Grand Rapids, MI: William B. Eerdmans Publishing Co., 1990) 229-266.

15. The intervention was in an appeal from the decision *CES v. Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47, a case which has generated significant comment in medico-legal literature. See note 18, *infra*, and article forthcoming.

16. (1996) 40 NSWLR 245.

17. *Fetal Welfare and the Law*, (1995), p. 29.

18. The extent to which such an analysis may be affected by the NSW Court of Appeal decision in *CES v. Superclinics Australia Pty Ltd*. (1995) 38 NSWLR 47 (which dealt with damages for "wrongful birth" as a result of negligence in diagnosing pregnancy) is unclear, particularly given that the three judges in that case expressed different views on almost every aspect of it (see, e.g. Andrew Grubb, "Wrongful Birth and Legality of Abortion" [1996] 4 *Medical Law Review* 102-110; Lynda Crowley-Smith, "Therapeutic Abortions and the Emergence of Wrongful Birth Actions in Australia: A Serious Danger to Mental Health," [1996] 3 *Journal of Law and Medicine* 359-370; Kerry Petersen, "Wrongful Conception and Birth," [1996] 18 *Sydney Law Review* 503-522; Jane Swanton, "Damages for Wrongful Birth", [1996] 4 *Torts Law Journal* 1). The High Court granted leave to appeal from that decision but the case was settled before the full hearing of the appeal was completed. A convenient discussion of wrongful life, wrongful conception and wrongful birth jurisprudence from the United Kingdom and the United States is provided by Ian Kennedy and Andrew Grubb, *Medical Law: Text with Materials* (second Edition) (London: Butterworths 1994) Ch. 13 "Actions by children and parents arising from occurrences before birth," pp. 927-1006.



19. On the duty to advise and to provide information, see *Rogers v. Whitaker* (1992) 175 CLR 479 *cf.* *Bolam v. Friern Hospital Management Committee* [1965] 1 WLR & *Sidaway v. Governors of Bethlem Royal Hospital* [1985] AC 871. And also see references in note 34, *infra*.

20. In relation to breach of contract in the provision of medical services, see J. Devereux, *Medical Law: Text, Cases and Materials*, (Sydney: Cavendish Publishing, 1997) Ch. 2; I. Kennedy and A. Grubb, *Medical Law: Text with Materials*, *op cit.* pp. 70-78.

21. See generally, J. Keown, *Abortion, Doctors and the Law*, *op cit.*, chapters 1 and 2; *id* "The Scope of the Offence of Child Destruction" (1988) 104 *Law Quarterly Review* 120-142; *Howard's Criminal Law* (B. Fisse) (Fifth Edition) (Sydney, The Law Book Company, Limited, 1990) Chapter 2 D (vi) and Chapter 3 B (vii) and literature there cited; *Law and Medical Ethics* (J.K. Mason & R.A. McCall Smith) (Fourth Edition) (London: Butterworths, 1994) Chapters 5-7; *Abortion Regimes* (K.A. Petersen) (Aldershot: Dartmouth, 1993) and see references in notes 21 and 23 herein.

22. See N. Rhoden, "The New Neonatal Dilemma: Live Births from Late Abortions" (1984) 72 *Georgetown Law Journal* 1451-1509 and M. Eburn, "The Legal Status of a Living Abortus," (1997) 4 *Journal of Law and Medicine* 373-378.

23. *op cit.*, see note 8.

24. For a recent summary of views concerning the ethics of early induction, see K. O'Rourke, OP, "Ethical Opinions in Regard to the Question of Early Delivery of Anencephalic Infants", *The Linacre Quarterly* 63 (August, 1996) 55-59. Generally, see the conclusion of Ashley and O'Rourke in *Health Care Ethics* (4th Edition) (Washington, D.C.: Georgetown Press, 1997) p. 263: "...we believe the anencephalic infant should be allowed to go to term, be baptized, and be allowed to die..." The principles set out by Ashley and O'Rourke seem to us to be apposite for all situations involving the terminal condition of a child *in utero* which is not threatening to the life or health of his or her mother. Fr. Ford, in a recent piece ("Duty of Care for a Fetus with a Lethal Abnormality" *Caroline Chisholm Centre for Health Ethics Bulletin* [Winter, 1997] 11-12) comes to a different conclusion. In doing so, he does not consider a number of articles which are contrary to his conclusion, including that by Fr. O'Rourke. Further, although the title of his paper is presented in legal terms of "duty of care", Fr. Ford does not address legal issues in his paper.

25. *Evangelium Vitae*, nn.14 and 15, AAS., Vol. LXXXVII, (2 May 1995) 401 at pp. 416 & 417.



26. See N. Tonti-Filippini, "The Status of Anencephalics," *The Australasian Catholic Record*, Vol. LXIII (April, 1986) 169-78.

27. Generally, see Lord Goff's useful article, "The Mental Element in the Crime of Murder," (1988) 104 *Law Quarterly Review* 30-59. See also the remarks of the Pontifical Council for Pastoral Assistance to Health Care Workers, *Charter for Health Care Workers* (1995) paras. 140-142 & see note 35 *infra*.

28. "Nutrition and Hydration: Moral and Pastoral Reflections" (2 April, 1992): text as in *Catholic International* 3 (1-14 July, 1992) 620-632 at 627 & 628.

29. Further comment on the question of futility, and more particularly undue burden, is provided in the informative paper of Dr. Goodwin in the proceedings of the 15th Workshop for Bishops in Dallas, Texas in 1996 entitled "Medical and Ethical Considerations Regarding Early Induction of Labor," in *The Gospel of Life and the Vision of Health Care* (ed. R. Smith) (Braintree, MA: The Pope John Center, 1996) 34-45. Dr. Goodwin comments: "If there is no substantive risk to the mother's health, then it is appropriate to the child *in utero*, no matter how malformed, to continue to the natural terminus of its existence.", *ibid.*, at p. 42.

30. P.J. Cataldo, "The NCCB on Anencephaly" *Ethics & Medics* 22 (January 1997) 3-4.

31. 1 December 1994; text in *Origins* Vol. 24 (15 December 1994) 449-462.

32. "The NCCB on Anencephaly," *op cit.* at p. 4.

33. G.J. Jarvis, *Obstetrics and Gynaecology*, *op cit* 446. He cites in support, J.M. Green, "Prenatal Screening and Diagnosis: Some Psychological and Social Problems," (1990) 97 *British Journal of Obstetrics and Gynaecology* 1074-76.

34. B. Raphael, "Grieving over the Loss of a Baby," (1986) 144 *Medical Journal of Australia* 281-82; P. McCullagh, *Brain Dead, Brain Absent, Brain Donors*, *op cit*, Chapter 5 "Brain Absence: Use of the Anencephalic Infant in Transplantation", especially at 160-163 and notes thereto.

35. Two matters should be noted. First, there is, of course, a distinction between the administration of analgesia and the administration of anesthesia and the amnesiac effect of some anesthetic agents. The relevance of the distinction, which is beyond the purview of this article, is discussed in the studies listed in note 36, *infra*. Secondly, the usual methods of induction would be dilation and evacuation or administration of prostaglandin(s). In the former case, death will ensue immediately; in the second, death will follow, usually from hypoxia, and/or the force of the contractions in the course of labor. Generally, see *Williams Obstetrics*, *op cit*, pp. 301 *ff.* and pp. 595 *ff.* These methods of induction would be *prima facie* evidence of an intention to kill the fetus, as opposed to the medically-indicated

induction of labor, an unintended consequence of which is the death of the child.

36. Generally of fetal sentience, see P. McCullagh, "Foetal Sentience" *Hospital Update* (January, 1996) 5-6 and P. McCullagh and J. McLean, *Fetal Sentience*, a paper published by the (UK) All-Party Parliamentary Pro-Life Group (undated); P. McCullagh, "Fetal Sentience and Fetal Surgery" in *Recent Advances in Anaesthesia & Analgesia* 20 (eds. A.P. Adams & J.N. Cashman) (in press).

37. 274 US 200 at p. 207 (1927). Australian cases are tending in the same direction in recent years: see Jennifer Ford, "Sterilisation of Young Women with an Intellectual Disability: A Comparison between the Family Court of Australia and the Guardianship Board of New South Wales," (1996) 10 *Australian Journal of Family Law* 236-262 & Nick O'Neill, "Sterilisation of Children with Intellectual Disabilities," (1996) 2 *Australian Journal of Human Rights* 262-277. (Mr. O'Neill is President of the Guardianship Court of New South Wales.)

38. *North Carolina Association for Retarded Children v. State of North Carolina* 420 F. Supp. 451 (1976).

39. S. McLean, "The Right to Reproduce," in *Human Rights: From Rhetoric to Reality*, (T. Campbell, D. Goldberg, S. McLean, T. Mullen, eds.) (Oxford: Blackwells, 1986) 99-122 at p. 112.

40. We note the conclusion of Kevin O'Rourke, OP to the same effect in relation to anencephaly:

Because intervention in the pregnancy of an anencephalic infant results in a direct killing of an innocent human being, the only suitable, ethical opinion seems to be to allow the pregnancy to go to term, baptizing the infant and allowing parents to hold the infant as it is allowed to die....This seems to be the only conclusion in accord with traditional Catholic teaching.

"Ethical Opinions in Regard to the Question of Early Delivery of Anencephalic Infants", op cit, 58. See also the remarks of pediatric surgeon, Professor Emmanuel Sapin of St. Vincent de Paul Hospital, Paris, in a paper to the Tenth International Conference organized by the Pontifical Council for Pastoral Assistance to Health Care Workers, *Vade et Tu Fac Similiter: From Hippocrates to the Good Samaritan* (Rome: 23-25 November, 1995):

The lack of an ability to treat a detectable anomaly before the birth of a child inevitably leads to the proposal to abort. In the case of a chromosome anomaly, as for example with the trisomy 21 syndrome, we are dealing with nothing less than the conscious selection of individuals, and this amounts to eugenics. In the case of an inherited illness such as mucoviscidosis or myopathy this is part of the

philosophy of euthanasia, and more particularly of prenatal euthanasia.

"The Horizons of Fetal Medicine and its Ethical Consequences," *Dolentium Hominum* 31 (1996) 155-158 at 158.

41. We do not consider the situation where the pregnancy has reached term but labor has not commenced. This scenario is outside the formal terms of the article.