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# Implications of the Coming Retreat from *Roe v. Wade*

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## ARTICLES

### IMPLICATIONS OF THE COMING RETREAT FROM *ROE V. WADE* \*

Charles F. Rice\*\*

In *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>1</sup> the Supreme Court held unconstitutional Pennsylvania statutes which required that (1) pregnant women give "informed consent" to an abortion and that they be provided information as to the characteristics of their unborn child, the nature and risks of abortion and the availability of alternatives to abortion;<sup>2</sup> (2) the attending physician must file detailed reports on abortions and the reports be made available to the public for copying, even though this could lead to public identification of the woman having the abortion;<sup>3</sup> (3) that in post-viability abortions, the physician use the care and techniques that would provide the best opportunity for the unborn child to be aborted alive unless . . . that technique would present a significantly greater medical risk to the life or health of the pregnant woman;<sup>4</sup> and (4) a second physician be present during an abortion involving a potentially viable fetus.<sup>5</sup>

The vote in *Thornburgh* was 5-4, with Chief Justice Burger, who had voted with the 7-2 majority in *Roe v. Wade*<sup>6</sup> dissenting. The division of the Court in the *Thornburgh* vote indicates that, with further appointments or a change in view on the part of sitting Justices, the Court may well alter its view on abortion.

In response to the *Thornburgh* ruling, Eleanor Smeal, former president of

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\* A substantial part of this essay derives from a Brendan Brown lecture delivered by Professor Rice on September 25, 1986 at The Catholic University of America, Columbus School of Law.

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1. 106A S. Ct. 2169 (1986).

2. *Id.* at 2178-79.

3. *Id.* at 2181-82.

4. *Id.* at 2183.

5. The Court held that these provisions were unconstitutional, because they lacked the necessary exception for an emergency. *Id.* at 2183-84.

6. 410 U.S. 113 (1973).

the National Organization for Women, said the decision "can be interpreted to read that the women of the United States are now just one vote away from losing the rights they worked so hard to win."<sup>7</sup> Opponents of abortion agreed that the closeness of the *Thornburgh* vote indicates that the decision of *Roe v. Wade* is likely to be overturned in the near future. "I have always felt that a constitutional amendment was the only way to reverse *Roe*,"<sup>8</sup> commented Congressman Henry Hyde (R. Ill.). "As the court matures in its thinking," he continued, "and begins to digest the national experience of 1.5 million abortions a year, the numbers are getting closer. Which will come first—a constitutional amendment or a new justice? I think a new justice."<sup>9</sup>

The fears and hopes of both sides as to the future of *Roe v. Wade* appear to be overdrawn. While it is fair to expect a change in the attitude of the Court toward legalized abortion, an examination of the basic premises of the *Roe* and *Thornburgh* decisions indicate that whatever change does occur will be less than fundamental.

In *Roe v. Wade*<sup>10</sup> and the companion case of *Doe v. Bolton*<sup>11</sup>, the Court said that it would not decide whether an unborn child is a living human being. Rather, the Court ruled that, whether or not he is a human being, the unborn child is not a person, since "the word person," as used in the Fourteenth Amendment [sic], does not include the unborn."<sup>12</sup> Thus, the Court effectively concluded that an acknowledged human being is a non-person.

In *Roe*, the right to life of the unborn child was asserted against the mother's right to privacy. As between those two rights, the right to life is clearly superior. The Court acknowledged this in a note, indicating that if the personhood of the unborn child was established, abortion would not be permitted even to save the life of the mother.<sup>13</sup> The Court candidly stated that if personhood were established, the case for legalized abortion "collapses."<sup>14</sup> But since the Court ruled that the unborn child, whether or not he is a human being, is not a person, he therefore has no rights.

The only right remaining is the mother's right to privacy. While the Court asserted that this right is not absolute<sup>15</sup>, it was defined so as to permit, in effect, elective abortion at every stage of pregnancy to the time of normal

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7. Chicago Tribune, June 15, 1986, § 5, at 1, col. 1.

8. *Id.*

9. *Id.*

10. 410 U.S. 113 (1973).

11. *Id.* at 179.

12. *Roe v. Wade*, 410 U.S. at 158 (1973).

13. *Id.* at 157 n.54.

14. *Id.* at 156-57.

15. *Id.* at 155.

delivery. According to *Roe*, after viability, the state may regulate abortion and may even prohibit it, "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."<sup>16</sup> The health of the mother, however, includes psychological as well as physical well-being. Thus in *Doe v. Bolton*, the Court said that "the medical judgment may be exercised in the light of all factors-physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the mother."<sup>17</sup> Consequently, these loose criteria are equivalent to a sanction for permissive abortion.

Since 1973, the Supreme Court has reaffirmed the basic principle of *Roe v. Wade* in various applications.<sup>18</sup> Although an analysis of these cases is beyond the scope of this article, their net effect is to confirm the present disposition of the Court, as in *Thornburgh*, to invalidate all state prohibitions, and even to invalidate most state regulations of abortion at any stage of pregnancy.

The crucial issue, however, is personhood. In a constitutional system in which personhood is a precondition for possessing constitutional rights, is there an inseparable connection between humanity and personhood? Must all human beings be regarded as persons, or may some human beings be excluded from the category of persons so as to be deprived of constitutional rights, including even the right to live? This article is not concerned with the ability of competent adults to waive the rights derived from personhood, including the waiver implied in the commission of a crime. Rather, the question is whether an innocent human being may be deprived of personhood, without his consent, so as to be subject to execution at the discretion of others. To the extent that one is subject to such execution, he is a non-person. That is why, as noted below, Justice Stevens stated in his *Thornburgh* opinion that if the unborn child is a person, his life cannot be at the disposal of the legislature.<sup>19</sup>

There is no reasonable basis, despite *Thornburgh*, to conclude that the Court is likely to reverse *Roe* on the crucial holding that the unborn child is not a person. None of the dissenters in *Thornburgh* disagreed with the majority on the personhood issue. Chief Justice Burger, who had voted with

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16. *Id.* at 165.

17. 410 U.S. at 192.

18. See, e.g. *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Beal v. Doe*, 432 U.S. 519 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Sendak v. Arnold*, 429 U.S. 968 (1976); and *Connecticut v. Menillo*, 423 U.S. 9 (1975).

19. *Thornburgh*, 106A S. Ct. at 2188 (Stevens, J., concurring.)

the majority in *Roe*, dissented in *Thornburgh* because he concluded that the *Thornburgh* ruling “plainly undermines . . . [the] important principle” of *Roe* that “the right to an abortion, is not unqualified and must be considered against important state interests in regulation.”<sup>20</sup> The Chief Justice, however, did not abandon his view that the Constitution guarantees a qualified right to an abortion.<sup>21</sup> Similarly, Justice White, joined by Justice Rehnquist, in his dissent stated:

I can certainly agree with the proposition-which I deem indisputable-that a woman’s ability to choose an abortion is a species of “liberty” that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so fundamental that restrictions upon it call into play anything more than the most minimal scrutiny.<sup>22</sup>

Justice White indicated that he would uphold even some state prohibitions of abortion and he opted for “overruling” *Roe v. Wade*. He stated:

[b]oth the characterization of the abortion liberty as fundamental and the denigration of the State’s interest in preserving the lives of nonviable fetuses are essential to the detailed set of constitutional rules devised by the Court to limit the States’ power to regulate abortion. If either or both of these facets of *Roe v. Wade* were rejected, a broad range of limitations on abortion (including outright prohibition) that are now unavailable to the States would again become constitutional possibilities.

In my view, such a state of affairs would be highly desirable from the standpoint of the Constitution. Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted. *Roe v. Wade* implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never - not in 1787, 1791, 1868, or at any time since - done any such thing. I would return the issue to the people by overruling *Roe v. Wade*.<sup>23</sup>

Justice White, however, did not challenge the basic holding of *Roe* that the unborn child is not a person. His evident preference is for the states’ rights solution that would permit the legislature of each state to allow or

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20. *Id.* at 2190 (Burger, C.J., dissenting).

21. *Id.*

22. *Id.* at 2194 (White, J., dissenting).

23. *Id.* at 2197-98 (White, J., dissenting).

prohibit abortion. As noted by Justice Stevens in his concurrence, this approach implicitly rejects the personhood of the unborn child.<sup>24</sup>

In a dissent joined by Justice Rehnquist, Justice O'Connor did not challenge the principle that the unborn child is a nonperson. Instead, she criticized the majority on the ground that it:

appears to adopt as its new test a *per se* rule under which any regulation touching on abortion must be invalidated if it poses "an unacceptable danger of deterring the exercise of that right." Under this prophylactic test, it seems that the mere possibility that some women will be less likely to choose to have an abortion by virtue of the presence of a particular state regulation suffices to invalidate it.<sup>25</sup>

In his concurring opinion, Justice Stevens emphasized the centrality of the personhood issue by stating:

[f]or, unless the religious view that a fetus is a person' is adopted—a view Justice White refuses to embrace—there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures.<sup>26</sup>

In a footnote to this statement, Justice Stevens observed that, "[n]o member of this Court has ever suggested that a fetus is a person' within the meaning of the Fourteenth Amendment."<sup>27</sup>

At the time of the *Thornburgh* decision, therefore, there was not one vote on the Court in favor of overruling *Roe* on its crucial personhood ruling. This was true despite Justice White's description of his proposed limitation of *Roe*.<sup>28</sup> Whatever the view adopted by the newly appointed Justices Antonin Scalia and Anthony Kennedy, there is no indication that the Court will overrule *Roe* on this point. One future prospect, however, would be the allowance by the Court of some more effective restrictions, and perhaps even prohibitions, of abortion by the states and Congress. The fulcrum of the controversy would then be shifted to the state legislatures and to Congress. If this were to occur, litigation would surely follow to test the type and scope of restrictions which the Supreme Court would tolerate. However, the issue of abortion would be complicated by the use of state constitutional provisions or statutes which provide greater protection to the right to privacy

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24. *Id.* at 2188 (Stevens, J., concurring).

25. *Id.* at 2214 (O'Connor, J., dissenting).

26. *Id.* at 2188 (Stevens, J., concurring).

27. *Id.* at 2188 n.8 (Stevens, J., concurring).

28. *Id.* at 2198 (White, J., dissenting).

than currently required by the Supreme Court. "Already, the decisions of the Massachusetts, New Jersey, and California High Courts can be read to establish a state constitutional right to abortion which would survive *Roe's* demise."<sup>29</sup>

The limited retreat from *Roe* apparently favored by Justice White and others would result in a patchwork of permissive and restrictive statutes on the abortion issue. It is likely, too, that such a compromise would only postpone the necessity of a judicial resolution of the personhood question.

If a state tribunal, such as the Montana or Louisiana Supreme Court, were to set aside an anti-abortion law because it violated a woman's state constitutional privacy right, the only remaining federal "pro-life" judicial option would be to urge the United States Supreme Court to hold that the federal constitution somehow protects the life of a fetus, the laws of Congress and the states notwithstanding.

Perhaps in the end this anticipated swirl of state and federal action would place the abortion issue back in the laps of nine life-tenured federal Justices. If so, the Court would be forced to face the formidable question: Are fetuses persons in the legal sense that they are entitled to the basic safeguards provided by the supreme law of the land? If the Court were to answer that question in the affirmative, such a ruling would place the abortion question beyond lawmakers' reach. Only a constitutional amendment could then revive the right cherished by many feminists.<sup>30</sup>

Another alternative is for Congress to enact a "Human Life Statute" defining the unborn child as a person.<sup>31</sup> In *Katzenbach v. Morgan*,<sup>32</sup> Justice Brennan enunciated the "ratchet theory" recognizing Congress' authority to secure fourteenth amendment guarantees through Section 5 of that amendment.<sup>33</sup> However, the Court also explained that:

[Section] 5 does not grant Congress power to exercise discretion in the other direction and to enact statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under Section 5 is limited to adopting measures to enforce the guarantees of the Amendment; Section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the

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29. Collins, *Is There "Life" (or "Choice") after Roe?*, 3 CONST. COMMENTARY 91, 95 n.9 (1986).

30. *Id.*

31. See Galeback, *A Human Life Statute*, 7 HUM. LIFE REV. 5 (1981).

32. 384 U.S. 641 (1966).

33. *Id.* at 650-51.

States to establish racially segregated systems of education would not be—as required by [Section] 5—a measure to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws.<sup>34</sup>

This “ratchet theory”, however, would make Congress merely an implementing agent for Supreme Court decisions. To ascribe such an intent to the legislators is unwarranted. Regardless, the pronouncement of the “ratchet theory” by Justice Brennan in the *Morgan* case was dictum since it was not necessarily essential to the decision of that case. But even if such a doctrine were enunciated by the Supreme Court as a specific holding, fidelity to the meaning of the fourteenth amendment would justify Congress in rejecting it as a self-serving attempt to establish a theory of judicial supremacy which is inconsistent with the intent of that amendment.

In any event, there is no reasonable prospect in the near future that Congress will enact a statute defining the unborn child as a person. If such a statute were enacted, it would, of course, eventually go before the Supreme Court for a decision as to its constitutionality. It is much more likely that the personhood issue will find its way to the Supreme Court by way of litigation arising out of state legislation.

A states' rights approach to abortion is premised on the concept of the non-personhood of the unborn child. Therefore, it is unlikely that a Supreme Court which has adopted this states' rights solution would repudiate it by conferring upon the unborn a personhood requiring the prohibition by the states of abortion in all cases. Unless a major reconstruction or realignment of the Court intervenes, the Court will likely decline the invitation to extend personhood to the unborn and will uphold the states' rights solution. While this would confirm the non-personhood of the unborn, its allowance of some restraints on abortion would be widely regarded by many as a victory for the pro-life cause. Such a “victory,” however, would have deeper and disturbing implications.

The adoption in American law of the “positivist principle” that some human beings can be decreed to be non-persons so as to be subject to death at the discretion of others, threatens not only the unborn but also the retarded, the incurably ill, the senile and other dependent classes of what the Nazis called “useless eaters.”<sup>35</sup> Even if the Supreme Court allows the states to extend some protection to the unborn child, stopping short of affirming his personhood and consequent immunity to execution at the discretion of

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34. *Id.* at 651 n.10.

35. See Affidavit of Defendant Brock, *Tricks of War Criminals Before the Nuremberg Military Tribunals*, Vol. I, (“The Medical Case”) 844. See also C. RICE, *THE VANISHING RIGHT TO LIVE* 61-66 (1969).



others, it will have implicitly rejected the necessary correspondence in a partial repeal of *Roe* that would save the lives of some unborn children, thus dissolving the basic protection of personhood with respect to all human beings.

The denial of personhood to some human beings must inevitably lead to a loss of respect for the sanctity of life in general. If the unborn child can be defined as a non-person, there would be no reason why his retarded brother and his grandmother might not be subjected to similar treatment. In the face of the demographic pressures toward euthanasia, as discussed below, and in the face of the privatization of abortion by early-abortifacient technology, it is predictable that an affirmation of non-personhood for the unborn, even in the context of a "repeal" of *Roe*, could lead to the killing of human beings of all ages on a scale larger than we have yet experienced.

The restoration of personhood could be particularly important to the unborn child in light of technological changes that have made early abortions by pill a reality.<sup>36</sup> The recognition of the unborn child as a person whose life must be protected by the law could be essential for a recognition of the validity of state prohibitions and regulation of drugs or devices that have no function other than the abortifacient.

In the coming era of privatized "abortion-by-pill" and privatized euthanasia by non-treatment and starvation, the disputes concerning exceptions to such practices will lose their importance. The major legislative control on early abortions will be in some form of licensing prohibiting substances and devices solely used for abortifacient purposes. There would also be regulation of the distribution of those substances and devices that have multiple purposes. As to private abortion and private euthanasia, the main safeguard for innocent life will be the restoration of the conviction among the American people that life is precious because it is the gift of God. The law could have an important educative effect, but only to the extent that it proclaims, without compromise, the sanctity of life and the personhood of all human beings without regard to age or ability.

At the risk of being misunderstood, I suggest that the advantage to be gained by a replacement of *Roe v. Wade* by a states' rights regime would be trivial. Surely many lives of unborn children would be saved in the states that would choose to restrict abortion. And I do not imply that to save even one life is trivial. Each life is precious and unique and we must do what we can to save lives, whether under *Roe*, a states' rights regime or any other arrangement. But in a wider perspective, the adoption of a states' rights

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36. For a discussion of the anti-progesterone pill, RU-486, see *Washington Times*, Jan. 22, 1986, at 2A, col. 2.

solution would so undermine American law that it would potentially jeopardize the lives of all and not merely the lives of the unborn. In any event, it is wrong to concede the legitimacy of the murder of Able in order to save Baker. Such a concession underlies the states' rights approach. It is wrong, in principle as well as in pragmatics, to attempt to save Able by accepting a depersonalization principle that subjects to forfeiture, at the decree of the majority, the lives of Baker, Charlie, Delta and every other human being.

Perhaps the main source of confusion with respect to the impending retreat from *Roe* is the tendency to view legalized abortion as the problem rather than a symptom of more basic ills. In fact, legalized abortion is a symptom of the general acceptance in American society of secularism, relativism (with its offspring, legal positivism) and the contraceptive ethic.

Abortion is a symptom of secularism. The establishment clause of the first amendment was intended to require Congress to maintain neutrality among religious sects. It was not intended to prevent government from acknowledging God and from promoting prayers and a recognition of His law.<sup>37</sup> Since 1961, however, the Supreme Court has imposed on the states as well as on the federal government, a requirement of neutrality, not only among religious sects, but also between theism and non-theism.<sup>38</sup> Thus, government is required to suspend judgment on the very question of the existence of God. It is now unconstitutional, according to the theory of the Supreme Court, for the President to affirm officially that the Declaration of Independence is in fact true when it proclaims the existence of "Nature's God," the "Creator," the "supreme Judge of the world" and the "Divine Providence." These words may be recited only as a historical commemoration without any affirmation that they are in fact true.<sup>39</sup> Government can neither affirm nor deny the existence of God. But when government suspends judgment on the existence of God, it gives implicit preference to agnosticism.

The Declaration of Independence recognized "the laws of nature and of nature's God"<sup>40</sup> and affirmed that "all men. . . are endowed by their Creator with certain inalienable rights."<sup>41</sup> Therefore, there are, God-given limits which no government can rightly exceed. The Supreme Court's false neutrality, however, implicitly rejects the natural moral law as a limit on government action. This preference for an agnostic secularism requires that the

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37. See generally R. CORD, *SEPARATION OF CHURCH AND STATE* (1982); C. RICE, *THE SUPREME COURT AND PUBLIC PRAYER* (1964).

38. See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

39. See *Abington School Dist.*, 374 U.S. at 304 (Brennan, J., concurring).

40. *THE DECLARATION OF INDEPENDENCE* para. 1 (U.S. 1776).

41. *Id.* at para. 2.

right to life of the unborn child, his elder, retarded brother and his grandmother must be evaluated in secular, utilitarian terms. In that context, the odds are heavily against the “unwanted.”

Legalized abortion is also a symptom of relativism, which denies that there is an objective moral law derived from the unchanging nature of man known through reason and revelation. Instead, the relativist states that the morality of abortion, will depend on the circumstances of the particular case. Relativistic morality leads to legal positivism, the theory under which law becomes wholly a question of power and there is no moral limit to what the human law can do.

St. Thomas affirms that in order that “what is commanded may have the nature of law, it needs to be in accord with some rule of reason.”<sup>42</sup> If the human law acts contrary to reason as found in the eternal law, revelation, and the natural law, that human “law” is not a law at all but rather an act of violence.<sup>43</sup> Although there is an element of will in any law, the positivist denies that the human law must be in accord with reason. Instead, he reduces human law to an act of will by the one in command. This can be seen in *Byrn v. New York City Health and Hospital Corp.*<sup>44</sup>, where the highest court of that state upheld the liberal New York abortion law of 1970. The court first found that the unborn child, “upon conception . . . is human, if only because it may not be characterized as not human, and it is unquestionably alive.”<sup>45</sup> But then the court asked “whether a human entity, conceived but not yet born, is and must be recognized as a person in the law.”<sup>46</sup> The court’s answer was that:

[w]hether the law should accord legal personality is a policy question which in most instances devolves on the Legislature, subject again of course to the Constitution as it has been “legally” rendered. That the legislative action may be wise or unwise, even unjust and violative of principles beyond the law, does not change the legal issue or how it is to be resolved. The point is that it is a policy determination whether legal personality should attach and not a question of biological or “natural” correspondence.<sup>47</sup>

In support of this conclusion, the New York Court of Appeals cited Hans Kelsen, “[a]ny content whatsoever can be legal; there is no human behavior

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42. T. AQUINAS SUMMA THEOLOGICA, part II, Q. 90. Art. 1 (1915).

43. *Id.* at Q. 90. Art. 4.

44. 31 N.Y.2d 194, 286 N.E.2d 887 (1972), *appeal dismissed*, 410 U.S. 949, *reh’g denied*, 411 U.S. 940 (1973).

45. *Id.* at 199, 286 N.E.2d at 888.

46. *Id.* at 200, 286 N.E.2d at 889.

47. *Id.* at 201, 286 N.E.2d at 889.

which could not function as the content of a legal norm."<sup>48</sup> For a law to be valid, it is necessary only that "it has been constituted in a particular fashion, born of a definite procedure and a definite rule. Law is valid only as positive law, that is, statute (constituted) law."<sup>49</sup> The Supreme Court, after deciding *Roe v. Wade*, dismissed the appeal of the *Byrn* case.<sup>50</sup> *Roe v. Wade* is based on the same principle as *Byrn*.

*Roe v. Wade* reflected a fundamental change in American law. With respect to the most basic of all issues, the right to life, *Roe* adopted the principles of legal positivism which had been discredited by the German experience of 1933 to 1945. Even prior to World War I, positivism was dominant in Germany. "According to this new positivistic jurisprudence, the legislator, and he alone, creates the law. Everything prior to legislative enactment is at best custom, but never true law. Thus, law and right become wholly identified, and bare legality takes the place of substantive justice as an ideal."<sup>51</sup> Under the Nuremberg Laws of 1935, the Nazis deprived Jews of their citizenship and political rights, in effect depriving them of personhood.<sup>52</sup> Later, they were deprived of their lives as well, pursuant to the euthanasia program designed to achieve "the destruction of life devoid of value."<sup>53</sup> The only significant difference between abortion and euthanasia, therefore, is the age and location of the victim.

Gustav Radbruch noted that positivism "disarmed the German jurists against law of an arbitrary and criminal content."<sup>54</sup> "Law is the quest for justice."<sup>55</sup> If enactments deny people their rights, "they are null and void; the people are not to obey them, and jurists must find the courage to brand them unlawful."<sup>56</sup>

Of course, application by the courts of a higher standard of law would be appropriate only in extreme cases. As a West German court said in 1947, "[w]henever the conflict between an enacted law and true justice reaches unendurable proportions, the enacted law must yield to justice, and be considered a lawless law."<sup>57</sup> There are some objective moral norms, however, of

48. Kelsen, *The Pure Theory of Law*, Part II, 51 L.Q. REV. 517, 517-18 (1935).

49. *Id.* at 518.

50. 410 U.S. 949 (1973).

51. Von Hippel, *The Role of Natural Law in the Legal Decisions of the Federal German Republic*, 4 NAT. L. F. 106, 107 (1959).

52. See H. ARENDT, *EICHMANN IN JERUSALEM* 39 (1964).

53. See generally F. WERTHAM, *A SIGN FOR CAIN* 153 (1969).

54. See Rommen, *Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany*, 4 NAT. L.F. 1, 11 n.26 (1959).

55. Von Hippel, *supra* note 51, at 110.

56. *Id.* at 111.

57. *Id.*

such importance that they should be held to override a contrary enacted law or even the Constitution itself. Racial equality before the law, I suggest, is such a norm. Thus the preferable response to school segregation in *Brown v. Board of Education*<sup>58</sup> was not to distort the intent of the fourteenth amendment so as to rest the outlawing of *de jure* segregation on a merely positivistic basis (*i.e.*, that it is against the intent of the fourteenth amendment). Rather, the response should have been that, whether or not the fourteenth amendment was intended to permit it, racial segregation in public facilities is unjust and is unlawful.

Another basic principle of natural law that should govern the human law is that, in a system where personhood is the condition of rights, there is an inseparable connection between humanity and personhood. A related principle is that law cannot justly sanction the execution of the innocent. This follows from the personhood principle since, as recognized by Justice Stevens in *Thornburgh*, to the extent that an individual is, as an innocent human being, is subject to death at the discretion of others, that individual is a non-person. This principle must apply to all human beings, including the unborn. And if one is somehow in doubt as to the humanity of the unborn child, he is bound, at least, to give the benefit of the doubt to life rather than death. In fact, there is no genuine doubt about the fact that human life begins at conception. When Louise Brown, the first test-tube baby, was born in 1978, the whole world knew when her life began: at the moment of conception.<sup>59</sup>

*Roe v. Wade* presented the conflict between the higher law and positivism because *Roe* placed no significant restrictions on its authorization of the execution of members of a class of innocent human beings. But even if *Roe* were to be modified so as to permit, but not require, the states to restrict or even prohibit abortion in some situations, that modification could be accepted only by conceding the legitimacy of the basic premises of legal positivism. The natural law does not forbid merely the unrestricted murder of the innocent, or such murder without the sanction of a legislature. Rather, it forbids murder absolutely. It would not have been a sound response to the Holocaust to say that each locality in Germany should have the right to choose whether to have its own death camp, or to argue that only those Jews who are over sixty-five should be killed. The issue is not whether an innocent human being can be killed without restriction, but whether he can be legally killed at all. Even if the Supreme Court makes a mid-course correc-

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58. 347 U.S. 483 (1954).

59. N.Y. Times, July 27, 1978, at 1, col. 2.

tion so as to restrict, but not forbid, such killing, it will have reaffirmed its adoption of the Nazi jurisprudence.

The experience of Nuremberg confirms the dictate of the natural law that the human law can never validly authorize the intentional execution of the innocent. It is no answer to say that we will allow only abortion on a limited basis, or that we will allow it only in states where the legislature so decides. That is the positivist position. The pre-1973 exception for the life of the mother was understandable in the context of medical knowledge of the time, and statutes were adopted as to cases where the mother's life was apparently or actually threatened, and where the principles of self-defense were understandably-but, I suggest, wrongly brought into play. I disagree with that exception. But its inclusion in pre-1973 laws did not reflect a conscious choice to sacrifice an innocent life for a lesser interest than life itself, and therefore did not involve the subjection of the innocent to death for convenience. Such killing for convenience is the issue today, together with presenting the issue between positivism and the natural law of God.

Abortion is also a symptom of the acceptance by American society of the contraceptive ethic. Abortion is the taking of life while contraception is the prevention of life. Nevertheless, there is a relation between the two which we tend to overlook.

As Pope Paul VI explained in his 1968 encyclical, *Humanae Vitae*,<sup>60</sup> contraception is always objectively wrong because it involves the willful separation of the two intrinsic aspects of sex - the unitive and the procreative.<sup>61</sup> Contraception is the exercise of the procreative function while taking a positive step to prevent a baby. Abortion shares this defect, denying that sex has any inherent relation to life. The contraceptive mentality is a mentality of not wanting babies. It tends to reduce objections to abortion an emotional or esthetic level. On the practical level, too, abortion is a "fail-safe" contraceptive. A necessary back-up technique for a society which regards new life not as a gift in trust from God but as a nuisance. Thus, permissive abortion is essential to a contraceptive society.

The acceptance of contraception arises from a lack of trust in the providence of God, and from a refusal to acknowledge that the law of God is the criterion for the origin of life. In his 1981 Apostolic Exhortation, *Familiaris Consortio*, Pope John Paul II said:

[w]hen couples, by means of recourse to contraception, separate these two meanings that God the Creator has inscribed in the being

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60. POPE PAUL VI, *HUMANAE VITAE*, ON THE REGULATION OF BIRTH (U.S. Catholic Conference 1968).

61. *Id.* at 7-9.

of man and woman and in the dynamism of their sexual communion, they act as 'arbiters' of the divine plan and they "manipulate" and degrade human sexuality and with it themselves and their married partner by altering its value of 'total' self-giving. Thus, the innate language that expresses the total reciprocal self-giving of husband and wife is overlaid, through contraception, by an objectively contradictory language, namely, that of not giving oneself totally to the other. This leads not only to a positive refusal to be open to life, but also to a falsification of the inner truth of conjugal love, which is called upon to give itself in personal totality.<sup>62</sup>

As with abortion, the connection between contraception and euthanasia arises from the question of dominion: who is in charge, man or God? In contraception, man assumes divine prerogative of deciding whether and when life shall begin. In euthanasia, he assumes the role of deciding when it shall end. This point of dominion was emphasized by Pope John Paul II who stated:

[a]t the origin of every human person there is a creative act of God. No man comes into existence by chance; he is always the object of God's creative love. For this fundamental truth of faith and reason it follows that the procreative capacity, inscribed in human sexuality, is - in its deepest truth - a cooperation with God's creative power.

It also follows that men and women are not the arbiters, are not the masters of this same capacity, called as they are, in it and through it, to be participants in God's creative decision. When, therefore, through contraception, married couples remove from the exercise of their conjugal sexuality its potential procreative capacity, they claim a power which belongs solely to God: the power to decide, *in a final analysis*, the coming into existence of a human person. They assume the qualification not of being cooperators in God's creative power, but the ultimate depositaries of the source of human life.

In this perspective, contraception is being judged, objectively, so profoundly unlawful as never to be, for any reason, justified. To think or to say the contrary is equal to maintaining that in human life situations may arise in which it is lawful not to recognize God as God.<sup>63</sup>

The practice of contraception is also based on the premise that there is

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62. Pope John Paul II, Apostolic Exhortation, *Familiaris Consortio*, reprinted in M.J. WRENN, POPE JOHN PAUL II AND THE FAMILY 29 (Franciscan Herald Press 1983).

63. Pope John Paul II, *Heroism in Marriage* 28 THE POPE SPEAKS 356-57 (1983).

such a thing as a life not worth living. In a secular, relativist, contraceptive society, this premise will be applied to the unfit and burdensome of all ages. If, through contraception, man makes himself, rather than God, the arbiter of the beginning of life, it ought not to be surprising that he will assume the same role with respect to the end of life.

A human life amendment or a human life statute would provide only limited protection to existing human life and, therefore, would not restrict contraception. But since abortion and euthanasia are an outgrowth of the contraceptive ethic, the chance of enacting effective protections of the right to life is diminished by the contraceptive consensus.

The general acceptance of the morality of contraception is a fundamental cause, with secularism and relativism, of other social problems in addition to abortion and euthanasia. Some examples of such social ills are as follows:

*Pornography.* Like contraception, pornography is the separation of sex from life and the reduction of sex to an exercise in self-gratification. In the process, the woman becomes an object rather than a person. One characteristic of contraception is its tendency to de-personalize the woman. Pope Paul in *Humanae Vitae*, warned that contraception would cause women to be viewed as sex objects, that "man, growing used to the employment of anti-conceptive practices, may finally lose respect for the woman, and no longer caring for her physical and psychological equilibrium, may come to the point of considering her as a mere instrument of selfish enjoyment, and no longer as his respected and beloved companion."<sup>64</sup>

*Homosexual activity.* The legitimization of homosexual activity is predictable in a contraceptive society which cannot say that homosexual relations are objectively wrong without condemning itself. Instead, homosexual living must be regarded as an alternate' lifestyle — which is what it is — if sex has no inherent relation to reproduction. On the contrary, a society in which it makes no difference whether boys marry girls or other boys is not only on the road to extinction; it is clinically insane.<sup>65</sup>

*In vitro fertilization.* Contraception is the taking of the unitive without the procreative. In vitro fertilization is the reverse. The teaching Church has warned against this as a perversion which treats man as a laboratory specimen. The process ordinarily involves the fertilization of several eggs; only the best ones are implanted in the womb. The rest may be used for experimentation;

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64. W. STANMEYER, *THE SEDUCTION OF SOCIETY: PORNOGRAPHY AND ITS IMPACT ON AMERICAN LIFE* (1984); C. RICE, *BEYOND ABORTION: THE THEORY AND PRACTICE OF THE SECULAR STATE* (1979).

65. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *DECLARATION ON CERTAIN QUESTIONS CONCERNING SEXUAL ETHICS* No. 8, Dec. 29, 1975.



frozen for later implantation in the mother or (it has been suggested) in other would-be 'mothers' to whom the embryo would be given or sold; preserved (according to another suggestion) for spare parts for persons in need of new organs; or simply flushed down the drain, which, of course, is miniaturized euthanasia.<sup>66</sup>

*Teen-age promiscuity.* In addition to the inducements offered by imprudent sex education, the media and the availability of contraception and abortion, one explanation for teenage promiscuity is parental example. According to natural moral law and the Commandments, sex is reserved for marriage; this is so because sex inherently has something to do with babies and the natural way to raise children is in a monogamous, life-time marriage. But if children see their parents, in their practice of contraception, behave as if sex had no inherent relation to reproduction, it should not be surprising if those children draw the conclusion that sex does not have to be reserved for marriage.<sup>67</sup>

*Divorce.* The divorce rate soared during the years in which contraception became practically universal and sterilization became the most popular form of contraception. Almost one out of every two marriages in the United States ends in divorce. In the natural order of things, marriage is permanent because sex is intrinsically related to reproduction and it is according to nature that children be raised in a stable home with parents permanently united in marriage. If sex and marriage are not intrinsically related to life, then marriage loses its reason for permanence. It tends to become an alliance for individual self-fulfillment - what Pope Paul called "the juxtaposition of two solitudes."<sup>68</sup> If marriage is merely "an association of two individuals," as the Supreme Court says it is,<sup>69</sup> it will tend to be more binding than any other contract at will. No-fault divorce is a predictable feature of a contraceptive society.

*Child abuse.* The refusal to accept responsibility for others and to endure frustration is characteristic of the contraceptive mind. According to Dr. Edward Lenoski, director of pediatric emergency services at Los Angeles County Hospital, ninety percent of the battered children in his six-year study were "planned pregnancies." Since the introduction of the contraceptive pill, child beating has increased three-fold.<sup>70</sup>

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66. Congregation for the Doctrine of Faith, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGINS AND ON THE DIGNITY OF PROCREATION (pts. 2 & 3, Mar. 10, 1987).

67. *Id.* No. 7.

68. *Conversations with Pope Paul VI*, MCCALL'S Oct. 1967, at 137-38.

69. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

70. L.A. Times, Oct. 12, 1970, § 4, at 11, col. 4; see also Ney, *Relationship Between Abortion and Child Abuse*, 24 CANADIAN J. PSYCHIATRY 610 (1978).

The American people seem to favor at least some legalized abortion and some euthanasia. A New York Times poll indicated in 1986 that forty percent of the population believe that abortion should be legal as it is now; fifty-six percent do not approve of the present legal situation, but only sixteen percent of these believe abortion should be illegal in all cases, while forty percent believe it should be legal in cases where needed to save the life of the mother or where the baby was conceived as a result of rape or incest.<sup>71</sup> Although no clear majority favors either total allowance or total prohibition of abortion, there does appear to be a consensus in favor of at least some legalized abortion.

Legalized euthanasia logically follows and practically upon legalized abortion. Americans generally favor euthanasia, at least in some situations. For example, a Media General-Associated Press poll in 1986 showed that sixty-eight percent of the 1,532 respondents said that people dying of incurable illnesses should be allowed to end their lives; sixty-eight percent believed doctors should be allowed to turn off machines keeping irreversibly comatose patients alive; and sixty-one percent believed parents should be allowed to withhold life saving surgery from severely-retarded infants.<sup>72</sup>

It is not surprising that a secularist, relativist society permeated with the contraceptive ethic will accept abortion and euthanasia at least in some situations, especially in light of the pressures generated by the aging of the American population. A fertility rate of 2.1 is necessary to ensure the maintenance of a nation's population level through the replacement of successive generations. The fertility rate of the United States has been at or around 1.8 for at least ten years. As of 1982, there were 5.4 people of working age for every person aged sixty-five and over; by 2050 the ratio will be 2.6 to 1.<sup>73</sup> The fastest growing age group in the population of the United States consists of those eighty-five and over. There are about 2.5 million in this group today but by the year 2000 there will be 5.4 million or 2 percent of the population; by 2050 there will be 16 million. Although those eighty-five and over are now less than one percent of the population they will fill more than twenty percent of the beds in nursing homes.<sup>74</sup> One incurs the majority of their lifetime medical expenses in the final year of life. To maintain the current level of services for the elderly would require opening a new 100-bed nursing home everyday of every year until the year 2000.<sup>75</sup> Among persons over

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71. N.Y. Times, Feb. 23, 1986, § 4, at 22, col. 4.

72. Lafayette, Ind., J. & Courier, Apr. 14, 1985, at A14, col. 1.

73. N.Y. Times, Nov. 9, 1982, at A19, col. 1. See generally P. ZOPF JR., AMERICA'S OLDER POPULATION (1986).

74. N.Y. Times, May 26, 1984, at L28, col. 5; So. Bend Trib., Oct. 14, 1984, at 46, col. 3.

75. AM. MED. NEWS, April 13, 1984, at 1.

sixty-five, in-patient days in the hospital, per 1,000 population, are five times those of persons under sixty-five. It costs 3.5 times as much to treat a patient over sixty-five as one who is under sixty-five. The cost of treating a patient seventy-five or older is seven times the cost of treating a patient under sixty-five.<sup>76</sup>

Statistics could be multiplied to show the increasing burden on the younger generation to support the increasing older generation. It should not be surprising that the provision of a "merciful release" to some of the elderly and disabled would appeal to a hard-pressed younger middle class as part of the solution to this problem. Nor should it be surprising that a positivist legal system would develop principles to accommodate this tendency.

Recent judicial decisions have treated food and water, whether administered orally or artificially, as treatment which a patient may refuse. If a patient is incompetent, through infancy, senility, coma or otherwise, the trend in American judicial decisions is to allow the termination of life support systems and other forms of treatment on a "quality of life" basis. The "quality of life" theory compares the benefits of continuing the patient's life with the burdens of sustaining it. Burdens are judged as either ordinary or extraordinary. A further trend is to regard nutrition and hydration, *i.e.*, food and water, as forms of treatment that may be refused by a competent patient, or withheld from an incompetent patient, on a similar "quality of life" basis.<sup>77</sup>

"[R]ecent surveys have suggested that a majority of practicing doctors now approve of passive euthanasia and believe that it is being practiced by members of the profession."<sup>78</sup> The American Medical Association Council on Ethical and Judicial Affairs enunciated a new policy in March, 1986, to allow the withholding of food and water from comatose patients:

[e]ven if death is not imminent but a patient's coma is irreversible and there are adequate safeguards to confirm the accuracy of the diagnosis and with the concurrence of those who have responsibility for the care of the patient, it is not unethical to discontinue all means of life prolonging medical treatment.

Life-prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition, or hydration. In treating a terminally ill or irreversibly comatose patient,

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76. *The Hospital Cost Equation*, SOUTHEASTERN HOSPITAL CONFERENCE, Sept. 1983.

77. *Compare Dresser & Boisaubin, Ethics, Law and Nutritional Support*, 145 ARCHIVES INTERNAL MED. 122 (1985) and Meyers, *Legal Aspects of Withdrawing Nourishment from an Incurably Ill Patient*, 145 ARCHIVES INTERNAL MED. 125 (1985), with Sigler & Weisbard, *Against the Emerging Stream*, 145 ARCHIVES OF INTERNAL MED. 129 (1985).

78. *In re Conroy*, 98 N.J. 321, 337, 486 A.2d 1209, 1225 (1985).

the physician should determine whether the benefits of treatment outweigh its burdens. At all times, the dignity of the patient should be maintained.<sup>79</sup>

The trend of the law can be seen from the leading case of *In re Conroy*,<sup>80</sup> which answered the question of whether:

life-sustaining treatment may be withheld or withdrawn from an elderly nursing-home resident who is suffering from serious and permanent mental and physical impairments, who will probably die within approximately one year even with the treatment, and who, though formerly competent, is now incompetent to make decisions about her life-sustaining treatment and unlikely to regain such competence.<sup>81</sup>

The court held that "life-sustaining treatment may be withheld or withdrawn from an incompetent patient when it is clear that the particular patient would have refused the treatment under the circumstances involved."<sup>82</sup> With respect to "persons who never clearly expressed their desires about life-sustaining treatment but who are now suffering a prolonged and painful death,"<sup>83</sup> the court held that life-sustaining treatment may be withheld "if either of two best interests' tests - a limited-objective or a pure-objective test - is satisfied."<sup>84</sup>

Under the limited-objective test, life-sustaining treatment may be withheld or withdrawn from a patient in Claire Conroy's situation when there is some trustworthy evidence that the patient would have refused the treatment, and the decision-maker is satisfied that it is clear that the burden of the patient's continued life with the treatment outweigh the benefits of that life for him . . . . In the absence of trustworthy evidence, or indeed any evidence at all, that the patient would have declined the treatment, life-sustaining treatment may still be withheld or withdrawn from a formerly competent person like Claire Conroy if a third, pure-objective test is satisfied. Under that test, as under the limited-objective test, the net burdens of the patient's life with the treatment should clearly and markedly outweigh the benefits that the patient derives from life.<sup>85</sup>

The court added the following qualification:

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79. *The AMA Opinion on Withholding Food and Water*, AM. MED. NEWS, Mar. 28, 1986, at 8.

80. *Id.*

81. *Id.* at 342-43, 486 A.2d at 1219-20.

82. *Id.* at 360, 486 A.2d at 1229.

83. *Id.* at 364, 486 A.2d at 1231.

84. *Id.* at 365, 486 A.2d at 1232.

85. *Id.* at 365-66, 486 A.2d at 1232.

[a]lthough we are condoning a restricted evaluation of the nature of a patient's life in terms of pain, suffering, and possible enjoyment under the limited-objective and pure-objective tests, we expressly decline to authorize decision-making based on assessments of the personal worth or social utility of another's life, or the value of that life to others. We do not believe that it would be appropriate for a court to designate a person with the authority to determine that someone else's life is not worth living simply because, to that person, the patient's quality of life or value to society seems negligible.<sup>86</sup>

Despite this disclaimer, the court authorized a "quality of life" determination based on the decision maker's evaluation of the "net burdens" and "benefits" of the patient's life.<sup>87</sup> In that evaluation, "the primary focus should be the patient's desires and experience of pain and enjoyment."<sup>88</sup> Clearly, this was a judgment as to the "quality" of Claire Conroy's life.

The court, in dictum, commented that, "the line between active and passive conduct in the context of medical decisions is far too nebulous to constitute a principled basis for decision-making."<sup>89</sup> The court also rejected the distinction "between the termination of artificial feedings and the termination of other forms of life-sustaining medical treatment."<sup>90</sup>

The starvation of a patient whose life is seen as more of a burden than a benefit is an aspect of depersonalization. And it is supported by the theory of legalized abortion. Peter Singer, who concedes that the right-to-life movement is correct in arguing that the unborn child should have the same right to life as a newborn infant, argues that both should be equally considered to have no right to life at all. Singer criticizes "speciesism," which is prejudice in favor of persons belonging to the species, *homo sapiens*, just as racism is prejudice in favor of persons of a particular race. Singer defines a person as "a rational and self-conscious being."<sup>91</sup> Chimpanzees, whales, dolphins, dogs and cats can make the personhood cut, according to Singer, while newborn infants and retarded humans do not even make the travelling squad.

We should reject the doctrine that places the lives of members of our species above the lives of members of other species. Some members of other species are persons; some members of our own species are not. No objective assessment can give greater value to the lives of members of our species who are not persons than to the

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86. *Id.* at 367, 486 A.2d at 1232-33.

87. *Id.* at 365, 486 A.2d at 1232.

88. *Id.* at 369, 486 A.2d at 1233.

89. *Id.* at 370, 486 A.2d at 1234.

90. *Id.* at 372, 486 A.2d at 1235.

91. P. SINGER, PRACTICAL ETHICS 76 (1979).

lives of members of other species who are. On the contrary, as we have seen there are strong arguments for placing the lives of persons above the lives of non-persons. So it seems that killing, say, a chimpanzee is worse than the killing of a gravely defective human who is not a person.<sup>92</sup>

“We can no longer base our ethics,” says Singer, “on the idea that human beings are a special form of creation, made in the image of God, singled out from all other animals, and alone possessing an immortal soul.”<sup>93</sup>

The legal theories and mechanisms are in place for the control of the problem of caring for the American aged and unfit. Dr. Leo Alexander, who wrote the seminal analysis of the euthanasia program in the Third Reich,<sup>94</sup> observed in 1984, with respect to the American situation, that “[i]t is much like Germany in the 20’s and 30’s - the barriers against killing are being removed.”<sup>95</sup>

The point of these remarks is to argue that the apparently impending partial retreat from *Roe v. Wade* will only aggravate the problem. The establishment of a states’ rights solution will confirm the corruption of American law through the acceptance of the depersonalization of innocent human beings. It will ultimately increase the toll of innocent victims of all ages. Furthermore, it will obscure the reality that no solution to the right-to-life issue can be found apart from a repudiation of secularism, relativism and the contraceptive ethic, that is, apart from a national return to the law of God.

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92. *Id.* at 97.

93. Singer, *Sanctity of Life or Quality of Life?*, PEDIATRICS, July, 1986, at 128-29.

94. Alexander, *Medical Science Under Dictatorship*, 241 NEW ENG. J. MED. 39 (1949).

95. Stanton, *The New Untermenschen*, 11 HUMAN LIFE REV. 77, 82 (1985).

