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# The Federal Fetal Experimentation Regulations: An Establishment Clause Analysis

Jane M. Friedman

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# The Federal Fetal Experimentation Regulations: An Establishment Clause Analysis

Jane M. Friedman\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	962
II. HISTORY AND DESCRIPTION OF FETAL EXPERIMENTATION POLICY AND REGULATION .....	963
A. FEDERAL REGULATION PRIOR TO THE RECOMMENDATIONS OF THE NATIONAL COMMISSION .....	963
1. <i>The Absence of Pre-1973 Regulation</i> .....	963
2. <i>The 1973 and 1974 Regulations</i> .....	966
3. <i>The Function and Structure of the National Commission</i> .....	967
B. THE RECOMMENDATIONS OF THE NATIONAL COMMISSION .....	969
C. THE CURRENT LAW—THE FEDERAL REGULATIONS OF 1975 .....	970
1. <i>The Substantive Provisions</i> .....	970
2. <i>The Ethical Advisory Boards</i> .....	973
a. Rulemaking Powers .....	973
b. Advisory Powers .....	974
c. Adjudicatory Powers—The Waiver Provision .....	974
III. AN ESTABLISHMENT CLAUSE ANALYSIS .....	976
A. INTRODUCTION .....	976
B. THE DEVELOPMENT OF THE FOUR FACTORS—THE GOVERNING CASES .....	977
C. APPLICATION OF THE ESTABLISHMENT CLAUSE TEST TO THE FEDERAL FETAL EXPERIMENTATION REGULATIONS .....	985
1. <i>Governmental Sanction of a Moral Precept that is not Buttressed by any Societal Consensus</i> .....	985
2. <i>The Coercive Impact of the Regulations</i> .....	986
3. <i>Evidence of Strong Religious Pressures for Enactment of the Law</i> .....	987
a. The Reports of the Commission's Scientific Consultants .....	989
b. The Writings and Recommendations of the Commission's Ethical Consultants .....	991
(1) The Fetal Personhood Premise .....	991
(2) The Immorality of Abortion .....	993

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(3) The Guiding Spirit—Judeo-Christian Tradition .....	994
4. <i>A Search for an Extrinsic Secular Purpose</i> .....	998
a. The "Domino Effect" .....	998
b. Preserving a Woman's Right to Change Her Decision to Undergo an Induced Abortion .....	1000
IV. CONCLUSION .....	1004

### I. INTRODUCTION

In 1973 in *Roe v. Wade*<sup>1</sup> the Supreme Court declared that the unborn are not included in the constitutional definition of person. In spite of that decision, or perhaps as a direct result of it, biomedical experiments utilizing fetuses or fetal tissue continue to be controversial.<sup>2</sup> Participants in the debate over fetal research<sup>3</sup> include theologians and other "religious ethicists,"<sup>4</sup> the legislatures of sixteen states,<sup>5</sup> the United States Congress,<sup>6</sup> a federal advisory commission,<sup>7</sup> and, on three occasions, the Department of Health, Education, and Welfare (HEW).<sup>8</sup>

Under the current HEW fetal experimentation regulations<sup>9</sup> the Secretary is virtually precluded from funding any biomedical research project that uses the fetus as an experimental object, either before, during, or after an abortion. Although technically applicable only to HEW-funded research,<sup>10</sup> which comprises more than 62 percent of all federally-funded research and more than 40 percent of *all* biomedical research in the United States,<sup>11</sup> the

1. 410 U.S. 113 (1973).

2. In an article describing the debate over fetal experimentation, Dr. Willard Gaylin and Dr. Marc Lappé coined the phrase "fetal politics." See Gaylin & Lappé, *Fetal Politics*, ATLANTIC MONTHLY, May 1975, at 66.

3. For a description of the kinds of fetal research that have been conducted and the results that have been obtained, see REPORT OF THE NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH 7-15 (1975), reprinted in part at 40 Fed. Reg. 33,530 (1975) [hereinafter cited as COMMISSION REPORT]; Note, *Fetal Experimentation: Moral, Legal, and Medical Implications*, 26 STAN. L. REV. 1191, 1192-97 (1974).

4. See, e.g., P. RAMSEY, THE ETHICS OF FETAL RESEARCH (1975); Walters, *Ethical Issues in Experimentation on the Human Fetus*, 2 J. RELIGIOUS ETHICS 33 (1975).

5. See note 202 *infra*.

6. See National Research Service Award Act of 1974, Pub. L. No. 93-348, tit. 2, §§ 201-205, 88 Stat. 348; notes 32-33 *infra* and accompanying text.

7. See notes 33-50 *infra*, and accompanying text.

8. See text accompanying notes 29-31 & 51-84 *infra*.

9. 40 Fed. Reg. 33,528 (1975), 45 C.F.R. §§ 46.201-.211 (1976).

10. 45 C.F.R. §§ 46.201(a), .301 (1976).

11. Letter from Richard W. Turlington, Chief of Office of Grant Inquiries, Division of Research Grants, National Institutes of Health, to author (Aug. 18, 1975) (on file with the author).

regulations, as an official statement of federal policy, will undoubtedly have great influence on other granting agencies, both public and private.<sup>12</sup>

Paradoxically, the federal government admits that fetal research has been indispensable to numerous biomedical advances, and that had such research been proscribed in the past, progress in diagnosing, preventing, and treating many pernicious diseases would have been "significantly delayed or halted indefinitely."<sup>13</sup>

It is the thesis of this Article that in making fetal experimentation taboo, the federal government is acting not only irrationally but also unconstitutionally. Because the current restrictions are the product of an essentially religious dispute concerning fetal status—a controversy that the federal government has "resolved" in favor of the fundamentalist Judeo-Christian premise of fetal personhood<sup>14</sup>—and because there is no extrinsic secular justification<sup>15</sup> for the broad restrictions, the regulations violate the first amendment's prohibition of governmental establishment of religion.

## II. HISTORY AND DESCRIPTION OF FETAL EXPERIMENTATION POLICY AND REGULATION

### A. FEDERAL REGULATION PRIOR TO THE RECOMMENDATIONS OF THE NATIONAL COMMISSION

The pre-1975 history of federal fetal experimentation policy has been recounted elsewhere.<sup>16</sup> This portion of the Article will briefly summarize only those events that are not discussed in the other published historical accounts.

#### 1. *The Absence of Pre-1973 Regulation*

This author has been unable to find any evidence of legislation or regulation directed specifically at fetal experimentation before April 1973. Indeed, as recently as 1972, the federal gov-

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12. This has certainly been the case with respect to HEW regulations regarding funding of other controversial scientific endeavors. For example, the HEW regulations governing recombinant DNA research, 41 Fed. Reg. 27,902 (1976), have been formally adopted by the American Cancer Society, the National Science Foundation, and several other private and public funding agencies. Private communication from Dr. David Jackson, Associate Professor of Microbiology, University of Michigan, to author (Aug. 8, 1977).

13. COMMISSION REPORT, *supra* note 3, at 24.

14. See notes 167-80 *infra* and accompanying text.

15. See notes 183-202 *infra* and accompanying text.

16. See, e.g., RAMSEY, *supra* note 4; Note, *supra* note 3, at 1197-203.

ernment's policy was described as follows: "Scientific studies of the human fetus are an integral and necessary part of research concerned with the health of women and children."<sup>17</sup> Exactly one year later, however, an official of the National Institutes of Health (NIH)<sup>18</sup> announced a radical change of position: "The NIH does not now support research on live aborted human fetuses, and does not contemplate approving the support of such research . . . . We know of no circumstances at present or in the foreseeable future which would justify NIH support of research on live aborted human fetuses."<sup>19</sup>

What had happened in the interim, of course, was the Supreme Court's abortion decision in *Roe v. Wade*,<sup>20</sup> which caused anti-abortionists to lobby strongly for measures ensuring that the "permissive abortion atmosphere"<sup>21</sup> would not lead the government to give its imprimatur to the use of the aborted fetus as an experimental research object.<sup>22</sup> Dr. Mark Frankel, a political

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17. Ob-Gyn News, Apr. 15, 1973, at 56.

18. The National Institutes of Health is a unit within the Department of Health, Education, and Welfare.

19. Statement of Dr. Robert Betliner, NIH Deputy Director of Science, quoted in *Health Agencies Ponder Research on Human Ethics*, N.Y. Times, Apr. 13, 1973, at 20, col. 3. The statement was read by Dr. Charles Lowe at a meeting which was attended by several anti-abortion groups. For the background of this statement, see notes 130-31 *infra* and accompanying text.

20. 410 U.S. 113 (1973). The precise legal relevance of the abortion decision for the issue of fetal research is not clear. The Court stated in *Roe* that the interest of the woman in deciding whether to bear a child or terminate her pregnancy was an element of the right to privacy. *Id.* at 152-54. In a balance between her interest and the interest of the state—which the Court identified as the interest in protecting potential life—the woman's right prevails in the first trimester. The state's interest becomes stronger as the pregnancy continues, however, and becomes "compelling" at the point of viability. *Id.* at 163. Neither of these interests is affected by research using fetuses. Certainly, so long as a woman's right to have an abortion within the *Roe* guidelines is not interfered with, her privacy interests are not infringed by any restriction on fetal research. The non-viable fetus of a woman who has chosen to have an abortion or the non-viable abortus by definition have no potential for life; thus there is nothing for the state to protect. See Note, *supra* note 3, at 1205. For a discussion of other interests that the state may raise in support of restrictions on fetal research, see notes 183-202 *infra* and accompanying text.

21. Press Release, U.S. Catholic Conference, quoted in *Health Agencies Ponder Research on Human Ethics*, N.Y. Times, Apr. 13, 1973, at 20, col. 3.

22. The assumption that liberalized abortion laws would provide scientists with a heretofore unavailable supply of fetuses for research, see, e.g., Note, *supra* note 3, at 1191, has been disputed by one commentator. He points out that even before *Roe v. Wade*, there was no shortage of subjects for those few scientists trained and interested in fetal re-

scientist who has studied the history and politics of the anti-fetal research movement,<sup>23</sup> has given the following account of the relationship between *Roe v. Wade* and national fetal experimentation policy:

The reaction to the [*Roe and Doe*<sup>24</sup>] rulings reflected the narrow division of public opinion on legalized abortion.<sup>25</sup> Proponents of abortion hailed it as a "tremendous victory," while anti-abortion groups promised to "work with more vigor than ever" to overturn the Court's decisions.<sup>26</sup> Anti-abortionists soon launched a massive campaign aimed at mobilizing enough support to cause the reversal of the Supreme Court's rulings. As part of that campaign, a number of proposals were introduced in Congress that would have either imposed an absolute ban on abortion or permitted the states to regulate abortion in any manner they judged proper.<sup>27</sup>

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With only slow and piecemeal success in their efforts to steer anti-abortion legislation through Congress, it is not surprising

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search. He also notes that the prevalence of early abortion has actually decreased the availability of the relatively large, intact, living, but non-viable fetuses used, for example, in projects studying the feasibility of transplanting fetal organs. Levine, *The Impact on Fetal Research of the Report of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research*, 22 VILL. L. REV. 367, 370 (1977).

23. See M. Frankel, *The Politics of Human Research* (May 1, 1977) (unpublished manuscript). Dr. Frankel is an Assistant Professor of Political Science at Wayne State University.

24. *Doe v. Bolton*, 410 U.S. 179 (1973), was a companion case to *Roe v. Wade* (footnote added).

25. A Gallup Poll taken in the month before the Supreme Court's rulings found the public to be almost evenly divided on the issue, with 46 percent in favor, 45 percent opposed, and 9 percent undecided. *Washington Post*, Jan. 28, 1973, § A, at 5, col. 2. (footnote in original; renumbered).

26. *Abortion Backers Hail Ruling; Foes Pledge Continued Fight*, *Washington Post*, Jan. 23, 1973, § A, at 2, col. 4. (footnote in original; renumbered).

27. During the 1973 congressional session more than thirty pieces of legislation relating directly to abortion were introduced. See J. SARGENT, *THE ABORTION CONTROVERSY: LEGISLATIVE AND JUDICIAL ACTIONS FOLLOWING THE SUPREME COURT'S INVALIDATION OF RESTRICTIONS UPON ACCESS TO ABORTIONS: ANALYSIS AND INTERPRETATION* (1974); U.S. COMM'N ON CIVIL RIGHTS, *CONSTITUTIONAL ASPECTS OF THE RIGHT TO LIMIT CHILD-BEARING* (1975) [hereinafter cited as *RIGHT TO LIMIT CHILDBEARING*]. (footnote in original; renumbered).

By no means has the controversy Dr. Frankel discussed abated. Anti-abortionists won significant victories in three recent Supreme Court decisions. In *Beal v. Doe*, 97 S. Ct. 2366 (1977), the Court held that Title IX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (Medicaid), does not require participating states to fund "nontherapeutic" abortions. In a companion case, *Maher v. Roe*, 97 S. Ct. 2376 (1977), the Court also held that state regulations prohibiting such funding do not deny Medicaid recipients equal protection of the law and do not unduly burden their exercise of the fundamental right to seek an abortion. Finally, in *Poelker v. Doe*, 97 S. Ct. 2391 (1977), the Court ruled

that anti-abortionists latched on to the fetal research controversy as a complementary means for achieving their objective. The strategy of anti-abortion groups was to establish the fetus as a person with full legal rights. If it was determined that a fetus was a "person" for the purposes of medical research, that would be one step closer to judging the fetus to be a "person" in the context of abortion. This position was the crucial link between the anti-abortion movement and fetal research. Once the fetus was legally recognized as a person, then a total ban on abortion might soon follow. As the nation debated the issues, the arguments surrounding abortion and fetal research became caught up in a funnel of confusion. Distinctions between the two issues were often ignored, if not purposely blurred. It is against this background that NIH and congressional activity can be more clearly understood.<sup>28</sup>

## 2. *The 1973 and 1974 Regulations*

In response to pressure from anti-abortion groups, HEW promulgated regulations in November 1973, that virtually prohibited HEW-supported scientists from engaging in *any* non-therapeutic<sup>29</sup> experimentation that employed the fetus as a

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that it does not deny equal protection for city-owned hospitals to provide facilities and services for childbirth while refusing to provide facilities and services for "nontherapeutic" abortions.

28. Frankel, *supra* note 23, at 211-13. Dr. Charles Lowe, the official who announced the NIH policy shift, *see* note 19 *supra*, subsequently admitted that the government's anti-fetal experimentation stance was primarily a response to the lobbying efforts of anti-abortionists, noting that after *Roe v. Wade*

[a] whole series of bills introduced in Congress . . . seemed to have the intention of prohibiting fetal research, hoping that the net effect would be a reduction in the number of abortions performed in this country. *Somehow certain legislators seemed to become convinced that fetal research encouraged abortion, and that curtailing fetal research would diminish the number of abortions.*

Lowe, *On Legislating Fetal Research*, in *GENETICS AND THE LAW* 352-54 (A. Milunsky & G. Annas eds. 1976) (emphasis added).

Another recent commentator has made a similar observation about the connection between the anti-abortion lobby and the move to limit fetal experimentation:

Once the opponents of abortion lost political control over the abortion procedure, even in those states where they believed that they held a majority, only one avenue was left open to them—a constitutional amendment that would limit the practice. To accomplish such an amendment in the face of determined liberal opposition would necessarily require neutralization of any general societal gains from the procedure. Research on the about-to-be-aborted fetus became a prime target of abortion opponents.

Nathan, *Fetal Research: An Investigator's View*, 22 *VILL. L. REV.* 384, 386 (1977).

29. In "non-therapeutic" research, although there is potential benefit to others, the data obtained are not used with the intent or expectation of treating an illness from which the patient is suffering. "Non-therapeutic" is not to be equated with "harmful," but is to be contrasted with "therapeutic" research, which is aimed at providing direct benefit

research object<sup>30</sup> either before, during, or after an abortion. In August 1974, HEW issued new, and slightly more permissive, regulations.<sup>31</sup> The revised regulations were never operative, however, for in July 1974, Congress enacted the National Research Service Award Act,<sup>32</sup> which created the National Commission for the Protection of Human Subjects of Biomedical and Behavior Research, and added a new variable to the process of federal funding for biomedical research.

### 3. *The Function and Structure of the National Commission*

It was (and is) the function of the National Commission to study and make recommendations with respect to the whole field of human experimentation, of which fetal experimentation is merely one small segment.<sup>33</sup> Indeed, the National Research Act contained only two paragraphs relating to fetal experimentation. Section 202(b) provided:

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to the patient. 38 Fed. Reg. 31,739 (1973). In the fetal experimentation regulations the "patients" are deemed to be both the pregnant woman and the fetus. Thus, the term "therapeutic" is applied to any research activity the purpose of which is to meet *the health needs of the particular woman or fetus being experimented upon*. All other fetal experimentation is categorized as non-therapeutic.

30. U.S. Dept. of Health, Education, and Welfare, Protection of Human Subjects—Policies and Procedures, 38 Fed. Reg. 31,747 (1973) (Proposed 45 C.F.R. §§ 46.31-39).

Among the most significant of those guidelines were the following:

1. A requirement that *no* non-therapeutic experimentation procedures entailing risk to the fetus to be undertaken in anticipation of abortion. 38 Fed. Reg. 31,747 (1973) (Proposed 45 C.F.R. § 46.37).

2. A statement that in the case of aborted, non-viable fetuses "vital functions of the abortus will not be maintained artificially for purposes of research." On the other hand, it was declared equally unacceptable to undertake experimental procedures which in themselves would terminate respiration and heartbeat. 38 Fed. Reg. 31,747 (1973) (Proposed 45 C.F.R. § 46.35(b) (2) & (3)).

3. The establishment of an Ethical Review Board whose function was to approve or disapprove specific proposals on ethical grounds. The board was mandated to disapprove non-therapeutic research activities which entailed substantial risk to the fetus. 38 Fed. Reg. 31,741 (1973). Interestingly, the Ethical Review Board was established under a provision entitled *Participation of Children in Research*.

31. U.S. Dep't of Health, Education, & Welfare, Protection of Human Subjects—Policies and Procedures, 39 Fed. Reg. 30,653 (1974) (Proposed 45 C.F.R. §§ 46.301-310).

32. Pub. L. No. 93-348, 88 Stat. 342 (codified in part in scattered sections of 42 U.S.C.). Sections 201-05, in which Congress created the National Commission and prescribed its composition and duties, have not been codified.

33. National Research Service Award Act of 1974, Pub. L. No. 93-348, tit. 2, §§ 202-203, 88 Stat. 348.



The Commission shall conduct an investigation and study of the nature and extent of research involving living fetuses, the purposes for which such research has been undertaken, and alternative means for achieving such purposes. The Commission shall, not later than the expiration of [a] 4-month period . . . recommend to the Secretary policies defining the circumstances (if any) under which such research may be conducted or supported.

Section 213, entitled "Limitation on Research" (and unofficially known as the moratorium section) provided:

Until the Commission has made its recommendations to the Secretary pursuant to section 202(b), the Secretary may not conduct or support research in the United States or abroad on a living human fetus, before or after the induced abortion of such fetus, unless such research is done for the purpose of assuring the survival of such fetus.

The Commissioners—four biomedical scientists,<sup>34</sup> three lawyers,<sup>35</sup> two "religious ethicists,"<sup>36</sup> one psychologist,<sup>37</sup> and one prominent minority group representative<sup>38</sup>—took office on December 3, 1974.<sup>39</sup> On May 21, 1975, after receiving reports on the various aspects of fetal experimentation from lawyers,<sup>40</sup> biomedical scientists,<sup>41</sup> and "ethicists,"<sup>42</sup> the Commission issued its findings and recommendations.<sup>43</sup>

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34. Joseph V. Brady, Prof. of Behavioral Biology, Johns Hopkins University School of Medicine; Robert E. Cooke, Vice Chancellor for Health Services, University of Wisconsin; John Kenneth Ryan, Chairman, Dep't of Obstetrics and Gynecology, Harvard Medical School; Donald Wayne Seldin, Chairman, Dep't of Internal Medicine, University of Texas at Dallas Medical School.

35. Patricia King, Prof. of Law, Georgetown University Law Center; David W. Louisell, Prof. of Law, University of California at Berkeley; Robert H. Turtle, Washington, D.C., attorney.

36. Albert R. Jonsen, S.J., Adjunct Assoc. Prof. of Bioethics, University of California at San Francisco School of Medicine; Karen A. Lebacqz, Ass't Prof. of Christian Ethics, Pacific School of Religion.

37. Eliot Stellar, Provost of the University and Prof. of Physiological Psychology, University of Pennsylvania.

38. Dorothy I. Height, Pres., Nat'l Council of Negro Women.

39. See Steinfelds, *The National Commission and Fetal Research*, HASTINGS CENTER REPORT, June, 1975, at 11.

40. See Capron, *The Law Relating to Experimentation with the Fetus*, reprinted in COMMISSION REPORT, *supra* note 3, at 13-1 app.; Wilson, *A Report on Legal Issues Involved in Research on the Fetus*, reprinted in COMMISSION REPORT, *supra* note 3, at 14-1 app.

41. See Batelle-Columbus Laboratories, *An Assessment of the Role of Research Involving Living Human Fetuses in Advances in Medical Science and Technology*, reprinted in COMMISSION REPORT, *supra* note 3, at 15-1 app. [hereinafter cited as Batelle Report]; Mahoney, *The Nature and Extent of Research Involving Living Human Fetuses*, reprinted in COMMISSION REPORT, *supra* note 3, at 1-1 app. [hereinafter cited as Mahoney Report]. See notes 133-47 *infra* and accompanying text.

42. Papers were prepared by eight "ethicists." Their findings are discussed in notes 148-79 *infra* and accompanying text.

43. See COMMISSION REPORT, *supra* note 3, at 61-88.

## B. THE RECOMMENDATIONS OF THE NATIONAL COMMISSION

The significant features of the Commissions' recommendations regarding non-therapeutic<sup>44</sup> experimentation were as follows:

(1) No non-therapeutic experimental procedures entailing greater than minimal risk to the fetus can be undertaken in anticipation of abortion.<sup>45</sup> (Experimentation prior to abortion is known as *in utero* experimentation.)

(2) Experimentation during or subsequent to abortion may be conducted provided that the fetus is nonviable.<sup>46</sup> However, "no intrusion into the fetus [can be] made which alters the duration of life" and "no significant procedural changes [can be] introduced into the abortion procedure in the interest of research alone."<sup>47</sup> (Experimentation during or subsequent to abortion is known as *ex utero* experimentation).

Both the *in utero* and *ex utero* guidelines contained the following addendum: "Such research presenting special problems related to the interpretation or application of these guidelines may be conducted or supported by the Secretary, DHEW, provided that such research has been approved by a national ethical review board."<sup>48</sup>

It seems clear that the purpose of the addendum was to create a device by which, in appropriate circumstances, the ostensibly proscribed research could, in fact, be undertaken.<sup>49</sup> Unfortunately, the Commission neglected to define—both for the public and for the proposed national ethical review board—the circumstances in which avoiding the regulations and permitting the research would be appropriate. What the Commission seems to have recommended, therefore, was a return to the anti-

44. The Commission defined non-therapeutic research as "research not designed to improve the health condition of the research subject." *Id.* at 6.

45. *Id.* at 74.

46. "Nonviable fetus" refers to the fetus *ex utero* which, although it is living, cannot possibly survive to the point of sustaining life independently, given the support of available medical technology. Although it may be presumed that a fetus is nonviable at a gestational age less than 20 weeks (five lunar months; four and one-half calendar months) and weight less than 500 grams, a specific determination as to viability must be made by a physician in each instance.

*Id.* at 6.

47. *Id.* at 74.

48. *Id.*

49. See dissenting statement of Commissioner David W. Louisell, COMMISSION REPORT, *supra* note 3, at 77.

experimentation regulations of 1973,<sup>50</sup> and establishment of a new Commission that would be empowered to make ad hoc judgments regarding possible waiver of those provisions.

### C. THE CURRENT LAW—THE FEDERAL REGULATIONS OF 1975

#### 1. *The Substantive Provisions*

On August 8, 1975, the Secretary of HEW promulgated the Department's adaptation of the Commission's guidelines.<sup>51</sup> These regulations, which currently govern all HEW-supported research, in essence provide:

(1) *Experimentation prior to abortion*: The current regulations track the Commission's recommended ban on any non-therapeutic *in utero* experimentation entailing "greater than minimal" risk to the fetus.<sup>52</sup>

(2) *Experimentation during or after abortion*: Whereas the Commission specified that 20 weeks gestational age was the upper limit on the strictly circumscribed experimentation it recommended,<sup>53</sup> the current regulations contain no reference to gestational age. Instead, they require that no research activities posing "added risk to the fetus" be conducted "until it has been ascertained whether the particular fetus is viable."<sup>54</sup> In the case of the nonviable fetus, the current law liberalizes the Commission's suggested rules in one respect: although the Commission recommended that "no intrusion into the fetus [can be] made which alters the duration of life,"<sup>55</sup> the current regulation permits vital functions to be artificially maintained but only "where the purpose of the activity is to develop new methods for enabling fetuses to survive to the point of viability."<sup>56</sup>

50. See notes 29-30 *supra* and accompanying text.

51. 40 Fed. Reg. 33,528 (1975), 45 C.F.R. § 46.201 - .211 (1976). In addition to the changes mentioned in text accompanying notes 53-60 *infra*, the Secretary also modified the Commission's recommendation relating to paternal consent. The Commission had recommended that only the mother's consent need be obtained for appropriate research, provided that the father had not objected. The current regulations provide that consent must be obtained from the mother and father unless the father's identity or whereabouts cannot reasonably be ascertained, he is not reasonably available, or pregnancy resulted from rape. 45 C.F.R. §§ 46.208-.209 (1976).

52. *Id.* § 46.208(a).

53. COMMISSION REPORT, *supra* note 3, at 74.

54. 45 C.F.R. § 46.209(a) (1976).

55. COMMISSION REPORT, *supra* note 3, at 74.

56. 45 C.F.R. § 46.209(b)(1) (1976) (emphasis added). This regulation further requires that the "purpose of the activity [must be] the

Maintaining fetal life functions for any other purpose, such as cancer research,<sup>57</sup> or even the development of new methods of prenatal diagnosis of currently untreatable genetic disease<sup>58</sup> are still prohibited, as are experimental activities that would themselves terminate the heartbeat or respiration of the fetus<sup>59</sup> and those that involve procedural changes in the timing or method of abortion solely in the interest of research.<sup>60</sup>

Although the language of the regulations makes "risk" a crucial factor in determining the kinds of non-therapeutic research procedures that will qualify for federal funding, the term is never specifically defined in the fetal experimentation provisions.<sup>61</sup> Read in conjunction with the regulations governing human subject experimentation generally, however, the current fetal research regulations—despite their seeming approval of some non-therapeutic research—could easily be applied to withhold federal support for any such experimentation.

Research proposals involving fetuses are expressly made subject to the rules governing human experimentation generally.<sup>62</sup> There the term "subject at risk" is defined as "any individual who may be exposed to the possibility of injury, including physical, psychological, or social injury, as a conse-

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development of important biomedical knowledge which cannot be obtained by other means." *Id.* § 46.209(b)(3). The use of life support systems as allowed by this provision may well be viewed as a therapeutic procedure, since it holds out the only possible hope that the "dying" fetus will be saved. Under California law, a physician is required to provide all available life supports to the possibly viable abortus. CAL. HEALTH & SAFETY CODE § 25955.9 (West 1976). A similar Missouri law, that apparently required life saving efforts in all stages of pregnancy and whether the fetus was *in utero* or *ex utero*, was recently held unconstitutional. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).

57. See note 147 *infra*.

58. [Dr. David G.] Nathan and Dr. Frederic D. Frigoletto . . . of Harvard said their proposal for the development of a new medical device called a flexible amnioscope was turned down by the human experimentation committee at the Boston Hospital for Women, apparently because the Committee thought it too risky in the current [anti-fetal experimentation] climate.

*Ann Arbor News*, May 27, 1975, at 7. See generally Friedman, *Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92 (1974).

59. See 45 C.F.R. § 46.209(b)(2) (1976).

60. *Id.* § 46.206(a)(4).

61. The Commission also failed to define "risk," stating only that "[d]etermination of acceptable minimum risk is a function of the review process." COMMISSION REPORT, *supra* note 3, at 66.

62. 45 C.F.R. § 46.201(c) (1976) ("The requirements of this subpart are in addition to those imposed under the other subparts [including Subpart A, relating to research with human subjects] of this part.").

quence of participation as a subject in any research, development, or related activity which departs from the application of those established and accepted methods necessary to meet his needs. . . ."<sup>63</sup>

The applicability of the general "at risk" standard to fetuses was affirmed in a recent HEW policy statement in which the then-Secretary declared that the definition was intended to cover all subjects of research that were addressed in legislative hearings preceding enactment of the National Research Award Act<sup>64</sup>—including, *inter alia*, experiments on prisoners, incompetents, and fetuses and pregnant women. "The regulations were intended, and have been *uniformly* applied by the Department, to protect human subjects against the types of risks inherent in these types of activities."<sup>65</sup>

Based on this official interpretation of the regulations it is reasonable to conclude that any procedure that would be deemed to put a living infant or adult at risk would also be deemed to put a living fetus—whether *in utero* or *ex utero*<sup>66</sup>—at risk.<sup>67</sup> Viewed in this light, the 1975 regulations are simply a throwback to the prohibitive 1973 regulations,<sup>68</sup> which were expressly based on the premise that "all appropriate procedures providing protection for children as subjects in biomedical research must be applied with equal vigor and with additional safeguards to the fetus."<sup>69</sup>

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63. *Id.* § 46.103 (b).

64. *See* note 32 *supra*.

65. 41 Fed. Reg. 26,572 (emphasis added) (Statement of David Matthews, Secretary of HEW, June 24, 1976).

66. The provisions specifically governing research using living, non-viable *ex utero* fetuses do not speak of risk. *See* 45 C.F.R. § 46.209 (b) (1976). According to the general human subject regulations, however, any nontherapeutic procedure by definition places a subject at risk. *See* 45 C.F.R. § 46.103 (b) (1976). Thus, if HEW's statement that the regulations are to be applied uniformly, *see* text accompanying note 65 *supra*, is taken of face value, risk to the fetus must always be a consideration in granting or denying federal money for a project.

67. This emphasis on uniformity appears to exclude the interpretation of risk proposed by two of the Commissioners who would only consider the fetus at risk if it had developed the capability to experience pain. COMMISSION REPORT, *supra* note 3, at 84 (Statement of Commissioner Karen Lebacqz, with the concurrence of Commissioner Albert R. Jonsen).

68. *See* notes 29-30 *supra* and accompanying text.

69. 38 Fed. Reg. at 31,742 (1973). Some recent commentators have reached precisely the opposite conclusion and have criticized the regulations for imposing too little restriction on fetal research. *See* Horan, *Fetal Experimentation and Federal Regulation*, 22 VILL. L. REV. 325

## 2. *The Ethical Advisory Boards*

The regulations also establish two "ethical advisory boards"—one to advise the Public Health Service and its components and the other to advise all other agencies and components within HEW.<sup>70</sup> The Boards are vested with three types of power—rule-making, advisory, and adjudicatory.

### a. *Rulemaking Powers*

The regulations provide that each Ethical Advisory Board may, with the approval of the Secretary, establish

classes of [fetal research] applications or proposals which: (1) Must be submitted to the Board, or (2) need not be submitted to the Board. Where the Board so establishes a class of applications or proposals which must be submitted, no application or proposal within the class may be funded by the Department . . . until the application or proposal has been reviewed by the Board and the Board has rendered its advice as to its acceptability from an ethical standpoint.<sup>71</sup>

Because this provision contains no standards for the Boards to follow in establishing the classes of proposals that must be submitted to them, the regulation potentially gives the Ethical Advisory Boards power to promulgate a rule requiring submission of all research applications involving fetuses or pregnant women.

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(1977); Louisell, *supra* note 49; Pilon, *Cost-Benefit Ethics: The Utilitarian Approach to Fetal Research*, 22 *VILL. L. REV.* 395 (1977). Although the failure to define significant terms, *see* note 61 *supra* and accompanying text, and the degree of discretion vested in those who will administer the regulations, *see* notes 71-72 *infra* and accompanying text, make all attempts at deciphering the rules somewhat speculative at this point, the position that the regulations are "too liberal" is not persuasive. The commentators who have taken this position also make it clear that they find abortion morally repellant and believe that *any* possibility of using the fetus in non-therapeutic research is objectionable, for it fails to treat the fetus as a person. More important, the commentators who see the regulation as clearing the way for unrestricted experimentation did not consider the interrelationship of the fetal experimentation regulations and the general human subject regulations, *see* notes 62-67 *supra* and accompanying text, and so did not evaluate their positions in light of the theory presented in this Article: that if the regulations, as interpreted and applied, treat the fetus as an actual living person they will violate the establishment clause.

70. Two Ethical Advisory Boards shall be established by the Secretary. Members of these Boards shall be so selected that the Boards will be competent to deal with medical, legal, social, ethical and related issues and may include, for example, research scientists, physicians, psychologists, sociologists, educators, lawyers, and ethicists, as well as representatives of the general public. No board member may be a regular, full-time employee of the Federal Government.

45 C.F.R. § 46.204(a) (1976).

71. *Id.* § 46.204(d).

Were the Secretary to approve such a rule, a Board would have the power to review (and find "ethically unacceptable") even those applications that qualify for funding under the substantive provisions of the regulations.<sup>72</sup> In the political climate surrounding the regulations, the Secretary presumably would not want to act in disregard of the Board's "advice as to [the proposal's] acceptability from an ethical standpoint."

b. Advisory Powers

In addition, the regulations give the Ethical Advisory Boards broad advisory powers relating to (a) the ethical issues raised by individual research proposals or classes of proposals, and (b) general policies, guidelines, and procedures.<sup>73</sup> The only standard contained in this provision is that the Board's advice must be "consistent with the policies and requirements of this [regulation]."<sup>74</sup>

c. Adjudicatory Powers—The Waiver Provision

The current law also retains, but modifies, the Commission's suggested escape provision under which the Secretary can modify or waive specific requirements of the regulations, but only "with the approval of the Ethical Advisory Board after such opportunity for public comment as the Ethical Advisory Board considers appropriate in the particular instance."<sup>75</sup> In addition, unlike the waiver provision recommended by the Commission, the current regulation contains the following "standards" for "Modification or Waiver of Specific Requirements":

In making such decisions, the Secretary will consider whether the risks to the subject are so outweighed by the sum of the benefit to the subject and the importance of the knowledge to be gained as to warrant such modification or waiver and that such benefits cannot be gained except through a modification or waiver.<sup>76</sup>

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72. For example, the HEW regulations allow maintenance of fetal life functions if the purpose is to develop techniques that would enable other nonviable *ex utero* fetuses to live and develop to the point of viability. Some commentators have expressed the view that any such procedure, for any purpose, is ethically impermissible. See Horan, *supra* note 69, at 338; Louisell, *supra* note 49, at 79-80; Pilon, *supra* note 69, at 401. A Board composed of like-minded persons could, through the Board's review process, thwart the intent of the regulations.

73. 45 C.F.R. § 46.204(c) (1976).

74. *Id.*

75. *Id.* § 46.211.

76. *Id.*

Upon close scrutiny, it appears unlikely that the waiver clause, which simply requires the Secretary—and presumably the Board before giving its approval or disapproval—to employ a risk-benefit analysis, will ever be the basis for lifting the prohibitions of the regulations. Against the risk to the fetus, two benefit factors are to be weighed: (1) The benefit of the proposed research *to the particular fetus being experimented upon*; and (2) “the importance of the knowledge to be gained” (presumably, its importance to the public at large).

The first factor is not a criterion for waiver of the prohibitions; it merely authorizes the Secretary to permit beneficial procedures, that is, *therapeutic in utero* research—an activity already allowed by the substantive *in utero* regulation.<sup>77</sup> Moreover, any apparent balancing between the second benefit factor—the importance of the knowledge to be gained—and the risk to the subject will probably be illusory. Since the regulations already permit experimentation where “the risk to the fetus imposed by the research is *minimal* and the purpose of the activity is the development of important biomedical knowledge which cannot be obtained by other means,”<sup>78</sup> a scientist will be required to apply for a waiver only if the Secretary or Board believe that the risk of the applicant’s research is *greater than minimal* or that the information could be gathered from other sources such as animal studies. In most such cases, however, the *actual* probability and magnitude of the risk will be unknown. Indeed, the very purpose of much fetal experimentation is to determine the degree to which the fetus is affected by various types of drugs and other intrusions into a pregnancy.<sup>79</sup> Thus, the Board will be asked to render a judgment in cases where the risk is believed to be greater than minimal, but the actual probability and magnitude of harm are unknown. In such cases, the general human experimentation regulations would preclude federal support for the project unless the applicant could prove that (1) the risks were so outweighed by the benefits and the knowledge to be gained as to justify allowing the subject to accept the risk;<sup>80</sup> (2) the rights and welfare of the subject would be protected;<sup>81</sup> and (3) the subject gave informed con-

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77. 45 C.F.R. § 46.208(a) (1) (1976).

78. *Id.* § 46.208(a) (2).

79. See COMMISSION REPORT, *supra* note 3, at 7-15; Mahoney Report, *supra* note 41, at 1-14 app. to 1-37 app.

80. 45 C.F.R. § 46.102(b) (1) (1976).

81. *Id.* § 46.102(b) (2).



sent<sup>82</sup> to participate in the research.<sup>83</sup> Since the members of the Board and the Secretary are directed to consider these elements exactly as they would in the case of any other human subject,<sup>84</sup> it is unlikely that any unknown, but possibly substantial, risk to that human subject would be countenanced, however noble the scientific goal and however great the likelihood of its achievement.

Thus, it is reasonable to conclude that the application of the substantive regulations and the possibility of their waiver are to be determined, by and large, by treating the fetus as a living person. Acting on this principle may prevent much valuable research. It will also violate the establishment clause.

### III. AN ESTABLISHMENT CLAUSE ANALYSIS

#### A. INTRODUCTION

The federal fetal experimentation regulations are a classic example of "morals legislation"—that is, they impose restrictions on conduct not harmful to *other persons* in any tangible or specific fashion. Instead, the law is based almost exclusively on "moral concern" for the fetus. It is not the purpose of this Article to revive the Hart-Devlin debate<sup>85</sup> over whether the government can, or should, regulate ethics or morality.<sup>86</sup> Rather, it is the thesis of this Article that this particular piece of "morals

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82. *Id.* § 46.103(c). On this view, of course, parents could give informed consent only to the extent that they could give it for any child. See generally Bennett, *Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis*, 62 VA. L. REV. 285 (1976).

83. *Id.* § 46.103(b) (3).

84. See notes 62-69 *supra* and accompanying text.

85. Compare H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963) with P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1959). H.L.A. Hart believes that the state cannot legislate against conduct which does not harm others in any tangible or specific manner. Lord Devlin, on the other hand, believes that society derives its quality from its prevailing moral code and that it is permissible to legislate for the purpose of enforcing that morality.

86. Recent Supreme Court decisions, particularly on obscenity, see, e.g., *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), and homosexuality, see *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), appear to have answered that question in the affirmative. The laws in these cases were not, however, challenged as violations of the establishment clause. For an argument that anti-obscenity laws are a violation of the establishment clause, see Henkin, *Morals and The Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963). While it is not the purpose of this Article to examine the religious origins or purposes of laws proscribing obscenity and homosexuality, such laws could be susceptible to challenge under the establishment clause analysis proposed in this Article.

legislation" is, in essence, religious legislation proscribed by the first amendment's prohibition on governmental establishment of religion. This conclusion is based on examination of cases in which the government has sanctioned—or has been requested to sanction—certain "moral" precepts or practices, and the governmental involvement has been challenged on establishment clause grounds. The cases indicate that "morals" legislation will be deemed impermissibly religious when four factors coalesce:

- (1) The legislation puts the authority of government behind a moral precept or practice that is not buttressed by any societal consensus, but rather is the object of widespread controversy and debate.
- (2) If the government lends its support to the precept or practice, nonadherents (a considerable portion of the population) will be forced to shape their behavior in accordance with the beliefs of adherents. If the government is not permitted to sanction the practice or precept, however, adherents will *not* be forced to shape their behavior in accordance with the beliefs of nonadherents.
- (3) The debate is often waged in religious terms and there is *evidence of strong religious pressures for the enactment of the particular law being challenged.*
- (4) The law serves no substantial extrinsic secular purpose, that is, any purpose other than to throw the power of government on one side of a moral debate and to suppress activity that is inconsistent with the chosen side.

#### B. THE DEVELOPMENT OF THE FOUR FACTORS—THE GOVERNING CASES

The first amendment bars any law "respecting an establishment of religion."<sup>87</sup> Professor Gerald Gunther has noted that "the most common [establishment clause] problems stem from two methods by which separation between church and state may be threatened":<sup>88</sup> (1) The government gives aid (usually financial) to an activity conducted by a religious organization (typically a parochial school);<sup>89</sup> or (2) The government permits a religious matter to intrude into a governmental activity.<sup>90</sup> The federal fetal experimentation regulations fall within the second

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87. U.S. CONST. amend. I.

88. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1452 (9th ed. 1975).

89. See, e.g., *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

90. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

category. The government has permitted a moral matter, which will be shown to be religious,<sup>91</sup> to intrude into government funding of scientific research.

Of course, "virtually every normative judgment is potentially traceable to one or more ultimate premises, that could be deemed religious."<sup>92</sup> For example, "[l]aws punishing homicide or theft, though they, too, may have religious roots by way of notions of natural law and the Bible (we still refer to them as *malum in se*), are obviously within the power of the most secular state . . ."<sup>93</sup> That certain religious groups adhere to the premise underlying the challenged law thus should not automatically lead to an adjudication of constitutional infirmity. Therefore the "morals legislation" cases in which the establishment clause issue has been raised must be examined to determine what elements have led the courts to conclude that statutes embodying certain "moral" precepts and practices are impermissibly religious.

The landmark cases involving the intrusion of religious matters into governmental activities were *Engel v. Vitale*,<sup>94</sup> in which the Supreme Court invalidated a school board rule requiring daily recitation of "nondenominational" prayer in the public schools, and *Abington School District v. Schempp*,<sup>95</sup> in which the Court held that the establishment clause prohibits state laws requiring Bible readings and the recitation of the Lord's Prayer at the opening of each school day. Neither case gives much guidance in distinguishing religious from nonreligious morals legislation, however, because the Court simply stated, categorically, that the challenged practices were religious.<sup>96</sup> Cases involving

91. See notes 167-80 *infra* and accompanying text.

92. Tribe, *The Supreme Court, 1972 Term—Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 23 n.106 (1973).

93. Henkin, *supra* note 86, at 408.

94. 370 U.S. 421 (1962).

95. 374 U.S. 203 (1963).

96. In *Engel*, Justice Black stated:

There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of prayer has always been religious, none of the respondents has denied this, and the trial court expressly so found.

370 U.S. at 424-25.

Similarly in *Abington School District*, the majority opinion, as well as two concurrences, rejected out of hand the notion that the Bible was "non-sectarian, merely a textbook of morals." 374 U.S. at 270. Justice Clark's opinion for the Court simply noted that "surely the place of the

evolution, Sunday closing laws, and sex education, in which the religious nature of the controversy was much less apparent, are better aids to establishment clause analysis of the fetal experimentation regulations.

In *Epperson v. Arkansas*,<sup>97</sup> the Supreme Court invalidated an Arkansas statute which prohibited any public school or university from teaching the doctrine that "mankind ascended or descended from a lower order of animals." The Court found an impermissible establishment of religion because (1) the "Monkey Law" gave governmental imprimatur to a particular religious precept and employed an organ of government (the schools) to ensure that that precept became state policy; and (2) there was no plausible secular justification for the law.

The overriding fact is that Arkansas law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

. . . .  
No suggestion has been made that the Arkansas' law may be justified by considerations of state policy other than religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence.<sup>98</sup>

The above-quoted statements are, however, somewhat disingenuous. While it is true that the state did not advance any secular justifications for its law, the Court itself clearly recognized that there were at least two possible *nonreligious* moral and ideological objections to teaching evolution in the schools. First, as noted by the majority, some opponents of Darwinism believed that it contradicted accepted *social* and *moral* ideas to suggest that mankind had descended from "lower" forms of life and that the notion that man had "simian rather than seraphic ancestors" was tantamount to a libel of the human race.<sup>99</sup> Second, as Justice Black observed in his concurrence, "it may be that the people's motive was merely . . . to remove this controversial subject from the schools."<sup>100</sup> Since both of these justifications may spring from social, moral, and ideological considerations—rather than from purely religious ones—what led

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Bible as an instrument of religion cannot be gainsaid." *Id.* at 224. Justice Brennan's concurrence stated that the religious nature of Bible reading was "plain," *id.* at 266, and Justice Goldberg declared that it was "unmistakable," *id.* at 307.

97. 393 U.S. 97 (1968).

98. *Id.* at 103, 107-08 (footnotes omitted).

99. *Id.* at 102 n.10.

100. *Id.* at 112-13.

the Court to conclude that "fundamentalist *sectarian* conviction was and is the law's reason for existence"?<sup>101</sup> In support of its conclusion the Court offered only newspaper ads and letters from the public stating, *inter alia*, that teaching evolution would be "subversive of Christianity" and the fact that a Tennessee anti-evolution law had stated a religious purpose in its preamble.<sup>102</sup>

These particular historical facts do not, on their face, seem overwhelmingly supportive of the Court's conclusion. The admittedly religious purpose of an earlier Tennessee law does not seem highly probative of the purpose of a later Arkansas law. Moreover, the religious motivation of some citizens who supported the law does not conclusively establish that the legislators were influenced by those considerations. The questionable relevance of this legislative history, coupled with the possible nonreligious moral and social justifications for the law led one group of authors to ask whether the Court was "psychoanalyz[ing] the legislators."<sup>103</sup>

On balance, however, the *Epperson* majority seems to have been correct, even though its conclusion could be reached only by second-guessing legislative motivation—long considered inappropriate in constitutional decisionmaking.<sup>104</sup> The anti-evolution law suppressed scientifically and intellectually significant information merely because one segment of society found the material offensive. Moreover, there is some evidence, although certainly not conclusive proof, that the legislature was motivated by religious pressures. One possible analysis of *Epperson*—although not one explicitly adopted by the Court—is that the facts at hand created a presumption of an establishment clause violation, a presumption that the state could overcome only by demonstrating that the law served a substantial purpose extrinsic

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101. *Id.* at 108.

102. *Id.* at 108-09.

103. W. LOCKHART, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW* 1146 (3d ed. 1970).

104. See Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887 (1970) and cases cited therein at n.1. But see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). Professor Ely offers a three part test for judicial inquiry into religious motivation: (1) "the court should not intervene on the basis of impact [on religion] *per se*"; (2) "the court should intervene only on the basis of proof of an intention to favor or disfavor religion relative to non-religion, or one religion relative to others"; (3) "a choice legitimately justifiable in terms of a nonreligious and otherwise permissible goal should be upheld, without inquiry into motivation." *Id.* at 1313-27.

to that of fostering a moral or ideological precept. Such a burden-shifting rule seems necessary if strict separation of church and state is to be maintained; otherwise, as illustrated by comparing the Arkansas and Tennessee statutes, religious groups and spokesmen could impose their views on the rest of society simply by couching their arguments in secular language.

The purpose of the Arkansas statute, which stated its prohibitions in secular terms,<sup>105</sup> was almost certainly the same as that of the earlier Tennessee statute, which forbade teaching "any theory that denies the story of the Divine Creation of Man as taught in the Bible."<sup>106</sup> The effect was exactly the same. Only the religious preamble had been deleted. Hence, by careful statutory drafting, the Arkansas government could impose restrictions on the intellectual and scientific curriculum in state schools for the sole purpose of supporting a religious precept, yet avoid giving the courts an apparent establishment clause basis for invalidating the law.<sup>107</sup> Invalidation could come only after the Court had inquired into—and made a somewhat speculative assessment of—legislative motive. This type of inquiry, usually considered improper, was absolutely essential in *Epperson*, because three factors were present.

First, the moral precept underlying the anti-evolution law was the subject of widespread controversy and debate, and therefore very different from the precepts underlying laws punishing homicide or theft which, although similarly rooted in the Biblical tradition, are also supported by a strong rationally based societal consensus.

Second, enactment of the law forced all those not adhering to the underlying moral precept (plaintiff Epperson, for example) to shape their behavior in accordance with the beliefs of adherents. Invalidation of the law, however, did not result in the converse. In striking down the anti-evolution law, the Court was simply adopting a laissez-faire position toward evolution. Teachers who rejected the theory of evolution would not be forced to teach it. Presumably the state of Arkansas would still be free to protect the rights of anti-evolutionist parents and students by permitting those students to be excused from any classes in which evolution was discussed.<sup>108</sup>

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105. 393 U.S. at 99 n.3.

106. *Id.* at 108.

107. See Emerson & Haber, *The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522 (1960).

108. Cf. *Citizens for Parental Rights v. San Mateo County Bd. of*

Third, the debate over evolution had often been waged in religious terms<sup>109</sup> and there was evidence of strong religious pressure for the enactment of the particular law being challenged.

It is submitted that these three factors created a presumption of unconstitutional religious motivation which the state could rebut only by demonstrating that the law served an *extrinsic* secular purpose. Although the *Epperson* Court did not explicitly adopt this reasoning, it does explain the Court's result. Moreover, it provides a doctrinal formula that can be consistently applied to other "moral precept" cases.

Under this proposed test, if the state of Arkansas had wished to argue that one purpose of the anti-evolution law was to support a nonreligious ideological viewpoint, for example, that the theory of evolution was a libel of mankind, it would have had to demonstrate that the libel of mankind was a social harm. Although the danger in such a belief is not immediately apparent, should the government demonstrate, for example, that people who believed in mankind's descent from lower forms of life had a higher incidence of illegal or anti-social conduct than those who believed that mankind was unique, perhaps an extrinsic secular justification for the law would be established. Similarly, if the government wished to allege "avoiding classroom controversy" as a nonreligious justification, it would have been required to demonstrate that controversy in the classroom was harmful because it impeded, rather than advanced, learning.

The presumption of unconstitutionality in cases involving morals legislation would not be impossible to rebut. The Sunday closing law case, *McGowan v. Maryland*,<sup>110</sup> for example, can be analyzed as one in which the state successfully met its burden. In that case, the Court rejected an establishment clause challenge based on the argument that by forcing all businesses to close on Sunday, "[t]he government was imposing on all the people the tenets of the Christian religion."<sup>111</sup> The closing laws clearly involved the same three crucial factors present in *Epperson*. First, the laws were not supported by any societal consensus. Second, the enactment of the law forced those who

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Educ., 124 Cal. Rptr. 68, 51 Cal. App. 3d 1 (1975), *appeal dismissed*, 425 U.S. 908 (1976) (statutory right to remove children from sex education classes). See also West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

109. See Emerson & Haber, *supra* note 107, at 522-24.

110. 366 U.S. 420 (1961).

111. *Id.* at 431.

did not observe a Sunday Sabbath day to shape their conduct in accordance with the tenets of those who did, whereas invalidation of the law would not have reversed the situation. Striking down the law would simply have been adopting a laissez-faire policy toward the entire issue. Third, the Court frankly admitted that the debate had often been waged in religious terms and that "the original laws which dealt with Sunday labor were motivated by religious forces."<sup>112</sup> Indeed, the title of the challenged statute was "Sabbath Breaking" and it prohibited both "profan[ing] the Lord's Day" and "work[ing] on the Lord's Day." Under the proposed analysis, however, these three factors would give rise only to a presumption of unconstitutionality, which the state could rebut by demonstrating that the law served a substantial extrinsic secular purpose—a purpose other than choosing sides in the ideological debate over the propriety of work on Sunday and suppressing activity inconsistent with the chosen side. The presumption was successfully rebutted in *McGowan*. The present purpose and effect of the statute, the Court stated, was to provide a uniform day of rest and recreation for *all* persons—a day that families and friends could spend together without interference from their work schedules.<sup>113</sup>

Stressing that Sunday closing laws had been supported by labor groups and other secular social welfare organizations, the Court reasoned that the challenged statute served a social good, extrinsic to any moral or ideological issue, and that this precise purpose could not be served by any other means.<sup>114</sup>

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112. *Id.*

113. *Id.* at 451-52.

114. It is true that if the State's interest were simply to provide for its citizens a periodic respite from work, a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual, would suffice.

However, the State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.

Obviously, a State is empowered to determine that a rest-one-day-in-seven statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility, a day which all members of the family or friends and relatives might spend together. Furthermore, it seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common-day-of-rest provision.

*Id.* at 450-51 (footnotes omitted). The Court also pointed out that Sun-



The doctrinal formula drawn from *Epperson* is also implicit in cases in which plaintiffs have sought to enjoin sex education programs as an impairment of parents' and students' free exercise of religion. In those cases the courts were asked to aid in the enforcement of a moral precept at least partly religiously based—that the study of human sexuality must encompass more than the study of reproductive biology and that value-free sex education is immoral. Although one could well believe this proposition on nonreligious grounds, state courts have declared that its judicial enforcement would violate the establishment clause. In *Citizens for Parental Rights v. San Mateo County Board of Education*,<sup>115</sup> for example, the California Court of Appeals held that the challenged program did not violate plaintiffs' right of free exercise of religion because, under the applicable statute, the parents were free to remove their children from all or any portion of the course. More significantly, the court stated that had the trial court held to the contrary, that is, had it used the parents' religious and moral objections as a basis for a decree *prohibiting* the sex education program, such a holding would be an unconstitutional establishment of religion because “under *Epperson* the state is required to plan its curriculum on the basis of educational considerations and without reference to religious considerations.”<sup>116</sup> Other state appellate courts have likewise concluded that a decree prohibiting sex education would probably run afoul of the establishment clause.<sup>117</sup>

The sex education cases support the theory that in “moral precept” cases the courts will, at least implicitly, analyze the problem as suggested above. First, the moral issues surrounding sex education are the subject of widespread controversy and debate. Second, if the courts (or legislatures) declare that sex education in the schools is impermissible, the educational experiences of those who do not adhere to the underlying moral precepts will be shaped in accordance with the beliefs of adherents.

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day had come to be regarded as a day apart by “[p]eople of all religions and people of no religion,” *id.* at 451-52, and stated that “[i]t would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord,” *id.* at 452.

115. 124 Cal. Rep. 68, 51 Cal. App. 3d 1 (1975), *appeal dismissed*, 425 U.S. 908 (1976).

116. *Id.* at 82, 51 Cal. App. 3d at 18.

117. See *Medeiros v. Kiyosaki*, 52 Hawaii 436, 441, 478 P.2d 314, 319 (1970); cf. *Hopkins v. Hamden Bd. of Educ.*, 29 Conn. Supp. 397, 289 A.2d 914 (1971).

Permitting sex education, however, will not result in the converse. Indeed, the court in *Citizens for Parental Rights* stressed that one of the redeeming features of the challenged program was that objecting parents had the right to remove their children from all or any portion of the course. Third, the sex education debate has often been waged in religious terms. In fact, the plaintiffs in *Citizens for Parental Rights* and related cases based their claim for relief squarely on their religious objections to the program. It is submitted that these three factors created a presumption that deletion of the program would violate the establishment clause.<sup>118</sup>

### C. APPLICATION OF THE ESTABLISHMENT CLAUSE TEST TO THE FEDERAL FETAL EXPERIMENTATION REGULATIONS

#### 1. *Governmental Sanction of a Moral Precept that is not Buttressed by any Societal Consensus*

The moral precept which is the *raison d'être* of the regulations is that the fetus is a human being.<sup>119</sup> Acceptance or rejection of this proposition appears to be based on ethical, rather than scientific, considerations<sup>120</sup> and to dictate conclusively what one believes are the permissible bounds of fetal experimentation.<sup>121</sup>

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118. Because the plaintiffs in the sex education cases based their claims solely on religious grounds, there could be no question of an extrinsic secular purpose for eliminating the programs.

119. See notes 62-69 *supra* and accompanying text; notes 148-59 *infra* and accompanying text.

120. Compare text accompanying notes 133-47 *infra* with text accompanying notes 148-59 *infra*.

121. If the fetus were considered in most "moral" respects to be like any other "group of specialized cells," see Guttmacher, *Symposium—Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 436 (1968), or human organ, like a lung or kidney, unaware of its own existence and unable to feel pain, the permissible bounds of experimentation would be very different from what they would be if the fetus were thought to be a human being. As Professor Richard Wasserstrom pointed out to the National Commission, if the fetus were merely a group of cells or an organ, there would be no argument against *ex utero* experimentation, and few against *in utero*. Wasserstrom, *Ethical Issues Involved in Experimentation on the Nonviable Human Fetus*, reprinted in COMMISSION REPORT, *supra* note 3, at 9-2 app. [hereinafter cited as Wasserstrom Report]. (Wasserstrom did not endorse this particular view of fetal status). If this were the status of a fetus, whatever could be done to a properly severed human organ that still had certain life capacities, such as maintaining some of its organ functions, could be done to a non-viable fetus *ex utero* before its life functions had stopped. *Id.*

If, on the other hand, the fetus were considered in most "moral" respects to resemble an animal such as a dog or monkey, then it would

The "fetal personhood" concept is, of course, not supported by a societal consensus; widespread moral and religious controversy over that concept has been recognized by the Supreme Court,<sup>122</sup> the United States Civil Rights Commission,<sup>123</sup> many members of Congress,<sup>124</sup> several of the ethicists who served as consultants to the National Commission,<sup>125</sup> and most notably by Professor Lawrence Tribe in his seminal discussion of the Supreme Court's abortion decision. According to Tribe:

If there were general agreement about a developmental stage as of which the fetus should be regarded as a human being with independent moral claims, then the propriety of entrusting its protection to government would follow from the consensus that states must have relatively wide latitude in fulfilling their responsibility to protect existing human lives from destruction.

But the reality is that the "general agreement" posited above simply does not exist. Some regard the fetus as merely another part of the woman's body until quite late in pregnancy or even until birth; others believe the fetus must be regarded as a helpless human child from the time of its conception. These differences of view are endemic to the historical situation in which the abortion controversy arose. Specifically, the advance of embryology and medicine over the past century and a half rendered untenable any notion that the fetus suddenly "came to life" in a physiological sense at a definable point during pregnancy.<sup>126</sup>

## 2. *The Coercive Impact of the Regulations*<sup>127</sup>

The regulations force those who do not adhere to the

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be deserving of more humane consideration. But it still would not be accorded the full ethical protection given to a human. Under this view, it would be proper to look upon the fetus as an object to be controlled, altered, killed, or otherwise used for the benefit of humans. But since the fetus would have to be accorded the same respect due to "higher" animals, it could not be subjected to needless cruelty. *Id.*

Finally, if the fetus were considered to be a "person," then the ethics of fetal research would be identical to the ethics applicable to experimentation on human beings. Governmental restrictions on such research—in accordance with a "Do No Harm" principle—would appear to be appropriate. The most reasonable interpretation of the 1975 regulations is that they adopt the third point of view. See notes 62-69 *supra* and accompanying text.

122. In *Roe v. Wade*, 413 U.S. 133, 160 (1973), the Court stated that the issue of fetal status is a matter of religious controversy and noted that "the predominant attitude of the Jewish faith . . . [and] also the position of a large segment of the Protestant community" is "that life does not begin until live birth."

123. "The question of when life begins is a matter of religious controversy and no choice can be rationalized on a purely secular premise." *RIGHT TO LIMIT CHILDBEARING*, *supra* note 27, at 31.

124. See *Lowe*, *supra* note 28, at 352.

125. See notes 148-59 *infra* and accompanying text.

126. Tribe, *supra* note 92, at 22.

127. The Supreme Court has stated that "the Establishment Clause,

premise of fetal personhood to conform their behavior to the beliefs of adherents. Invalidation of the regulations would not, however, result in the converse. That is, if the courts were to strike down the regulations, only those scientists who chose to do so would seek federal funding for projects involving experimental use of the fetus. Moreover, the government would certainly remain free to require that no pregnant woman planning an abortion be coerced into participating in such an experiment—that voluntary, unpressured, informed consent be obtained in every instance. The government would thus be adopting a laissez-faire policy. Neither the pro-personhood nor the anti-personhood groups would be forcing their views on the remaining segments of society.<sup>128</sup>

### 3. Evidence of Strong Religious Pressures for Enactment of the Law

Unlike *Epperson*, where the recorded legislative history of the anti-evolution statute was scant,<sup>129</sup> the written history of the fetal experimentation regulations is extremely lengthy. Dr. Mark Frankel suggests that the controversy was sparked by a

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unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Engel v. Vitale*, 370 U.S. 421 (1962); *accord*, *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

Other establishment clause cases, however, seem to recognize that coercion is one of the harms that the clause was designed to remedy. In *McGowan v. Maryland*, 366 U.S. 420 (1961), for example, the Court, in distinguishing Sunday closing laws from statutes permitting religious instruction in the public schools, noted that the latter "had the effect of coercing the children to attend religious classes; no such coercion to attend church services is present in the situation at bar." *Id.* at 452.

128. This "non-coercion" analysis explains why the Court's judgment in *Roe v. Wade*, 410 U.S. 133 (1973), was not an establishment of religion. Certainly *Roe* did not result in anyone's being forced to participate in an abortion. Indeed, under a 1974 amendment to the Health Programs Extension Act, 42 U.S.C. § 300a-7(c) (Supp. V 1975), federally-funded hospitals and other medical facilities are permitted to assert a religious or moral conviction against performing either sterilization or abortion procedures. In *Taylor v. St. Vincent's Hospital*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976), the Ninth Circuit sustained the validity of that law. It seems that *Roe*, coupled with the Church Amendment and *Taylor*, offers the ultimate in government assurance that neither pro- nor anti-abortion persons or institutions will be forced to shape their behavior in accordance with the dictates of the opposing faction. It would certainly not be difficult for the government to adopt a similar stance with respect to fetal experimentation.

129. See text accompanying notes 101-02 *supra*.

front page story in the April 10, 1973 issue of the Washington Post:

The story revealed that the "possibility of using newly-delivered human fetuses . . . for medical research before they die is being strenuously debated by federal health officials."

The news account prompted a barrage of phone calls to the NIH protesting against the possible use of live fetuses for research. One of those phone calls was from the principal of the Stone Ridge Country Day School of the Sacred Heart, [a Catholic school] located very near to the NIH, who indicated that the school's students were organizing a "protest picket" to symbolize their objection to fetal research. Upon learning of the students' plans, NIH officials offered to meet with them the following day. At a public meeting attended by the press, a prepared statement by Robert Berliner, NIH Deputy Director for Science, was read, which denied that NIH was supporting research on live aborted fetuses, and further, that it did not contemplate approving the support of such research.<sup>130</sup>

. . . .

The initial story that the NIH was considering the support of live fetal research was bitterly attacked by prominent anti-abortion groups. A spokesman for the executive committee of the United States Catholic Conference expressed his "shock" and commented that "(i)f there is a more unspeakable crime than abortion itself, . . . it is using victims of abortion as living human guinea pigs." The Catholic Bishops' Ad Hoc Committee on Population and Pro-Life Affairs considered the matter "cause for moral outrage."<sup>131</sup>

In addition to the public pressures that seem to have influenced the promulgation of the regulations, the official history of the regulations reveals a strong religious bias among those who were commissioned to advise the promulgators. The official record is contained chiefly in two documents—the Commission Report and an appendix to that Report comprised of papers submitted to the Commission by its sixteen consultants. Inasmuch as current HEW regulations are very similar to the recommendations of the Commission, and because the text of the regulations contains both the Commission report and excerpts from most of the consultants' reports, it can be assumed that the regulations have the same moral and philosophical underpinnings as the Commission Report. The following sections of this Article will discuss (a) the reports of the Commission's scientific consultants, and (b) the writings and recommendations of the Commission's ethical consultants. The contrast between the two presents a classic illustration of Bertrand Russell's observation about science and Christianity:

Christian ethics is in certain fundamental respects opposed to the scientific ethic. . . . Christianity emphasizes the importance of

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130. Frankel, *supra* note 23, at 216.

131. *Id.* at 218 (footnotes omitted).

the individual soul, and is not prepared to sanction the sacrifice of one innocent man for the sake of some ulterior good to the majority. Christianity, in a word, is unpolitical, as is natural since it grew up among men devoid of political power.<sup>132</sup>

a. The Reports of the Commission's Scientific Consultants

The task of the Commission's two chief scientific consultants, Batelle-Columbus Laboratories<sup>133</sup> and Dr. Maurice J. Mahoney of Yale Medical School,<sup>134</sup> was to study the nature and extent of research involving fetuses and to evaluate its contributions to biomedical progress. The Batelle Report examined the history of four biomedical advances achieved through fetal research in order to determine whether the same results could have been obtained by other means. Based on Batelle's findings the Commission concluded that a ban on fetal research or its postponement to await study on appropriate animal models would have "significantly delayed or halted indefinitely" the development of medical knowledge and techniques in three of the four areas studied:<sup>135</sup> prenatal diagnosis of genetic defects through amniocentesis;<sup>136</sup> prevention, diagnosis, and treatment of Rh isoimmunization disease;<sup>137</sup> and management of respiratory dis-

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132. B. RUSSELL, *THE SCIENTIFIC OUTLOOK* 234 (1931).

133. See note 41 *supra*.

134. *Id.*

135. COMMISSION REPORT, *supra* note 3, at 24.

136. Amniocentesis is a technique for obtaining a sample of the amniotic fluid that surrounds the fetus in the womb by inserting a needle through the pregnant woman's abdomen and into the amniotic sac. Analysis of the fluid has become increasingly important in the diagnosis and management of sex-linked diseases, chromosomal abnormalities, metabolic disorders (Tay-Sachs disease is the most well-known of these), and Rh isoimmunization. Battelle Report, *supra* note 41, at 15-25 app. to 15-34 app. Amniocentesis also enables physicians to determine the gestational age of a fetus in cases in which the pregnancy must be terminated early if the child is to survive. *Id.* at 15-32 app. Amniocentesis is probably best known to the lay public as a means of detecting the chromosomal abnormality that indicates Down's Syndrome (mongoloidism) in the pregnancies of older women. See generally Friedman, *Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92 (1974).

137. Rh immune disease occurs when "red cells from an Rh positive fetus cross the placenta and provoke an immune response from an Rh negative mother. Her anti-Rh antibodies then enter the fetus, destroying its red cells, and stimulating abnormally high production of immature red cells, or erythroblasts." Battelle Report, *supra* note 41, at 15-133 app. The condition causes brain damage in the fetus. Many are still-born. Researchers have developed a vaccine that has proven 100 percent effective in preventing the condition when administered to high-risk Rh-negative women. The standard treatment for the disease is an intra-uterine transfusion of red cells into the fetal abdominal cavity. *Id.* at 15-63 app.

tress syndrome.<sup>138</sup> The development of rubella (German measles) vaccine, the fourth area analyzed, could have progressed without experimentation using fetuses.<sup>139</sup> Such experimentation was necessary, however, to test the safety of the vaccine. By administering the drug to pregnant women who planned to have abortions and then studying the tissues of the aborted fetuses, researchers discovered that the vaccine virus crossed the placenta and infected the fetus.<sup>140</sup> As a result of this research, rubella vaccinations are not administered to pregnant women.<sup>141</sup>

Dr. Mahoney, after a survey of medical literature reporting results of research involving fetuses, similarly concluded that without such research scientists could not fill the gaps in medical knowledge about the effect on fetuses of drugs taken by women during pregnancy:<sup>142</sup>

Thus, for intelligent information about drug effects in the fetus, one requires detailed information about the pharmacokinetics of drug transfer across the placenta and into various parts of the fetus, and one requires detailed information on the disposition of the drug both anatomically and metabolically within the fetus.<sup>143</sup>

. . . .

For many of the studies mentioned above, the aborted fetus from a spontaneous abortion does not provide an adequate research model. For some purposes, e.g., a drug transfer study, the research must start at some interval before abortion starts.<sup>144</sup>

The development of polio vaccine<sup>145</sup> and of a safe treatment for thyroid disease,<sup>146</sup> although not stressed by the scientific

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138. Respiratory distress syndrome is a condition in which the lungs of a premature infant are insufficiently developed and collapse with the first breaths taken after birth. *Id.* at 15-75 app. Forty thousand infants a year have this condition; 10,000 of them die. *Id.*

139. *Id.* at 15-15 app.

140. *Id.* at 15-14 app.

141. *Id.*

142. Recent reviews in the United Kingdom and the United States document that during pregnancy women take, on the average, six pharmacologic agents. . . . The effects of this enormous amount of drug therapy, some physician-prescribed and some self-prescribed, on a developing fetus are almost entirely unknown. In a very real sense *the human fetus is incubated in a sea of drugs*. We know very little about the effect of these drugs on the human fetus or the distribution within the human fetus.

Mahoney Report, *supra* note 41, at 1-37 app. (emphasis added).

143. *Id.*

144. *Id.* at 1-38 app.

145. See Omenn, Scientific Manipulation of the Unborn 14 (paper presented at ABA/AMA Medicolegal symposium, Las Vegas, 1975) (on file at MINNESOTA LAW REVIEW).

146. See Chapman, Conner, Robinson, & Evans, *Collection of Radio-*

consultants, also supports the view that fetal research has been an indispensable aid to biomedical progress. In addition, some scientists currently believe that "if we could understand how the mother's body avoids rejection of the fetus, we might have crucial clues" to an understanding of cancer.<sup>147</sup>

b. The Writings and Recommendations of the Commission's Ethical Consultants

The writings of the Commission's ethical consultants reveal that the prevailing view was that the fetus is a person, and that fetal experimentation is inextricably intertwined with our "immoral abortion system." The moral basis for this position is so closely linked with fundamentalist Judeo-Christian tradition that it can only be categorized as religious.

(1) The Fetal Personhood Premise

The crucial inquiry for six of the Commission's eight ethical commentators was, "what is a fetus?" For each of them the answer to that question was a moral one and one that conclusively defined the permissible bounds of fetal experimentation. All six of these consultants began their analyses by categorizing the fetus as either a person, or a close analogue to a person. Because of their belief in fetal personhood, their recommendations regarding the permissibility of fetal experimentation were based largely on what they believed would be permissible human experimentation.<sup>148</sup>

Dr. Paul Ramsey, who has written a book about fetal experimentation,<sup>149</sup> believes that there is no moral distinction between a fetus and any other human being,<sup>150</sup> and that the

*active Iodine by the Human Fetal Thyroid*, 8 J. CLINICAL ENDOCRINOLOGY 717 (1948).

147. Omenn, *supra* note 145, at 14: "If we could understand how the mother's body avoids rejection of the fetus, we might have crucial clues to understand how to prevent rejection of organ transplants and to understand why the body tolerates rapidly dividing tumor cells instead of destroying them."

148. This view was subsequently embodied in the federal regulations. See notes 62-69 *supra* and accompanying text.

149. P. RAMSEY, *supra* note 4.

150. Moreover, always to say "fetus" in discussing the ethics of fetal research is as question-begging and laden with moral con-



ethical standards applicable to fetal experimentation should be the same as those applied to experimentation on children or on unconscious, dying, or condemned persons.<sup>151</sup> Four others—Father Richard McCormick,<sup>152</sup> Rabbi Seymore Siegel,<sup>153</sup> Dr. LeRoy Walters,<sup>154</sup> and Dr. Richard Wasserstrom<sup>155</sup>—believe that the fetus is a close analogue to a human being. Each of the four stresses the fetus's *potential* to become a fully developed adult. Dr. Marc Lappé, who finds discussions of fetal personhood “unsatisfactory, because they are either untestable . . . inconsistent . . . or irrelevant,” nevertheless believes that the pre-viable fetus, whether *in utero* or *ex utero*, is an entity which “has a legitimate claim on us for protection.”<sup>156</sup>

Only two of the ethical consultants, Dr. Sissela Bok and Dr. Joseph Fletcher, reject the fetal personhood premise. Dr. Bok refuses to assign any categorical status to the fetus. Instead, her analysis of the ethical issues surrounding fetal experimentation concentrates on the principles that underlie society's concern with the protection of life.<sup>157</sup> Because none of the reasons to preserve life are rationally applicable to the fetus that is to be aborted in the early stages of pregnancy, she concludes that a total ban on fetal research based on the supposed humanity of the subject makes no sense.<sup>158</sup> Dr. Fletcher, on the other hand, takes the position that the fetus is a “nonpersonal organism,”

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trovcrsy as to insist on always saying “person.” So I suggest that “embryonic human being,” “fetal human being,” “aborted human being,” “neonatal or newborn human being” grasp rather well the reality we are to talk about, *precisely because the stage of development is properly placed in an adjectival, not substantive, position.*

*Id.* at xx (emphasis added).

151. Ramsey, *Moral Issues in Fetal Research*, reprinted in COMMISSION REPORT, *supra* note 3, at 6-10 app. [hereinafter cited as Ramsey Report].

152. McCormick, *Experimentation on the Fetus: Policy Proposals*, reprinted in COMMISSION REPORT, *supra* note 3, at 5-2 app. to 5-3 app. [hereinafter cited as McCormick Report].

153. Siegel, *Experimentation on Fetuses Which are Judged to be Nonviable*, reprinted in COMMISSION REPORT, *supra* note 3, at 7-2 app. to 7-3 app. [hereinafter cited as Siegel Report].

154. Walters, *Ethical and Public Policy Issues in Fetal Research*, reprinted in COMMISSION REPORT, *supra* note 3, at 8-6 app. to 8-8 app. [hereinafter cited as Walters Report].

155. Wasserstrom Report, *supra* note 121, at 9-2 app., 9-3 app., & 9-9 app.

156. Lappé, *Balancing Obligations to the Living Fetus with the Needs for Experimentation*, reprinted in COMMISSION REPORT, *supra* note 3, at 4-2 app. [hereinafter cited as Lappé Report].

157. Bok, *Fetal Research and the Value of Life*, reprinted in COMMISSION REPORT, *supra* note 3, at 2-5 app. [hereinafter cited as Bok Report].

158. *Id.* at 2-7 app.

one which has value only when "its potentiality is wanted" by its progenitors. The fetus is neither a "patient" nor a "human subject," he declares, but is precisely and only a fetus.<sup>159</sup>

## (2) The Immorality of Abortion

Each of the six ethical consultants who believes in fetal personhood also believes, as a corollary, that abortion is immoral and that fetal experimentation is inextricably intertwined with the immoral abortion system. Fetal experimentation, the consultants believe, is both a *cause* and an *effect* of abortion. Professor Wasserstrom, for example, starts from the premise that "abortion, not experimentation upon the non-viable fetus is the fundamental, morally problematic activity."<sup>160</sup> Because he believes that a woman must be able to change her mind about her decision to abort, he cannot condone *any* risky non-therapeutic *in utero* experimentation. Should the woman decide to continue the pregnancy to term after such experimentation has begun, the infant born to her may have been injured, a tragedy for the child, for the parents, and for society. Wasserstrom thus finds experimentation objectionable because it may, in some cases, be an "artificial" inducement to carry out the morally problematic decision to abort.<sup>161</sup>

Fetal experimentation is, of course, more often an end product or *effect* of abortion. Dr. Walters, who objects strongly to this connection, illustrates his point with the following analogy:

In the case of a random homicide, there is generally no ethical objection to the use of organs from the deceased for transplantation purposes . . . . However, if a particular hospital became the beneficiary of an organized homicide-system which provided a regular supply of fresh cadavers, one would be justified in raising questions about the moral appropriateness of the hospital's continuing cooperation with the suppliers.<sup>162</sup>

To Rabbi Siegel, the guiding principle is a "bias for life,"<sup>163</sup> which requires first that life (including prenatal life) be sustained where it exists and second that any individual life (again, including prenatal life) presently in being be given precedence

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159. Fletcher, *Fetal Research: An Ethical Appraisal*, reprinted in COMMISSION REPORT, *supra* note 3, at 3-3 app. to 3-5 app. [hereinafter cited as Fletcher Report].

160. Wasserstrom Report, *supra* note 121, at 9-3 app.

161. *Id.* at 9-9 app. to 9-10 app.

162. Walters, *supra* note 4, at 41. This argument, of course, assumes its conclusion: abortion is homicide and an abortus a cadaver.

163. Siegel Report, *supra* note 153, at 7-1 app.

over life that might come afterwards. Dr. Ramsey finds abortion ethically objectionable and society therefore "collectively guilt-laden."<sup>164</sup> He believes that one reason for society's desire to make scientific experimental use of the fetus is to compensate for its guilt, that is, to derive some good out of evil.<sup>165</sup>

### (3) The Guiding Spirit—Judeo-Christian Tradition

An examination of the reports of the Commission's ethical consultants reveals that the spirit behind the "fetal personhood" premise was predominantly a religious one. The most influential ethical consultant to the National Commission was Paul Ramsey, Professor of Religion at Princeton University, whose work is considered the primary "reference point for almost all the other reasoning in [the] area [of fetal experimentation]; his views are encountered at every turn, even if in efforts to rebut them."<sup>166</sup> Ramsey's major premise is that a fundamentalist Jewish-Christian tradition, which he believes to be the "foundation of medical ethics to date," ought to govern ethical thinking on the issue of fetal experimentation.<sup>167</sup>

LeRoy Walters, who describes both himself and Ramsey as "religious ethicists,"<sup>168</sup> is explicit about the source of his views regarding fetal personhood: "For the most part, the Judeo-Christian tradition has ascribed a high value to pre-natal human life . . . . The primary grounds for this respect have been *theories of ensoulment* ("animation"), on the one hand, and a concern for the protection of innocent life on the other."<sup>169</sup> More significantly, Walters believes that fundamentalist religious thought provides the justification not only for placing a high value on "prenatal human life" but also for placing a relatively low value on the medical progress, for example, perfecting tech-

164. P. RAMSEY, *supra* note 4, at 43.

165. *Id.*

166. Steinfels, *supra* note 39, at 12. See also Capron, Book Review, 294 N. ENG. J. MED. 789 (1976).

167. I myself tend to believe that *any* use of the fetal subject . . . would be *abuse* . . . . [S]eizing the "golden opportunity" afforded by abortion to exact—and falsely to presume"—acts of charity from the fetus as a human research subject . . . can only mean a terrible distortion of medical ethics to date, and of the Jewish-Christian tradition which was the foundation of its regard for the sanctity of life regardless of its age, condition, or "expectation of life."

Ramsey Report, *supra* note 151, at 6-11 app. (emphasis added).

168. Walters, *supra* note 4, at 33.

169. *Id.* at 48 (emphasis added).

niques to prevent death from prematurity, that might result from the scientific use of the fetus. Quoting from Ramsey's discussion of Christian and Jewish "pulses," Walters concludes that "we are not bound to guarantee life to premature infants at all costs and that there are questions of means, which are at least equally deserving of consideration."<sup>170</sup>

Rabbi Siegel offered a similar theological answer to the question of ethical responsibility for nonexperimentation. Siegel's thesis is that fundamentalist Jewish thought, as reflected in Talmudic literature, would place a higher value on the life of a soon-to-be-aborted fetus than on the lives or welfare of future generations:

Experiments for the "good of medicine" or for the sake of the "progress of knowledge" are not automatically legitimated, if they cause harm to people now, because someone in the future might benefit. What comes in the future is what the Talmudic literature calls "*the secrets of the Almighty*." This does not mean that we have no responsibility toward the future. However, we have a greater responsibility to those who are now in our care.<sup>171</sup>

That most of the Commission's consultants referred to "Judeo-Christian tradition," "theories of ensoulment," and "secrets of the Almighty" does not inevitably lead to the conclusion that there was no nonreligious inspiration behind the current law.<sup>172</sup> Professor Richard Wasserstrom, one of the six ethicists who expressed a belief in fetal personhood, or quasi-personhood,

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170. *Id.* at 46. Walters drew this line of reasoning from Ramsey's book on genetic control in which Ramsey declared:

Anyone who intends the world as a Christian or as a Jew knows along his pulses that he is not bound to *succeed* in preventing genetic deterioration, any more than he would be bound to retard entropy, or prevent planets from colliding with this earth or the sun from cooling. He is not under the necessity of *ensuring* that those who come after us will be like us. . . . He knows no such *absolute* command of nature or of nature's God. . . .

[The Christian] will always have in mind the premise that there may be a number of things that might succeed better but would be intrinsically wrong means for him to adopt.

P. RAMSEY, *FABRICATED MAN: THE ETHICS OF GENETIC CONTROL* 29-30 (1970).

171. Siegel Report, *supra* note 153, at 7-1 app. (emphasis added).

172. Cf. *RIGHT TO LIMIT CHILDBEARING*, *supra* note 27, at 28 n.57: Norman St. John Stevas, *The Right to Life* (1964) 117, attempts to insulate opposition to abortion from religious freedom considerations by asserting that the right to life from the moment of conception is not religious dogma but a Western *philosophic* position in opposition to destroying human life. However, a Western philosophic belief in the sanctity of life *does not necessarily embrace the concept of personhood before birth*. Cf. Daniel Callahan, *Abortion: Law, Choice and Morality* (1970), 307-348 (emphasis added).

attempted to identify a possible nontheological ethical basis for a public policy that treats

the fetus . . . in most if not all morally relevant respects like a fully developed, adult human being. . . . The [nontheological] argument focuses upon the similarities between a developing fetus and a newly born infant. In briefest form, the argument goes as follows. It is clear that we regard a newly born infant as like an adult in all morally relevant respects. Infants as well as adults are regarded as persons who are entitled to the same sorts of protection, respect, etc. But there are no significant differences between newly born infants and fetuses which are quite fully developed and about to be born. What is more, there is no point of the developmental life of the fetus which can be singled out as the morally significant point at which to distinguish a fetus not yet at that point from one which has developed beyond it and hence is now to be regarded as a person. Therefore, fetuses are properly regarded from the moment of conception as having the same basic status as an infant. And since infants are properly regarded as having the same basic status as adults, fetuses should also be so regarded.<sup>173</sup>

This developmental thesis does not pass muster as a non-religious foundation for the anti-experimentation regulations. Despite its presentation in carefully neutral language, the argument rests, at bottom, on a religious premise. Professor Tribe has pointed out that science and medicine offer no way to determine when a fetus has become a person, and that "the only bodies of thought that have purported in this century to locate the crucial line between potential and actual life have been those of organized religious doctrine."<sup>174</sup> The search for that morally significant point, therefore, "entails not an inference or demonstration from generally shared premises, whether factual or moral, but a statement of religious faith upon which people will invariably differ widely."<sup>175</sup> Wasserstrom's phrasing of the argument in terms of a developmental continuum does not alter its essentially religious premise. As Tribe has noted:

More modest theories disavow any certainty as to which event marks the crucial transition but conclude that conception should be deemed decisive so as to avoid any risk that, by choosing a later line, one will mistakenly overshoot the correct point . . . . The premise on which [this argument rests]—that there is in fact a moment, albeit one that human beings may be forever barred from correctly identifying, after which the fetus must be considered, in some objective rather than merely conventional sense, an independent human being—is unmistakably religious . . . .<sup>176</sup>

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173. Wasserstrom Report, *supra* note 121, at 9-1 app.

174. Tribe, *supra* note 92, at 20.

175. *Id.* at 21.

176. *Id.* at 20 n.94.

Moreover, even if the developmental argument could be shown to rest on secular principles, it is not logically possible that it was the ethical foundation for the current anti-experimentation regulations. Governmental adherence to this point of view would require, contrary to *Roe v. Wade*, that abortion be treated as murder. Professor Wasserstrom recognized this,<sup>177</sup> as did one of the Commission's theological consultants, Father Richard McCormick.

[A]ny policy restrictive of fetal experimentation must find other grounds (other than present fetal humanity and rights) for its restrictiveness—at least if legal consistency is to be preserved. For it is patently ridiculous to stipulate that fetal life may be taken freely because it is only "potential human life" and yet to prohibit experimentation on this same "potential human life," especially when great medical benefits may be expected from such experimentation.<sup>178</sup>

If, however, the ethical basis for fetal experimentation policy is Judeo-Christian principle rather than a secular jurisprudential premise, consistency with established legal norms and definitions is not required. For one who starts from a theological moral absolute, current secular law and the premises underlying that law are irrelevant to the task of formulating an *ethical* public policy.<sup>179</sup> Indeed, contravening *Roe v. Wade* by imposing the fundamentalist view of personhood-from-conception in one area of governmental activity might well be viewed as the first step toward reversing public policy on abortion itself.<sup>180</sup>

In any case, it is clear that the ethical consultants, including the most influential one, waged the fetal experimentation debate in religious terms. Their reports, read in conjunction with the informal legislative history of the regulations, show evidence of a strong religious influence for the enactment of rules premised

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177. "Now, of course, on this view abortion . . . raises enormous moral problems, since it is morally comparable to infanticide and homicide generally. And the morality of abortion per se is beyond the scope of the present inquiry." Wasserstrom Report, *supra* note 121, at 9-1 app.

178. McCormick Report, *supra* note 152, at 5-8 app. (emphasis added).

179. From no legal "is" can a moral "ought" be drawn—either in medical or in general ethics. The superiority of the original NIH guidelines we shall see, is most clearly evident because the drafters proceeded to reason *ethically* about fetal research and the needed guidelines, *the Supreme Court notwithstanding*. The inferiority of its subsequent revision is clear from its crucial introduction of legal positivism and the facticity of abortion.

RAMSEY, *supra* note 4, at 41.

180. See COMMISSION REPORT, *supra* note 3, at 78 (dissenting statement of Commissioner David W. Louisell); McCormick Report, *supra* note 152, at 5-8 app. See also notes 20-28 *supra* and accompanying text.

on a fundamentalist Judeo-Christian world view. Had HEW couched the regulations in terms of "fetal ensoulment" and "secrets of the Almighty," they almost certainly would have been unable to withstand an establishment clause challenge. The ethicists' reports indicate that the *purpose* of the instant regulations is essentially the same as would be the purpose of a hypothetical "ensoulment" regulation. The *effect* on national health needs is *exactly* the same. Only the words are different. Thus, by careful drafting, that is by deleting the "ensoulment," "Almighty," "Talmudic," and "Judeo-Christian" language from his excerpts of the consultants' reports, the Secretary of HEW was able not only to disregard completely the reports of the Commission's scientific consultants and to impose substantial restrictions on the progress of biomedical science, but also to avoid giving the courts an obvious establishment clause basis for invalidating the law.

Under the constitutional analysis proposed here, however, the predominantly religious underpinnings, coupled with the disputed moral premise<sup>181</sup> and coercive impact<sup>182</sup> of the regulations, create a presumption of unconstitutionality; if the regulations are to survive, they must be supported by a wholly secular justification.

#### 4. *A Search for an Extrinsic Secular Purpose*

The term "extrinsic secular" will be applied to any anti-fetal experimentation argument the validity of which does not necessarily depend on the acceptance of the moral (and largely religious) premise of fetal personhood. If there is any justification for the regulations that retains its force regardless of what one believes about the moral status of the fetus, such justification will be deemed secular, and the regulations will be constitutionally redeemed.

An examination of the regulations and their ethical premises reveals two possible extrinsic secular justifications for the provisions. These are (1) the "domino effect" and (2) preservation of a woman's right to change her decision to undergo an abortion.

##### a. The "Domino Effect"

According to the "domino effect" argument, if fetal experimentation is permitted, then it is likely that such research will

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181. See notes 119-26 *supra* and accompanying text.

182. See text accompanying notes 127-28 *supra*.

set a precedent for the performance of similar experiments on other powerless or defenseless entities, such as infants or dying or unconscious adults.<sup>183</sup> Although this argument is generally made only by those who also accept the premise of fetal personhood,<sup>184</sup> one who makes a moral distinction between a fetus and an actual human being might still worry that investigators, or perhaps society in general, will come to believe that if fetal experimentation is morally permissible, then experimentation on others who are unable to defend themselves is also ethically proper.<sup>185</sup> Once this "domino effect" is set in motion, the result, it is feared, will be "a reenactment of the 'Nazi situation' or *Brave New World* or 1984."<sup>186</sup>

Those who urge this apocalyptic view fail in two respects to provide a secular justification for prohibitions on fetal research. First, unlike the situation in *McGowan* in which there was some factual support for the proposition that a uniform day of rest for workers served a social good,<sup>187</sup> there is no evidence that approval of fetal experimentation leads to insensitivity to the rights of helpless persons; hence, conversely, there is no factual support for the proposition that banning such experimentation serves a social good. Second, again unlike *McGowan* in which the state's specific goal could not be attained by any other reasonable means,<sup>188</sup> the precise goal of protecting helpless persons can be achieved by means other than depriving society of the benefits of fetal research. Thus, a societal consensus that children or the aged or dying should be protected from abusive treatment could be enforced by shaping policies specifically to prevent or halt any such abuses. The two-part counterargument to the domino theory is well stated by Dr. Sissela Bok:

Taken as an empirical argument, it must be seen for what it is—an inflammatory toying with human fears totally unrelated to any development seen to have taken place in societies permitting abortion and fetal research. To the best of my knowledge, available data do not bear out such dire predictions. The societies which have permitted abortion for considerable lengths of time have not experienced any tendency to infanticide, euthanasia, or Nazi-style experiments on children or adults. The infant mortality statistics of Sweden and Denmark, for example, are ex-

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183. See, e.g., Walters Report, *supra* note 154, at 8-9 app.

184. See, e.g., *id.* at 8-6 app. to 8-8 app.; P. RAMSEY, *supra* note 4.

185. See Wasserstrom Report, *supra* note 121, at 9-4 app.

186. Fletcher Report, *supra* note 159, at 3-9 app. Dr. Fletcher, of course, does not endorse this argument.

187. See note 113 *supra* and accompanying text.

188. See notes 113-14 *supra* and accompanying text.



tremely low, and the protection and care given to all living children, including those born with special handicaps, is exemplary. It is true that facts cannot satisfy those who want a logical demonstration that dangerous developments cannot under any circumstances come about. But if they are also trying to warn of actual risks, the burden of proof rests upon them to show some evidence of such developments taking place before opposing a policy which will mean so much to children and their families, and also to show why it would not be possible to stop any such development after it begins to take place.<sup>189</sup>

Perhaps the essence of the "domino effect" argument is not that permitting fetal experimentation leads to brutal treatment of defenseless human beings, but rather that fetal experimentation is brutal treatment of helpless human beings,<sup>190</sup> which returns the argument to its religious premise of fetal personhood. The "domino effect" theory thus fails to provide an extrinsic secular foundation for the regulations.

b. Preserving a Woman's Right to Change her Decision to Undergo an Induced Abortion

It is always possible that a pregnant woman who has decided to have an abortion will change her mind and decide to continue the pregnancy to term. *In utero* fetal research, it is argued, interferes with the woman's ability to alter her decision because the fetus may be injured by the experimentation, making the mother very reluctant to give birth to the child. Unlike the domino theory, the change-of-mind rationale is contained in the text of the Commission's Report<sup>191</sup> and presumably is one of the bases upon which the Secretary adopted the Commission's recommendation concerning an almost total ban on non-therapeutic *in utero* research.

The possibility of change of mind does seem to justify the stringent *in utero* restrictions—until one looks at the available data, which indicate that the "problem" is almost nonexistent and can be solved by other more specifically tailored means. Information submitted to the Commission as a consultant's report by Dr. Michael Bracken<sup>192</sup> indicates that the number of women who initially seek an abortion and subsequently change their minds is infinitesimal. For example, in 1973, at Eastern

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189. Bok Report, *supra* note 157, at 2-13 app. (emphasis added).

190. See P. RAMSEY, *supra* note 4, at 31-37.

191. COMMISSION REPORT, *supra* note 3, at 68.

192. Bracken, *The Stability of the Decision to Seek Induced Abortion*, reprinted in COMMISSION REPORT, *supra* note 3, at 16-1 app.

Women's Center in New York City, out of 7,777 women seeking abortions, only seven changed their minds.<sup>193</sup> Similarly, in 1973-74, at Preterm Clinic in Boston, out of 10,858 women who initially sought abortions, only 31 subsequently decided to carry the pregnancy to term.<sup>194</sup>

The women who are at risk of changing their minds are not only very small in number, but also usually identifiable in the abortion counseling process.<sup>195</sup> Thus, it appears that the change-of-mind problem could be solved by disqualifying from participation in fetal experimentation all women who have not undergone abortion counseling, as well as those who during the course of such counseling have expressed either ambivalence about the impending abortion or difficulty in coping with conflict in general.<sup>196</sup> As an added precaution, any investigator participating in fetal experimentation could be prohibited from participating in the abortion decision or in the counseling.<sup>197</sup> Clearly the Commission's and Secretary's virtually total ban on non-therapeutic *in utero* experimentation is not a reasonable means available to pursue this secular goal.

Moreover, the change-of-mind argument does not provide even an ostensible extrinsic secular basis for the *ex utero* restrictions. The Commission, of course, recognized this, noting that "[o]nce the abortion procedure has begun, or after it is com-

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193. *Id.* at 16-5 app. to 16-6 app.

194. *Id.* at 16-6 app. The remainder of Dr. Bracken's data deal with persons seeking abortions before *Roe v. Wade* when the "institutional and psychosocial environments" were, in many cases "formidable." *Id.* at 16-5 app. Hence, those earlier change-of-mind rates would have little bearing on the number of women likely to change their minds in a more favorable post-*Roe* abortion climate. It should be noted that the Commission, while making repeated references to the "problem" of maternal change-of-mind, never once mentioned the Bracken study, which it had commissioned, and which indicates that maternal change-of-mind is a numerically insignificant problem. Since the text of the Commission's Report refers to each of the other consultant's reports, the failure to mention the Bracken study seems particularly significant.

195. "Abortion counseling is a crucial procedure for selecting out of the clinic population women who are at increased risk of changing their decision to abort. An invitation to participate in a research project should only follow, and should be independent of, routine abortion counseling." *Id.* at 16-17 app.

196. "Women more at risk of changing their decision to abort are more likely to be characterized by psychological than by demographic factors. The style of coping with conflicts during decision making, rather than simply the presence of conflict, is more likely to predict late changes of decision." *Id.* at 16-16 app.

197. See note 195 *supra*.

pleted, there is no chance of a change of mind on the woman's part which will result in a living, injured subject."<sup>198</sup> How then did the Commission justify its stringent restrictions on *ex utero* research? The answer is that the Commission justified the prohibition by resorting to respect for the "dignity" and "integrity" of the aborted fetus which, the commissioners believed, is indistinguishable from a dying human being:

[W]hile questions of risk [of harm or injury to a fetus which is in the process of being, or already has been, aborted] become less relevant, *considerations of respect for the dignity of the fetus continue to be of paramount importance, and require that the fetus be treated with the respect due to dying subjects.* While dying subjects may not be "harmed" in the sense of "injured for life", issues of violation of integrity are nonetheless central. The Commission concludes, therefore, that out of respect for dying subjects, no non-therapeutic interventions are permissible which would alter the duration of life of the non-viable fetus *ex utero*.<sup>199</sup>

The Commission's recommendation was adopted by the Secretary but with one important exception—the *ex utero* prohibitions are inapplicable where the purpose of the research activity is to "enable [other] fetuses to survive to the point of viability."<sup>200</sup> Paradoxically, however, when the purpose of the research activity is to help infants, children, or adults—about whose personhood there is no controversy—then the research activity is prohibited; for, in such cases, the "dignity" and "integrity" of the fetal person<sup>201</sup> is of "paramount importance." This is the only stated rationale for the *ex utero* restrictions; it can hardly be deemed to have been derived from premises which are independent of the controverted fetal personhood rationale.

In sum, "fetal dignity," rather than the likelihood of changing the abortion decision, is at the root of the federal fetal-experimentation prohibitions. For, if the object of concern were the mother, then *all ex utero* restrictions would be unnecessary

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198. COMMISSION REPORT, *supra* note 3, at 68.

199. *Id.* (emphasis added).

200. 45 C.F.R. § 46.209(b) (1976).

201. The Commission's treatment of the "fetal personhood" issue contains an interesting paradox. In the "Preface to Deliberations and Conclusions" the Report states that "the Commission has not addressed directly the issues of the personhood and the civil status of the fetus." However, in the same paragraph, indeed in the preceding sentence, the Commission states that "the belief has been affirmed that the fetus *as a human subject* is deserving of care and respect." COMMISSION REPORT, *supra* note 3, at 61-62 (emphasis added).

(so long as the mother's consent were obtained). Moreover, in light of the extremely small number and the identifiability of women who actually alter their decision to abort, the *in utero* ban is so overinclusive that it appears to be arbitrary and without reasonable relation to any end within the competency of the secular state.<sup>202</sup>

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202. The same constitutional analysis is applicable to state statutes governing fetal research. The history of the state laws parallels the federal experience. Before *Roe v. Wade* there apparently were no laws or regulations directed specifically at research involving fetuses. After January 1973, however, the legislatures of sixteen states enacted statutes that regulate fetal research. These laws range from a Louisiana statute under which any non-therapeutic experimentation on any embryo, fetus, or abortus, is punishable by a minimum sentence of five years at hard labor and a maximum sentence of twenty years, LA. REV. STAT. ANN. § 14:87.2 (West Supp. 1974), to a South Dakota statute which prohibits only "experimentation with fetuses without written consent of the woman" and does not specify any punishment. S.D. COMP. LAWS ANN. § 34-23A-17 (Supp. 1976).

Eight of these statutes prohibit both *in utero* and *ex utero* research: ILL. ANN. STAT. ch. 38, § 81-26 (Smith-Hurd Supp. 1977); LA. REV. STAT. ANN. § 14:87.2 (West Supp. 1974); ME. REV. STAT. ANN. tit. 22, § 1574 (West Supp. 1975); MASS. ANN. LAWS ch. 112, § 12J (Michie/Law. Co-op Supp. 1977); MINN. STAT. § 145.422 (1976); MO. REV. STAT. § 188.035 (Cum. Supp. 1975); S.D. COMP. LAWS ANN. § 34-23A-17 (Supp. 1976); N.D. CENT. CODE § 14-02.2 (Supp. 1975). One proscribes *in utero* procedures only. UTAH CODE ANN. § 76-7-310 (Supp. 1975). Seven appear to be aimed at *ex utero* experimentation: CAL. HEALTH & SAFETY CODE § 25956 (West Supp. 1977); IND. CODE ANN. § 35-1-58.5-6 (Burns 1975); KY. REV. STAT. ANN. § 436.026 (Baldwin 1975); MONT. REV. CODE ANN. § 94-5-617(c) (Supp. 1973); NEB. REV. STAT. § 28-4, 161 (1975); OHIO REV. CODE ANN. § 2919.14, (Page 1975); PA. STAT. ANN. tit. 35, § 6605 (Purdon Supp. 1977). Those state statutes which are directed, in whole or in part, at *ex utero* procedures appear to be more restrictive than their federal counterpart. That is, while the federal guidelines permit *ex utero* experimentation in some (very limited) circumstances, see notes 54-60 *supra* and accompanying text, most of the state laws proscribe all *ex utero* research.

Their flat proscription on research procedures using fetuses indicates that the state laws are also based on the premise that a fetus is a person whose dignity, at least, must be protected—a conclusion that can be drawn only by reference to religious principles. See notes 166-79 *supra* and accompanying text. The statutes are also coercive, clearly forcing nonbelievers to conform their actions to the religious premises on which the laws are based. Overt evidence of religious influence behind state statutes is more difficult to supply; unlike the federal regulations, the recorded legislative history of the state enactments is scant. *Epperson* may be of assistance on this point as indicating that when a state statute is based on a possibly religious premise, informal sources such as newspaper accounts may be considered. See notes 99-102 *supra* and accompanying text. In any case, if a court could be persuaded to accept Professor Tribe's argument that an establishment clause issue is presented when "a controversy [is] so structured in a particular social and historical context that no attempt to resolve it in a public forum can avoid

## IV. CONCLUSION

That research using fetuses has led to many significant medical advances is undisputed. There is also little question that continuation of such research would aid the development of other medical knowledge and techniques of great benefit—particularly to infants. Because medical studies using fetuses are inevitably linked to abortion, however, the debate over fetal research became a means through which the opponents of abortion could secure official recognition of their belief that a fetus is a person from the moment of conception. The current federal regulations, which were shaped by this controversy, are most reasonably interpreted as requiring that the fetus be treated according to the same standards as any human subject involved in a scientific experiment.

It is the thesis of this Article that the question of fetal personhood cannot be resolved through rational inquiry but is a matter of faith and of religious belief. Moreover, in this society, it is a belief as to which there clearly is no consensus. The federal regulations governing fetal research give official sanction to the disputed premise of fetal personhood and thereby force nonbelievers to conform their behavior to it. More important, both the official and unofficial history of the regulations strongly suggest that the predominant animus underlying the law was a religious one. Under the analysis proposed in this Article, these factors create a presumption that the regulations represent an impermissible establishment of religion. This presumption may be overcome by showing that a secular purpose, unrelated to the disputed religious belief, is also served by the regulations. Examination of the two most commonly urged non-religious reasons for such restrictions on fetal research, however, reveals that they are not sufficient to uphold the regulations. Neither the brutalizing effect on society nor undermining a woman's ability to change her mind is a significant danger causally related to approval of fetal experimentation. Moreover, each

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explicit confrontation with the religious differences that ultimately divide the disputants," Tribe, *supra* note 92, at 23 n.106, actual proof of legislative history might be unnecessary. Consequently according to the constitutional analysis suggested in this Article, the state would have the burden to show that (1) the statute serves a wholly secular purpose—one that does not depend on acceptance of the premise of fetal personhood—and (2) that the secular purpose cannot be served by other reasonably available means that do not raise constitutional questions.

of these interests could be served by more specifically drawn measures that do not raise constitutional issues.

The only legitimate position for a secular state with regard to an essentially religious issue such as fetal personhood is one of neutrality. This principle, in the context of biomedical research, would allow those scientists willing and competent to carry on valuable research using fetuses to do so, while leaving those who find such work objectionable for moral or religious reasons equally free not to participate. Because the federal regulations governing fetal research depart from this principle of neutrality, they are open to attack as an unconstitutional establishment of religion.

