Notre Dame Law Review

Volume 46 | Issue 1 Article 1

10-1-1970

Abortion-On-Demand: Whose Morality

Robert M. Byrn

ABORTION-ON-DEMAND: WHOSE MORALITY

*Robert M. Byrn**

The basic problem, it would seem, is not that we often behave badly but that we may be losing our sense of ethics; the American consensus about what is good and bad, what is to be done and what avoided, may be breaking down.[1]

Proponents of abortion-on-demand have won a major battle — perhaps even the war—in New York. While it lasted, the abortion controversy in that state was a microcosm of the national debate. The outcome may be an omen for the nation.

New York has enacted what is essentially an abortion-on-demand law although it is limited to the first twenty-four weeks of pregnancy.[2] Within that period any pregnant woman, resident or non-resident, married or unmarried, is free to have an abortion provided only that she find a doctor willing to do it. The new law became effective on July 1, 1970. The prior law, like the statutes presently in effect in a majority of states, forbade all abortions except those performed "under a reasonable belief that such [was] necessary to preserve the life of" the female.[3]

Revision of the law aborted an embryonic constitutional challenge to New York's prior abortion law. Proponents of abortion-on-demand had unleashed a two-pronged attack: one in the legislature and one in the court. On November 4, 1969, a United States District Judge had signed an order granting the motion of plaintiffs in four actions to convene a three-judge court for purposes of declaring New York's abortion law unconstitutional and permanently enjoining its enforcement.[4] Depositions had been taken[5] and plaintiffs had served and filed their briefs before the New York legislature passed the new bill. This passage of the new bill rendered the court action moot. Governor Rockefeller signed the bill into law on April 11, 1970.[6]

Both in the three-judge court action and in the public forum in connection with the action of the legislature,[8] it had been argued that the Catholic Church was the only opponent of permissive abortion. In short, "the Catholic in opposing reform would impose his minority will upon the entire public . . . ."[9] The Church

* B.S., Fordham University, 1953; J.D., Fordham University, 1959; Professor of Law, Fordham University School of Law; member of New York Bar.

1 Cogley, *Introduction*, in NATURAL LAW AND MODERN SOCIETY 11, 13 (1962).

2 Ch. 127, [1970] N.Y. Laws 170 (McKinney 1970) (effective July 1, 1970). Hawaii preceded New York in enacting an abortion-on-demand law. The Hawaii law is analyzed in Rice, *The Anti-Life Movement*, Twin Circle, May 10, 1970, at 11, col. 1.

3 Ch. 1030, §125.05 (3), [1965] N.Y. Laws 1583.

4 Hall v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y. 1969). Plaintiffs in the four cases were a group of doctors and Planned Parenthood of New York, Inc., all of whom wished to perform abortions or give abortion advice; a clergyman who gave abortion advice; a heterogeneous group of doctors, social workers, feminists, etc.; and a number of persons at the poverty level.

5 Hereinafter, citations to depositions refer to the depositions in the four New York actions.

6 N.Y. Times, Apr. 12, 1970, §1, at 47, col. 1.

7 Brief for Plaintiffs at 135-44, Hall v. Lefkowitz, Civil No. 69-4284 (S.D.N.Y.).

8 *E.g.*, N.Y. Times, Apr. 12, 1970, § 4 (The Week In Review), at 10, col. 2.

9 Hall, *Commentary*, in ABORTION AND THE LAW 224, 231 (D. Smith ed. 1967).

was isolated and quite frequently an *ad religionem* attack was substituted for a discussion on the merits. Typical of this line of attack is a story related by Jerome M. Kummer, M.D., concerning a panel discussion on abortion at Loyola University, Los Angeles:

> During the meeting at Loyola, the late Dr. A. C. Mietus commented from the audience that he could not see how anyone could dispute the fact that a two or three months' fetus was a human being. I replied that he would not be there arguing his point were he not a Catholic. I say the same about the article by the Mietus brothers, as well as articles along similar lines by others. They would not be holding their strong views were it not for their Catholic indoctrination.[10]

Because it has been effective, the *ad religionem* challenge cannot be shrugged off. Further, it raises substantial questions about the interrelationship of law, morality and theology. With the change in the thrust of the abortion movement from relaxation to abolition of abortion laws, the jurisprudential issues have been brought into much sharper focus. This article will explore the jurisprudence of abortion-on-demand. It seems important to determine at this juncture whose morality is being enacted into law when abortion laws are effectively abolished. In order to make this determination, a logical starting point is the distinction between a question of fact and a question of morality.

I. The Human-ness of the Fetus: A Question of Fact or Morality?

When one argues that the human fetus is entitled to fundamental human rights, he is frequently confronted with the answer: "But I don't believe the fetus is human," or "it is not human until it has (a) quickened, (b) become viable or (c) been born," or "it is only potentially human." The human-ness of the fetus is the crux of the abortion controversy. On the one hand, it is argued by opponents of abortion-on-demand that the question of human-ness is one of fact and the scientific facts are not in dispute. Proponents argue, to the contrary, that resolution of the issue depends on personal or sectarian morality which the law ought not to codify. The latter frequently frame their moral evaluations in terms of the fertilized human egg which, of course, bears little superficial or organic resemblance to the baby after birth.[11] Opponents of abortion, including the author, have taken up the challenge and defended the zygote as the beginning of a new human life.[12]

It is not the author's intention to abandon his position on the distinctive

---

10 Letter from J. M. Kummer to the Editor, 52 A.B.A.J. 524 (1966). The citation in the quote to the "article by the Mietus brothers" refers to A. C. & Norbert J. Mietus, *Criminal Abortion: "A Failure of Law" or a Challenge to Society?*, 51 A.B.A.J. 924 (1965).

11 *See, e.g.*, Clark, *Religion, Morality and Abortion: a Constitutional Appraisal*, 2 LOYOLA (L.A.) L. Rev. 1, 9-10 (1969); Hardin, *Semantic Aspects of Abortion*, 24 ETC. 263, 278-80 (1967); Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. CRIM. L.C. & P.S. 3, 20-21 (1969).

12 Byrn, *Abortion in Perspective*, 5 DUQUESNE L. REV. 125, 127 (1966); Noonan, *The Constitutionality of the Regulation of Abortion*, 21 HASTINGS L.J. 51 (1969).

and independent human-ness of the fertilized human egg.[13] In reality, however, the zygote should never have been the focus of the abortion debate. Proponents of abortion-on-demand have used the zygote as a convenient strawman. Opponents have felt it necessary to pinpoint the moment human life begins — that is, at conception. Unfortunately this most crucial issue has been debated on a theoretical rather than a practical plane. A woman who wishes to terminate an unwanted pregnancy does not seek an abortion at conception, but at some later time in the gestation period. For practical purposes, the controversy ought to shift chronologically from conception to that later point in time. From the factual, scientific point of view, this chronological shift alters the controversy considerably. The question of when human life begins becomes irrelevant. When an abortion is performed, human life — as a matter of objective science — has begun.

A. The Facts of Life at Eight Weeks

The interval between ovulation and menstruation is fourteen days.[14] As a result, a woman will not begin to suspect that she is pregnant until two weeks after fertilization when she misses her menstrual period. She must wait at least another week before she can have a pregnancy test which, at this stage, is liable to produce a false result.[15] As a practical matter, then, the earliest she will seek to abort is the third to fourth week after fertilization.

By the fourteenth day of gestation, it is impossible for the zygote to split into twins or to recombine with other fertilized ova to become a single zygote.[16] At the end of the second week, the name of the conceptus changes from zygote to embryo,[17] and between the third and fourth week, the embryo's heart begins pumping.[18] Before a woman knows that she is pregnant and decides to abort, the embryo has been organized irreversibly into a single human entity with a pumping heart, has been implanted in the uterus, and has an eighty percent chance of surviving through birth.[19]

Definitions of human death vary, but everyone seems to include as a minimum the irreversible cessation of spontaneous heart and circulatory pulsation

---

13 That the fertilized egg is a new life, independent of the pregnant female, has been demonstrated dramatically by Dr. E. S. E. Hafez of Washington State University. Using hormone injections, Dr. Hafez caused a cow's ovaries to release as many as 100 ripe eggs. The cow was then artificially inseminated and several days after the mass conception, the fertilized eggs were removed. They were transferred into smaller animals such as rabbits where they continued to thrive up to 14 days before being put into other cows. "[T]he implanted calf will go through a normal gestation period and be born as if it were the foster mother's own — but with the genetic qualities of its true parents." LIFE, Sept. 10, 1965, at 75.

In the sense that the fertilized egg can live and grow in a substitute environment, it can be said to be "viable," *i.e.*, capable of developing and surviving normally through birth outside of the female which produced the egg and within which it was fertilized.

14 Hellegers, *Fetal Development*, 31, THEOLOGICAL STUDIES 3, 7 (1970).

15 Deposition of Dr. Andre Hellegers, M.D., at 50. Dr. Hellegers testified that the earliest that a pregnancy test can be performed is two weeks after implantation of the embryo in the wall of the uterus. Implantation occurs six to seven days after fertilization. Hellegers *supra* note 14, at 6.

16 Hellegers, *supra* note 14, at 4, 8.

17 *Id.* at 8.

18 *Id.*

19 H. M. I. LILEY, MODERN MOTHERHOOD 7 (rev. ed. 1969).

in the human subject.[20] Conversely, the presence of such pulsation signals the presence of life even in an immobile patient. By analogy to minimal definitions of death, every decision to abort and every abortion performed pursuant to that decision involves the killing of a living human-in-being, *i.e.*, an individuated, irreversible human entity with a pumping heart.

Actually, it is unreal to focus even on the third or fourth week of pregnancy. Testifying in the New York abortion actions, plaintiff Alan Guttmacher, M.D., an obstetrician-gynecologist, a leading spokesman for permissive abortion and the President of Planned Parenthood Federation of America, Inc.,[21] asserted that most women who come to him seeking an abortion are in the eighth to tenth week of pregnancy.[22] It can be assumed that some also come after ten weeks.[23] Thus, the great majority of abortions will be performed after the eighth week.

The fetus at eight weeks has a pumping heart with fully deployed blood vessels and has all other internal organs.[24] The face is completely formed, and the arms, legs, hands, feet, toes and fingers are partially formed.[25] The fetus will react to tickling of the mouth or nose, and there is readable electrical activity coming from the brain.[26]

Photographs of the fetus around the eighth week present an unmistakable human baby with rather blunt features and extremities.[27] However, such pictures invariably have been taken after the death of the fetus following an abortion. Paul E. Rockwell, M.D., Director of Anesthesiology at Leonard Hospital in Troy, New York, maintains that a fetus of eight weeks, while alive, appears to be perfectly developed. It is death which superimposes the bluntness of appearance:

> Eleven years ago while giving an anesthetic for a ruptured ectopic pregnancy (at two months gestation) I was handed what I believe was the smallest living human being ever seen. The embryo sac was intact and transparent. Within the sac was a tiny (approx. 1 cm.) human male swimming extremely vigorously in the amniotic fluid, while attached to the wall by the umbilical cord. This tiny human was perfectly developed, with long, tapering fingers, feet and toes. It was almost transparent, as regards the skin, and the delicate arteries and veins were prominent to the ends of the fingers.
>
> The baby was extremely alive and swam about the sac approximately one time per second, with a natural swimmer's stroke. This tiny human did not look at all like the photos and drawings and models of "embryos" which I have seen, nor did it look like a few embryos I have been able to observe since then, obviously because this one was alive!

---

20 *See* Halley & Harvey, *Medical vs. Legal Definitions of Death*, 204 J.A.M.A. 423 (1968). Recent attempts to substitute brain death for heart death (including cases where the heart has been maintained artificially) have met with consternation. *See* HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENT, U.N. Doc. E/CN. 4/1028/ Add. 2 (1970) at 7-14.

21 Brief for Plaintiffs, *supra* note 7, at 13-14.

22 Deposition of Alan F. Guttmacher, M.D., at 27.

23 In his *Techniques of Therapeutic Abortion*, 7 CLINICAL OBST. & GYN. 100 (1964), Dr. Guttmacher describes the techniques for aborting fetuses up to the twenty-sixth week.

24 Hellegers, *supra* note 14, at 7-8.

25 LILEY, *supra* note 19, at 28.

26 Hellegers, *supra* note 14, at 7-8.

27 *E.g.*, L. NILSSON, A. INGELMAN-SUNDBERG & C. WIRSÉN, A CHILD IS BORN 81 (1966).

> . . . When the sac was opened, the tiny human immediately lost its life and took on the appearance of what is accepted as the appearance of an embryo at this age (blunt extremities, etc.)
>
> . . . .
>
> It is my opinion that if the lawmakers and people realized that very vigorous life is present, it is possible that abortion would be found much more objectionable than euthanasia.[28]

In summary: at eight weeks, after which the great majority of abortions are performed, the fetus is irreversibly organized into a recognizable human-child, is responsive to stimulation, and is possessed of a pumping heart, a functioning circulatory system, an active brain and all other internal organs. From the practical scientific point of view, " 'By the eighth week the embryo or fetus, as we now call it, is an unmistakable human being . . . . ' "[29] (Citation omitted.)

B. The Factual Irrelevance of Quickening

"Quickening" refers to that moment in the gestation period when the pregnant woman feels the fetus move within her.[30] Sir Edward Coke asserted:

> If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder. . . .[31]

The majority of common law courts interpreted "quick with childe" to mean quickening although a few chose the moment of conception as the beginning of life.[32]

Quickening ordinarily is felt during the latter part of the fifth month of pregnancy.[33] The phenomenon varies with each woman and is thus purely subjective. One noted authority described the physical facts of quickening in this way:

> Some women feel their babies much more strongly than others do, depending on their own body fat and also upon the position of the placenta. If the placenta lies in the front of the mother's uterus, serving as a sort of buffer between the unborn and his mother's abdominal wall, she may feel her baby only slightly throughout her pregnancy. There have been women who have never felt their babies at all. Others are not able to differentiate between what feels like a "slight gas pain" and the thrust of their baby's fist or elbow or foot.[34]

Actually the fetus moves long before the pregnant woman feels the move-

---

28 Albany Times Union, Mar. 10, 1970, at 17, col. 3.
29 Bonbrest v. Kotz, 65 F. Supp. 138, 140 n. 11 (D.D.C. 1946).
30 BLACK'S LAW DICTIONARY (4th ed. 1951).
31 3 COKE, INSTITUTES OF THE LAWS OF ENGLAND 50 (1797).
32 R. PERKINS, CRIMINAL LAW 140 (2d ed. 1969).
33 N. EASTMAN, EXPECTANT MOTHERHOOD 9 (3d ed. 1957). It may occur as early as the twelfth week. Hellegers, *supra* note 14, at 7-8.
34 LILEY, *supra* note 19, at 37-38.

ment.[35] Dr. Andre Hellegers places the beginning of spontaneous fetal movement at the tenth week of gestation.[36] However, Dr. Paul Rockwell's experience indicates that at eight weeks the fetus is capable of "swimming extremely vigorously in the amniotic fluid."[37] Thus quickening is not a valid, factual, objectively scientific test of the human-ness of the fetus because it "is a phenomenon of maternal perception rather than a fetal achievement. It is subjective and varies with the degree of experience and obesity of the mother."[38]

It might be suggested that spontaneous movement ought to be substituted for quickening as the beginning of human life. Such an approach would, of course, carry us back to the eighth to tenth week of pregnancy during and after which the great majority of abortions are performed. In any event, spontaneous movement is hardly a satisfactory test since, as has been noted, an adult patient is deemed to be alive as long as he has a spontaneously pulsating heart, even though he is otherwise immobile — and the three to four weeks old embryo has a spontaneously pumping heart.[39]

If quickening is factually irrelevant to the beginning of human life, then the common law needs explaining. Why was abortion after quickening considered a homicide only if the child was born alive and then died? Why was abortion prior to quickening no crime at all?

The early common law history of abortion is clouded by theologically oriented disputations on "ensoulment" overlaid by canon law.[40] Ancient embryological theories compounded the ambiguity.[41] The law does not appear to have been settled until Coke chose quickening as the crucial point in pregnancy after which an abortion became criminal.[42]

It might be argued that Coke did not consider the unborn child to be a human being until he was born alive, or else he would have designated all abortions — including those which produced a stillbirth — as homicide. On the other hand, it is more likely that the difference in treatment of a live birth followed by death (homicide) and a stillbirth (a great misprision) resulted from difficulties in compiling evidence.

As a prerequisite to a homicide conviction, the common law required proof that the act of the accused was the cause of death.[43] However, given the state of medical knowledge in the seventeenth century, such proof was not always easy to come by. For instance, if the victim died after a year and a day following an assault upon him, the assailant could not be convicted of homicide. Proof of causality between the assault and the death was precluded by the passage of time.[44] Similarly, unless the child were born alive after an induced

35 *Id.* at 38.
36 Hellegers, *supra* note 14, at 8.
37 Albany Times Union, Mar. 10, 1970, at 17, col. 3.
38 Hellegers, *supra* note 14, at 8.
39 See text accompanying notes 18-20 *supra.*
40 *See* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411, 411-18 (1968).
41 *See* Quay, *Justifiable Abortion — Medical and Legal Foundations,* 49 GEO. L.J. 395, 426-30 (1961).
42 See text accompanying note 31 *supra.* Blackstone adopted Coke's rule. I W. BLACKSTONE, COMMENTARIES* 129.
43 PERKINS, *supra* note 32, at 28-29.
44 *Id.*

abortion, it would have been virtually impossible to prove that the abortional act killed him. He might have died in the womb from some other cause, concurrent in time with the abortion.

The same difficulties in proof precluded the incrimination of pre-quickening abortion. At least after quickening, it was possible to condemn every abortion as an assault upon a human-in-being who was known (by his movements) to be alive. If the fetus had not yet demonstrated life by movement, he might already have been dead prior to the abortion — or perhaps the woman had not really been pregnant. Hence, the abortional act could hardly be characterized as a crime against a living human-in-being. The *corpus delicti* was unprovable.

Difficulties in proof seem to explain the common law of quickening. This conclusion gains strength when one probes more deeply into other areas of the common law. At least one English court took the position that a woman, quick with child, could not be executed for a crime even though the child had not yet quickened. " 'Quick with child' is having conceived. 'With quick child' is when the child has quickened."[45] The difference in the significance of quickening in the abortion and execution situations is explained by a shift in the benefit of the doubt. The abortionist, as defendant, was entitled to the benefit of the doubt as to (a) whether the fetus was alive or dead or even in existence when the abortional act occurred and (b) whether the abortional act, in fact, killed the fetus. But when a pregnant woman was about to be executed, the fetus, as a possible innocent victim of the execution, was entitled to the benefit of the doubt as to whether he was present and alive in the womb, even though he had not yet manifested life by perceptible movement.

The execution situation was not unique. For purposes of inheritance, the common law again recognized that "both by the rules of the common and civil law, [the posthumous child] was, to all intents and purposes, a child [while unborn], as much as if born in the father's life-time."[46] (Citations omitted.) The independent existence of the unborn child was no mere legal fiction. In *Thellusson v. Woodford*,[47] the court in rebutting the claim that the unborn child is a non-entity, stated:

> Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.
>
> . . . .
>
> . . . Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons.[48] (Citations omitted.)

In summary, the common law generally regarded the unborn child as a human being except in the abortion situation where practical difficulties of proof

45 Regina v. Wycherley, 8 Car. & P. 262, 264, 173 Eng. Rep. 486, 487 (Nisi Prius 1838).
46 Wallis v. Hodson, 2 Atk. 114, 117, 26 Eng. Rep. 472, 473 (Ch. 1740); *see* Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 U.C.L.A. L. Rev. 233, 235-38 (1969); Noonan, *supra* note 12, at 52-53.
47 4 Ves. Jun. 227, 31 Eng. Rep. 117 (Ch. 1798).
48 *Id.* at 322-23, 31 Eng. Rep. at 163-64.

as to the presence of fetal life and the cause of fetal death mandated the quickening rules.

Oliver Wendell Holmes once wrote:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[49]

So it seems to be with the rules of quickening. Today medical science can establish the presence of life in the womb long before the pregnant woman feels fetal movement.[50] Nor is the requirement of proof of causality any longer an insuperable barrier. For example, one of the original objections to a recovery for prenatal injuries was the difficulty in proving that the defendant's wrongful act, in fact, produced the defect discovered at birth. But medicine has refined its expertise and the objection is no longer valid.[51] Neither is the causality objection any longer persuasive in the law of abortion.

It is not surprising that prior to the present movement for relaxed abortion laws, quickening was gradually disappearing from state statutes on the subject. Thus in 1960, the Supreme Court of Michigan commented on the pattern in modern abortion legislation to abolish the quickening distinction altogether:

> Courts in the field of criminal law have long recognized a child's legal existence while *en ventre sa mere*, and a change has been noted with respect to criminal abortion in that in late years statutes have been amended doing away with the requirement that the woman must be quick with child.[52] (Citations omitted.)

To paraphrase the Michigan court, if quickening is factually irrelevant on the question of when human life begins, it ought to be legally irrelevant to the issue of abortion and the protection of a human life already begun.

C. The Factual Irrelevance of Viability

The unborn child is said to be viable when he is capable of existence apart from his mother.[53] With recent advances in technology, viability has been pushed back from the twenty-eighth to the twentieth week of pregnancy.[54] Scientists in England, Sweden and the United States are already experimenting with an artificial placenta which will enable the child to exist outside his mother's womb at a much earlier stage.[55] In one such experiment, Dr. G. Chamberlin was able to keep an aborted human fetus alive for approximately 5 hours and 8

49 Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
50 See text accompanying notes 14-38 *supra*.
51 *See* Woods v. Lancet, 303 N.Y. 349, 356, 102 N.E.2d 691, 695, 111 N.Y.S. 2d ——, —— (1951).
52 La Blue v. Specker, 358 Mich. 558, 567, 100 N.W.2d 445, 450 (1960). The history of the various state statutes is traced in Quay, *supra* note 41, at 447-520.
53 *See* Woods v. Lancet, 303 N.Y. 349, 357, 102 N.E.2d 691, 695, 111 N.Y.S. 2d ——, —— (1951).
54 Hellegers, *supra* note 14, at 8-9.
55 Ayd, *Experimentation on Pre-Natal Human Life: Ethical Considerations*, Medical-Moral Newsletter, June, 1969 at 37, 40.

minutes.[56] These giant steps in technology have led one doctor to conclude:

> The youngest survivor in medical literature is of about 20 weeks' gestation. Survivors with a birth weight between one and two pounds are documented. Practically no knowledgeable person considers the age of survivability as immutable; too many variables are involved. In this day of DNA synthesis, test-tube incubation, intra-uterine transfusions, talk in high circles of chromosomal manipulation and *in vitro* generation, the 20-week survivability standard is about as sacred as the four-minute mile.[57]

Indeed, with the development of an artificial placenta, probably within the next decade, even a twelve-week fetus may survive.[58] The successful transplantation of fertilized eggs in animals[59] suggests that there may come a time when *every* aborted fetus has a chance to live and grow to adulthood.

All of the above suggests the factual irrelevance of viability as an indicium of the beginning of human life. Viability is a function of technology, not a qualitative characteristic of the unborn child. In this respect, the nonviable fetus might be compared to a space-walking astronaut who is connected by an "umbilical cord" to the "mother ship." He too will die if the umbilical is severed and he is cut off from his life-support system. (Do not we also speak of a space mission being "aborted" when the life-support system fails to function?) If the non-viability of the astronaut does not render nonhuman, then can we say less of the non-viable fetus?

Like quickening, viability once enjoyed some standing in the law. In 1884, in *Dietrich v. Inhabitants of Northampton*,[60] Holmes ruled that the estate of a non-viable child, who was born prematurely and died a few minutes later following an injury to his mother negligently caused by defendant, had no cause of action for either the pre-natal injuries to the child or his death. According to Holmes, at least the non-viable child is an organic part of the pregnant woman and not a separate human entity to whom legal duties are owed. A dissenting judge in *Allaire v. St. Luke's Hospital*[61] argued that the *Dietrich* rule ought to be limited to pre-natal injuries to non-viable children; if the child were viable when injured in the womb, he could not be said to be a part of his mother. Thus the door was opened for drawing a distinction in law between viable and non-viable unborn children.

Dietrich remained the law as to all pre-natal injuries until the 1946 case of *Bonbrest v. Kotz*[62] wherein the court rejected the old Holmes rule and permitted a recovery for a pre-natal injury to a viable child. The judge in *Bonbrest* said "[t]he law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884,"[63] and "[f]rom the viewpoint of the

56 *Id.* at 39.
57 Diamond, *Humanizing the Abortion Debate*, AMERICA, July 19, 1969, at 36, 37.
58 Cavanagh, *Reforming the Abortion Laws: A Doctor Looks at the Case*, AMERICA, April 18, 1970, at 406, 410; *see also* Noonan, *Amendment of the Abortion Law: Relevant Data and Judicial Opinion*, 15 CATH. LAW. 124, 127 (1969).
59 See note 13 *supra*.
60 138 Mass. 14 (1884).
61 184 Ill. 359, 368, 56 N.E. 638, 642 (1900) (Boggs, J., dissenting).
62 65 F. Supp. 138 (D.D.C. 1946).
63 *Id.* at 143.

civil law and the law of property, a child *en ventre sa mere* is not only regarded as [a] human being, but as such from the moment of conception — which it is in fact."[64]

In 1953, a New York Court extended the *Bonbrest* rule to pre-natal injuries to non-viable children.[65] In rejecting viability as a line of demarcation the court observed:

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions exist, of course, that have that result at every stage of its life, post-natal as well as pre-natal. The complaint here, in alleging that plaintiff was in being in the third month of his mother's pregnancy, alleges a conclusion of fact consistent with generally accepted knowledge of the process.[66]

The trend in tort law after 1953 has been to disregard viability as a relevant factor in a pre-natal injury case.[67]

Tort law "is not an anachronism, but is a living law which responds to the surging reality of changed conditions."[68] It is a "means 'for the creation and protection of rights. . . .' "[69] Modern courts have recognized that the surging reality of advances in the life sciences mandates the creation and protection of rights for the non-viable fetus. The tort cases teach us that the "unborn child in the path of an automobile is as much a person in the street as the mother. . . ."[70] Whether viable or non-viable, he is, as a matter of fact, no less a person in the path of a curette wielded by an abortionist hired by his mother.

D. The Factual Irrelevance of Birth

"[B]irth is but a convenient landmark in a continuing process. . . ."[71] It is "just another step along the way."[72] "Birth is not a beginning . . . . [n]or is birth an ending. It is more nearly a bridge between two stages of life. . . ."[73]

---

64 *Id.* at 140.
65 Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S. 2d 696 (Sup. Ct. 1953).
66 *Id.* at 544, 125 N.Y.S. 2d at 697.
67 *See, e.g.*, Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); Torigian v. Watertown News Co., Inc., 352 Mass. 446, 225 N.E.2d 926 (1967); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); Puhl v. Milwaukee Automobile Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959).
68 Gallagher v. St. Raymond's Roman Cath. Ch., 21 N.Y.2d 554, 558, 236 N.E.2d 632, 634, 289 N.Y.S.2d 401, 404 (1968).
69 Briere v. Briere, 107 N.H. 432, 434, 224 A.2d 588, 590 (1966).
70 W. PROSSER, LAW OF TORTS 355 (3d ed. 1964). See E. PATTERSON, LAW IN A SCIENTIFIC AGE, 35 (1963) where it was said: "[T]he meaning and scope of even such a basic term as 'legal person' can be modified by reason of changes in scientific facts — the unborn child has been recognized as a legal person, even in the law of torts."
71 B. PATTEN, FOUNDATIONS OF EMBRYOLOGY 3 (2d ed. 1964).
72 Deposition of biologist William Beckert, at 33.
73 A. MONTAGU, LIFE BEFORE BIRTH 205 (1964).

Birth is a dramatic event but so too is puberty, and, as with puberty, birth, factually, is merely a "landmark," "another step," a "bridge" in the life of a human being whose life began sometime before. On the other hand, birth is not a fixed event. The child is viable for a number of weeks before he is born.[74] During that period, he might have survived premature birth or surgical removal from the womb. Birth, in other words, is no more factually relevant to the humanness of the fetus than viability.

A number of jurisdictions still adhere to the rule that an action may not be maintained for the wrongful death of a child stillborn as a result of pre-natal injuries. These holdings are not intended as a denial of the humanity of the unborn child; they merely reflect the difficulties inherent in any such action, *e.g.*, the practical impossibility of computing damages.[75]

At issue in the abortion situation is the preservation of the unborn's life, not the computation of damages consequent upon his death. Birth which may have significance for the latter is irrelevant to the former. Further, the statutory wrongful death action creates a right in the survivors; it is not intended to vindicate a right of the child. Accordingly, the New York Court of Appeals has held that the law will not consider the unborn child to be a legal person " 'except in so far as is necessary to protect the child's own rights'."[76] (Citation omitted.) The most valuable of "the child's own rights," the one without which all other rights are meaningless, is the right to live. Professor John T. Noonan observed:

> The common law, before the enactment of wrongful death acts, was that if a person were tortiously killed, no suit could be brought to vindicate his death by civil damages because "the tort died with him." No one ever asserted that the law did not recognize adult beings as persons because at common law they had to survive in order to sue. No one ever said that an injury was not done by destroying an adult because the law precluded recovery for the wrong.
>
> It is plain that, in recognizing a cause of action for injury inflicted before birth, a legal interest and personality are recognized as protected before birth. The birth itself is not an event which, suddenly and retroactively, endows the newborn with rights which a negligent motorist could have invaded five months before the child had them. If the child in the womb is a person in the path of the automobile, it is because he is a person at the prenatal moment when the automobile or other agency of injury or death strikes him.[77] (Citations omitted.)

E. Fact, Value and Morality

In the view of Dr. Andre Hellegers,

> it is not a function of science to prove, or disprove, where in this process [of pre-natal maturation] *human* life begins, in the sense that those discussing the abortion issue so frequently use the word "life," *i.e.*, human dignity, human personhood, or human inviolability. Such entities do not

74 Hellegers, *supra* note 14, at 8.
75 Byrn, *supra* note 12, at 128 n. 22.
76 Endresz v. Friedberg, 24 N.Y.2d 478, 485, 248 N.E.2d 901, 904, 301 N.Y.S.2d 65, 70 (1969).
77 Noonan, *supra* note 58, at 128.

> pertain to the science or art of medicine, but are rather a societal judgement.[78]

Science is able to demonstrate factually that abortion destroys an individuated and unique human life. Society then makes a judgment on the worth of the human life destroyed.

Those who refuse to admit the human-ness of the fetus — who say that the fetus is merely "potential" or an organic part of the pregnant woman until a particular stage of maturation — expound, not scientific fact, but a value judgment on the worth of the unborn human life. They weigh the fetus' life against other apparently competing values and they find that the latter outweigh the former.

Opponents of abortion also make a value judgment when they speak of the "sanctity" of the life of the unborn child. As they view it, the value of the single, innocent human life always preponderates except, perhaps, when weighed against other human lives — as in the case of an abortion to preserve the mother's life.

The question boils down to this: how much weight is to be given to the life of the fetus on the scale of human values in society? Each person's answer will inevitably reflect a moral judgment on his part.

It is possible to assign priorities to societal goals without making a clear moral judgment on the value of those goals; a moral judgment may not even be involved. For instance, a community, desirous of improving the lot of its inner-city citizens, may set as its goals the building of an industrial park to provide more jobs and the construction of an additional school to provide a better education. Which goal is more worthwhile? Which should have priority? If a shortage of funds mandates that one goal be sacrificed, which one should go? A difference of opinion on these questions does not necessarily involve a difference in fundamental morality.

The abortion decision, however, always presents a moral option. The choice between the school and the industrial park, no matter which way it goes, is premised on the moral judgment that the ghetto dweller is possessed of essential human dignity. It is merely a question of how that dignity is best served. The abortion decision, since it involves the destruction of human life, for no other reason, perhaps, than it is unwanted, is as Dr. Hellegers points out, a judgment that a particular human life lacks the complete dignity of human-ness. In the case of abortion-on-demand, the unborn human life is reduced almost to the level of an animal.[79] If the unborn human life is unwanted, it is moral to destroy it. Pro-abortionist Lawrence Lader wrote, "[t]he real sin, reformers declare, is the law that demands an unwanted child . . . . [T]he morality of humane abortion demands that we bring our law up to date with medical progress."[80]

---

78 Hellegers, *supra* note 14, at 9.

79 Sometimes the unborn child is reduced to an even lower level. For instance, one issue of a popular magazine carried separate articles deploring the slaughter of baby seals and advocating the destruction of defective fetuses. *Compare* Leonard, *Why Must They Die?*, Look, November 4, 1969 at 42 *with* Rorvik, *The Unborn*, Look, November 4, 1969 at 74.

80 Lader, *The Scandal of Abortion — Laws*, N.Y. Times, Apr. 25, 1965, § 6 (Magazine) at 32, col. 1, 62, col. 3.

Quite clearly, in Lader's view, the principle is a moral one: To prohibit an abortion of an unwanted child is immoral, to allow it is moral. Anti-abortionists agree that the issue is grounded in morality but would frame the principle differently.

Before probing more deeply into the morality of abortion and its relationship to law, one other question has to be answered. It it possible to be morally opposed to abortion without espousing a particular sectarian moral theology?

In the New York abortion actions, plaintiffs claimed that anti-abortion laws violate the first amendment guarantee against laws respecting an establishment of religion in that they have been retained principally because they embody the theology of the Roman Catholic Church.[81] The inference is that moral objections to abortion of necessity flow from Catholic theology.

Moral principles may and do exist apart from sectarian theology or any theology at all. Some religions which expound ethical values do not, as the Supreme Court has noted, teach what generally would be considered a belief in the existence of God, *e.g.*, "Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[82] In the conscientious objector cases,[83] the Court scrutinized the personal objection to war of one of the objectors who "decried the tremendous 'spiritual' price man must pay for his willingness to destroy human life."[84] In upholding the claim of the objector, the Court concluded that "the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God. . . ."[85] In short, a person may construct for himself a system of morality in regard to the value of human life even though he does not accept the creed of any theocentric religious sect. To support this thesis, the Court quoted from Dr. David Saville Muzzey, a leader in the Ethical Culture Movement:

> Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that it expresses itself in the human world as the power which inspires in men moral purpose.
>
> Thus the "God" that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward "the knowledge, love and practice of the right."[86] (Citations omitted.)

81 Brief for Plaintiffs, *supra* note 7, at 135-44. However, a statute is not unconstitutional because coincidentally it embraces the theology of a particular sect. McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday Closing Laws).

82 Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

83 United States v. Seeger, 380 U.S. 163 (1965).

84 *Id.* at 187.

85 *Id.* at 165-66.

86 *Id.* at 183; *see also* Welsh v. United States, 398 U.S. 333 (1970).

If an anthropocentric ethical code can lead one to deplore "the tremendous 'spiritual' price man must pay for his willingness to destroy human life" in war, then secular morality may also impel us to lament the tremendous spiritual price society must pay for its willingness to destroy human life in *utero*. We may even be moved to go further and urge that society be "purged of the evil elements" of abortion "which retard its progress toward 'the knowledge, love and practice of the right.' "

A person may, if he likes, choose to condemn abortion by invoking the tenets of Catholic theology, but anti-abortionists typically have not. They have spoken in terms of secular morality and its relationship to law.[87] They urge that the sanctity and fundamental equality of human life is a valid principle of secular morality, that it is invidiously discriminatory and immoral to concede the presence of human dignity in some humans-in-being (*e.g.*, healthy adults) and not in others (*e.g.*, defective fetuses), that the law historically has protected human life from the moment that its existence in the womb could factually be established, and that to deny the human-ness (human dignity and human rights) of unborn children will undermine those first principles of morality which are the foundation of our society: the sanctity of life, fundamental human equality, freedom and decency.

II. Abortion-on-Demand: The Moral-Legal Conflicts

Few would openly dispute the proposition that the sanctity of life, fundamental human equality, decency and freedom are values which are essential to a democratic society. But freedom is a difficult concept to define. If it means sheer libertarianism — a sort of egomoralism translated into action — then these other values cannot coexist with it. One man's unrestrained freedom is another man's enslavement.

The American ideal of freedom is not sheer libertarianism but rather ordered liberty which, in turn, implies that norms have been used to put various values in a desired order of priority. These value judgments, as previously shown, are really moral judgments.[88] As the late John Courtney Murray wrote:

> Part of the inner architecture of the American ideal of freedom has been the profound conviction that only a virtuous people can be free. It is not an American belief that free government is inevitable, only that it is possible, and that its possibility can be realized only when the people as a whole are inwardly governed by the recognized imperatives of the universal moral law.
>
> . . . Political freedom is endangered in its foundations as soon as the universal moral values, upon whose shared possession the self-discipline of a free society depends, are no longer vigorous enough to restrain the passions and shatter the selfish inertia of men. The American ideal of freedom as ordered freedom, and therefore an ethical ideal, has traditionally reckoned with these truths, these truisms.[89]

87 For an extended anti-abortion statement on a secular level, see, *e.g.*, GOVERNOR'S COMMISSION APPOINTED TO REVIEW NEW YORK STATE'S ABORTION LAW, MINORITY REPORT (1968) [hereinafter cited as MINORITY REPORT].

88 See text accompanying notes 78-80 *supra*.

89 J. MURRAY, WE HOLD THESE TRUTHS 36-37 (1960).

The sanctity of life, fundamental human equality, decency and freedom are not, therefore, empty semantic niceties. Traditionally, we have regarded them both in law and in daily life as imperatives of the universal moral law. The Declaration of Independence holds as self-evident the moral truths "that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The fourteenth amendment institutionalized these principles, particularly the principle of equality, in the Constitution.[90] "The great fundamental guarantees of the Constitution are, after all, moral standards wrapped in legal commands. . . ."[91]

Pro-abortionists also maintain a scale of values which they would translate into a " 'utopian world' " — " 'an enlightened society' wherein it would be possible for any woman to be legally aborted of any unwanted pregnancy."[92] It is important that this value system of the pro-abortionists be examined in relation to the moral principles which underlie our law.

A. Individualism versus the Sanctity of Life

Yves Simon defined "individualism" as "the philosophy according to which the common good is merely a useful one, in other words, is a mere means to the good of individuals. . . ."[93] In the abortion debate, individualism emerges in the claim that our anti-abortion laws wrongfully invade the privacy of the individual, of the family, and of the physician-patient relationship. Privacy, as a useful individual good, is exalted over the sanctity of life, a common social good. One court, in upholding the primacy of privacy, stated the proposition this way:

> For the purposes of this decision, we think it is sufficient to conclude that the mother's interests [*i.e.*, the right of privacy] are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares.[94]

Is the court correct? Does our law exalt privacy over life?

1. Personal Privacy. Personal privacy is a treasured right but it has never been regarded as absolute. The private life of a recluse, who has long been out of the public eye, may be exposed with impunity.[95] A stop and frisk may be reasonable though it constitutes "a severe, though brief, intrusion upon cherished personal security. . . ."[96] A person may be required to submit to a vaccination,[97] and a blood sample may forcibly be extracted from the body of an in-

90 *See* II B. SCHWARTZ, RIGHTS OF THE PERSONS § 468 (1968).
91 P. FREUND, ON LAW AND JUSTICE 35 (1968).
92 N.Y. Times, Oct. 26, 1965, at 37, col. 4. (Quoting Dr. Carl Goldmark, Jr., in his inaugural address as president of the New York County Medical Society.)
93 Y. SIMON, THE TRADITION OF NATURAL LAW 97 (1965).
94 Babbitz v. McCann, 310 F. Supp. 293, 301 (E.D. Wis. 1970); *accord*, People v. Belous, 71 Cal. 2d 996, 1005, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), *cert. denied*, 397 U.S. 915 (1970); *contra*, Commonwealth v. Brunelle, No. 83879 (Middlesex County, Mass. Super. Ct. 1970).
95 Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940).
96 Terry v. Ohio, 392 U.S. 1, 24-25 (1968).
97 Jacobson v. Mass., 197 U.S. 11 (1905).

dividual arrested for drunken driving.[98] Conversely, the state, as *parens patriae*, may require a woman to submit to a blood transfusion necessary to preserve her life in order that her small child shall not be left without a mother.[99]

A conflict between the mother's privacy and the fetus's life developed in *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*[100] wherein the New Jersey Supreme Court was asked to decide whether the rights of a child *in utero* were violated by his mother's refusal, on religious grounds, to submit to a blood transfusion necessary to preserve the lives of both the mother and the unborn child. Finding a parity of rights between the pre-natal and the post-natal child, the court held:

> We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.[101]

In each of the above cases, the right of privacy was subordinated to a more compelling state interest. In the last case, the interest of the state was in protecting human life. Or as another court put it, in upholding the constitutionality of an anti-abortion statute, "Protection of life has traditionally been one of the first duties owed by a state to its people."[102]

In the abortion context, the right of privacy is really a euphemism for a mother's desire, whatever her reason may be, to rid herself of an unwanted and burdensome life. To acquiesce in her claim of right is to erode the concept of the sanctity of life by devaluing the life of a weak and dependent human individual in order to accommodate the competing claims to comfort and convenience of a stronger member of society.

The erosion is not limited to the rights of the pre-natal human-in-being. Such events as quickening, viability and birth are, as previously shown, factually irrelevant to the question of whether a human fetus is a human child.[103] In the light of these irrelevancies, a woman might claim, as a corollary of the right to abort and an incident of the right of privacy, the right to destroy a defective newborn who may also prove burdensome to her. Thus, the plaintiffs in the New York abortion action, arguing on behalf of the woman's right of privacy, stated:

> When pregnancy begins, she is faced with *a state mandate compelling her to serve* as an incubator for months, and finally *as an ostensibly willing mother for up to twenty or more years.* Often she must forego a career or further education, and she and her immediate family must endure social and economic hardships.[104] (Emphasis added.)

98 Schmerber v. Cal., 384 U.S. 757 (1966).
99 Application of President and Directors of Georgetown, Col., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).
100 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).
101 *Id.* at 423, 201 A. 2d at 538.
102 Commonwealth v. Brunelle, No. 83879, at 5 (Middlesex County, Mass. Super. Ct. 1970).
103 See text accompanying notes 30-77 *supra.*
104 Brief for Plaintiffs, *supra* note 7, at 87. When he signed the New York abortion bill, Governor Rockefeller commented, "Women's liberation played an important part in the passage of this bill." N.Y. Times, Apr. 12, 1970, § 1, at 47, col. 1. Mrs. Betty Friedan, the

Apparently the woman's right of privacy is invaded not only by being mandated to serve as an incubator for the pre-natal child, but also by being forced to serve as a mother for the child after birth. If she can relieve herself of one burden, why not the other?

Testifying in the New York abortion action, plaintiff Alan F. Guttmacher, M.D., identified Glanville Williams' book, *The Sanctity of Life and the Criminal Law*,[105] as "one of my bibles."[106] Williams wrote, "an eugenic killing by a mother, exactly paralleled by the bitch that kills her mis-shapen puppies, cannot confidently be pronounced immoral. And where this certainty is lacking, should not liberty prevail?"[107] This is not to say that every pro-abortionist, including Dr. Guttmacher, espouses infanticide; it is to say that the morality of abortion-on-demand, if one accepts it, removes the moral taint from infanticide. Ashley Montagu has maintained:

> [T]he embryo, fetus and newborn of the human species, in point of fact, do not really become functionally human until humanized in the human socialization process.
>
> Humanity is an achievement not an endowment. The potentialities constitute the endowment, their fulfillment requires a humanizing environment.[108]

Montagu does not deny the human-ness of either the fetus or the newborn. He places a lesser value, however, on the lives of each. Contrary to the Declaration of Independence, human rights, which are the reflection of human value, are not endowed at creation; they are achieved only when one is able to function independently as a person in society. Neither the newborn nor the unborn qualify.

Dr. H. M. I. Liley has said that the fetus "is . . . a tiny human being, as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother."[109] If we accept the morality of abortion-on-demand-cum-personal-privacy, then we must be prepared to accept the radical alteration of the sanctity of life which will permit us to kill the child, not only in the womb, but also in the crib.

2. *Family Privacy.* Like personal privacy, family privacy is highly valued in our law. But like personal privacy, it is not absolute. A family victimized by criminals may seek seclusion to forget its ordeal only to find the incident resurrected by the media several years later.[110] The family may not be polygamous.[111] Despite his parents' objection, a court may order formal schooling for a child[112] or prohibit the child's labor.[113] The parents may not "expose

---

founder of the National Organization of Women, advocates child day care centers to "get rid of the mawkish Mother's Day approach to child care and drastically change society. . . ." N.Y. Post, May 29, 1970, at 2, col. 1, 54, col. 2.

105 G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1957).
106 Deposition of Alan G. Guttmacher, M.D., at 64.
107 WILLIAMS, *supra* note 105, at 20.
108 Letter from Ashley Montagu to the Editor, N.Y. Times, Mar. 9, 1967, at 38, col. 6.
109 LILEY, *supra* note 19, at 26-27.
110 Time, Inc. v. Hill, 385 U.S. 374 (1967).
111 Reynolds v. United States, 98 U.S. 145 (1878).
112 Prince v. Mass., 321 U.S. 158, 166 (1944).
113 *Id.*

the community or the child to communicable disease or the latter to ill health or death."[114] (Citation omitted.)

In *Gleitman v. Cosgrove*,[115] the unborn child's right to live came into conflict with family privacy. Plaintiff-family sought damages from two doctors who had attended Mrs. Gleitman during her pregnancy. The Gleitmans alleged that their child had been born with grave defects after the doctors had negligently failed to warn them that an attack of German measles suffered by the mother during the pregnancy might result in birth defects. The failure to give the warning, it was alleged, deprived the family of the opportunity of terminating the pregnancy. In affirming the dismissal of the complaint, the majority of the court emphasized the primacy of the child's right to live:

> The right to life is inalienable in our society. . . .
> We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life to support a remedy in tort.[116]

Gleitman highlights the inappositeness of *Griswold v. Connecticut*[117] in the abortion debate. That the conjugal use of contraceptives is within the penumbras of privacy as held by the Supreme Court in *Griswold*, does not mean that abortion is similarly situated:

> The contraceptive relationship is between a man and a woman. . . . The abortion relationship, on the other hand, is between parents and child. This additional party changes the whole structure of the situation. The freedom of the parents is limited by the rights of the child.[118]

Like personal privacy, family privacy is a euphemism for the family's desire to rid itself of an unwanted and a burdensome member. And like personal privacy, the erosive effect on the sanctity of life is the same. If the Gleitman family had been permitted to destroy its defective child in the womb, then upon what rational basis would one deny to *X* family the right to destroy its defective child in the delivery room of a hospital?

3. Physician-Patient Privacy. The privacy of the physician-patient relationship is not open to doubt. Proponents of abortion-on-demand assert that anti-abortion laws unlawfully intrude into this relationship. They assume necessarily that the doctor treating a pregnancy owes an obligation of good medical care to only one patient, the pregnant woman. The judgment is, of course, a moral,

114 *Id.* at 166-67.
115 49 N.J. 22, 227 A.2d 689 (1967).
116 *Id.* at 30-31, 227 A.2d at 693.
117 381 U.S. 479 (1965).
118 D. GRANFIELD, THE ABORTION DECISION 184-85 (1969). *See also* 38 Fordham L. Rev. 557, 565-67 (1970).

not a medical one. It means that the socio-economic "health" of the woman is valued more highly than the life of the child.[119]

In fact, however, the doctor has two patients when he treats a pregnancy — mother and child. In *Jones v. Jones*,[120] a New York court found that the unborn child

> became a patient of the mother's obstetrician, as well as the mother herself. In so holding, I can think of the infant as a third-party beneficiary of the mother-doctor contract or perhaps a principal for whom the mother acted as agent.[121]

As patient of the obstetrician, the child may recover damages for a prenatal injury suffered as the result of the negligence of his doctor.[122] Anti-abortion laws do not intrude upon the physician-patient relationship; quite the contrary, the laws come into play only when the doctor, *qua* socio-moral engineer, betrays his obligation to his unborn patient.

The idea that a doctor should be free of legal restraints in making socio-moral judgments is dangerous indeed. Human experimentation, research in dangerous drugs, the use of experimental drugs which may be harmful to the unborn child, and vital organ transplants, for instance, raise serious problems of protecting human rights which the law may not ignore. Depredations by the medical profession in Nazi Germany[123] suggest that the sanctity of life suffers dramatically when the law abrogates its responsibility of protecting the patient against betrayal by his doctor. Out of his experiences as an inmate in a Nazi concentration camp, Dr. Viktor E. Frankl wrote:

> it is not the doctor's province to sit in judgment on the value or lack of value of a human life. The task assigned to him by society is solely that of helping wherever he can, and alleviating pain where he must; of healing to the extent that he can, and nursing illness which is beyond cure.[124]

---

119 Byrn, *supra* note 12, at 136-37. See, *e.g.*, text accompanying note 126 *infra*.

120 208 Misc. 721, 144 N.Y.S.2d 820 (Sup. Ct. 1955).

121 *Id.* at 726, 144 N.Y.S.2d at 826.

122 Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966); Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962).

123 *See* F. WERTHAM, A SIGN FOR CAIN: AN EXPLORATION OF HUMAN VIOLENCE 153-91 (1966).

124 V. FRANKL, THE DOCTOR AND THE SOUL 37 (paperback ed. 1969). *See also* Jakobovits, *Jewish Views on Abortion*, in ABORTION AND THE LAW, 124, 125 (D. Smith ed. 1967), where Rabbi Jakobovits stated:

> Physicians, by demanding that as the practitioners in this field they should have the right to determine or adjudicate the laws governing their practice, are making an altogether unprecedented claim not advanced by any other profession. Lawyers do not argue that, because law is their speciality, the decision on what is legal should be left to their conscience. And teachers do not claim that, as the profession competent in education, the laws governing their work, such as on prayers at public schools, should be administered or defined at their discretion. Such claims are patently absurd, for they would demand jurisdiction on matters completely beyond their professional competence.

The state, in the exercise of its police power, may regulate the medical profession to protect the health and welfare of all its citizens. *See* Wasmuth v. Allen, 14 N.Y.2d 391, 399, 200 N.E.2d 756, 760, 252 N.Y.S.2d 65, 71, *appeal dismissed*, 379 U.S. 11 (1964); Barsky v. Bd. of Regents, 347 U.S. 442, 449 (1954).

Glanville Williams noted that legalized infanticide "would involve the co-operation of the medical profession. . . ."[125] If physician-patient privacy protects the physician's accessoryship to abortion, then would it not accord a similar protection to infanticide?

The law has traditionally adhered to the first moral principle that every innocent human life, as soon as it is detected and wherever it may be found, is sacred and inalienable. The philosophy of individualism, which would justify an abortion for personal convenience under the guise of privacy, is radically antithetical to that jurisprudence of life.

B. Quality versus Equality

A "quality of life" theme ran through the testimony of plaintiff-physicians in the New York abortion actions. Dr. Alan F. Guttmacher testified that there is little disagreement among doctors on the strict medical indications for abortion. The parting of the ways occurs when "quality of life" factors enter into the abortion decision:

> So I would say that men make these decisions in good conscience, in good will, trying to improve the lot of mankind and in trying to improve the lot of mankind, we come to our conclusions, which may differ, depending upon their own background and our own philosophy and thinking.
>
> Q. And on your own view, perhaps, of medical standards?
>
> A. No, religious attitudes, ethical attitudes. Medical standards, I don't think that would enter into it very much.
>
> Most of these decisions are really made on things outside of medicine.
>
> What kind of a human being you are, how conservative, how liberal, your religious background.
>
> . . . .
>
> You see, medicine, fortunately, has outgrown just sheer survival, just the beating of heart and the breathing of a lung.
>
> This is not life. Life is a much more total experience than that and that's where the vagueness of the law comes in and that's where doctors have such difficulty.[126]

Dr. Guttmacher further interpreted "the quality of life" as "the amount of happiness and the ability of the individual to be useful to himself and his family, the pleasures and all that."[127]

Plaintiff Louis M. Hellman, M.D., equated "life" with "worth living":

> I believe that life is a little more than breathing in and out and having a heartbeat.
>
> There is something about the quality of life that makes it worth living. Otherwise, you're just some kind of an animal. . . .[128]

According to Dr. Hellman, in measuring the desired quality of life, "In this country, you have to consider the dollars . . . ."[129]

125 WILLIAMS, *supra* note 105, at 20.
126 Deposition of Alan F. Guttmacher, M.D., at 55-56.
127 *Id.* at 23.
128 Deposition of Louis M. Hellman, M.D., at 54.
129 *Id.* at 108. The question of whether abortion laws are unconstitutionally vague is

Yves Simon deplored the "myth of a common good external to man," a "counterfeit common good" which conceives "a human community after the pattern of a work of art."[130] The quality of life concept partakes of this myth except that technology is substituted for art. The quality life, like the well-oiled machine, runs smoothly and functions usefully. If the machine is defective, it is less valuable. *Vita* is not truly *vita* unless it is *la dolce vita.*

In this technological scheme of life, abortion becomes a useful tool for keeping the machines in quality condition. It serves to eliminate the least functional members of society (unborn children) who might, by their presence, disrupt the smooth running of things. The abortional act is considered morally good since it represents advanced technological know-how. Because doctors now know how to perform abortions safely, abortion, in the view of its proponents, must be a civil right,[131] a morally acceptable way of curing the social ills which detract from the quality of life. With abortion freely available, it is urged, there will no longer be any unwanted children;[132] population control by abortion will de-pollute our natural resources[133] and eradicate poverty;[134] and the illegal abortionist will be driven out of business.[135]

---

beyond the scope of this paper. *Compare* People v. Belous, 71 Cal. 2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970), *and* United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969) *with* State v. Moretti, 52 N.J. 182, 244 A.2d 499, *cert. denied*, 393 U.S. 952 (1968), *and* Kudish v. Bd. of Registration, —— Mass. ——, 248 N.E.2d 264 (Mass. 1969). The author suggests, however, that the exception in the abortion statutes, "necessary to preserve the life [or health] of" the pregnant woman, becomes vague only when the attending physician (a) refuses to acknowledge the unborn child as a patient to whom he owes an obligation of good medical care, and (b) substitutes his subjective concept of quality of life for the known norms of survival of life. The testimony of Drs. Guttmacher and Hellman would seem to bear out this hypothesis.

130 SIMON, *supra* note 93, at 92.

131 *See, e.g.*, Means, *supra* note 40; Lader, *supra* note 80.

132 *But see* LILEY, *supra* note 19, at 198:

> In cases trying abortionists, the baby is never mentioned. Apparently only the mother's life and welfare is at stake. Yet all of us, if we count for something now, also counted for something before we were born. Until individual fetal life is regarded as valuable, will people stop to think twice about shouldering the great responsibility of bringing new life, wanted or unwanted, into the world?

133 *But see* Greeley, *Between Pollution, Population*, The Tablet, May 21, 1970, at 14, col. 1:

> As demographer Ben Watterberg puts it, "Lake Erie, the Hudson River, the Potomac are ecological slums today. If the U.S. Population did not grow by one person over the current 205,000,000 Americans these bodies of water would still be ecological slums . . . ."
>
> . . . .
>
> . . . I know enough social science to be able to say that the linking of abortion and pollution is either stupid or dishonest and quite possibly both.

134 *But see* Neuhaus, *The Dangerous Assumptions*, COMMONWEAL, June 30, 1967, at 408, 411:

> We are told about the poor underprivileged child who could have been spared the trials of life had he been aborted in the womb. . . . As an inner-city pastor in Brooklyn, it occurred to me that by these criteria almost all the children in my parish should not have been born. . . . [P]eople who are reactionary on other issues suddenly become very liberal with regard to birth control in the ghetto.

135 But more humans-in-being will die. In every country where abortion laws have been relaxed, the total number of abortions has risen dramatically (and every abortion kills at least one human-in-being). Over a 15-year period, Sweden and Denmark, operating under modified abortion laws, experienced a tenfold increase in hospital abortions with no decrease in illegal abortion. *See* Tietze, *Abortion in Europe*, 57 AM. J. OF PUBLIC HEALTH 1923, 1927-28 (1967). In Rumania, where abortion was available on demand, the birth rate dropped so dramatically that a more restrictive law was enacted. *Id.* at 1931. In Hungary, abortions exceed live births; other Eastern European countries also have disproportionately high abortion to live birth ratios. Tietze, *The Demographic Significance of Legal Abortion in Eastern Europe*, 1 DEMOGRAPHY 119, 120 (1964). As a result of its abortion-on-demand law, Japan is in

Analyzing this technological approach to life, the late Thomas Merton concluded:

> Philosophy reduces itself to knowing how: *knowhow*. The question "what?" is relatively insignificant. As long as one knows *how*, the *what* will take care of itself. You just initiate the process, and keep it going. That *what* follows. In fact the *how* tends more and more to determine the *what*.[136]

Obviously, the final arbiter of morality in this society of techno-moralism must be the technician. The practice of medicine changes, as Drs. Guttmacher and Hellman observed, from the treatment and preservation of a beating heart and a respiring lung (the "what") to the engineering of a quality life (the "how"); and the law must not interfere in physician-patient "privacy" when these judgments on quality are made.

Improving the quality of life is surely a laudable purpose. All children should be wanted. Pollution, poverty and illegal abortions are genuine social ills. But the quality of life movement becomes invidious and dangerous when it equates the quality of life with life itself, especially with factors like "usefulness," and "dollars" thrown in. It is simply incompatible with the first moral principle of fundamental human equality as that ideal has heretofore been understood.

First, the principle of equality does not excuse discrimination because it subserves a public object.[137] Vulnerable members of society are not sacrificed to achieve a more smoothly functioning community. For instance, cutting down the incidence of crime is a worthwhile goal but it may not be accomplished by discriminatorily mandating the sterilization of a particular class of felons.[138] Interracial strife is to be avoided, but not by the discriminatory segregation of the races.[139] In short, the *know-how* of creating a functionally efficient society cannot be utilized if it conflicts with the principle of fundamental human equality. In the context of abortion, this means that the unborn child is entitled to the equal protection of the law.[140]

---

danger of becoming a "nation of old people." N.Y. Post, May 11, 1970, at 5, col. 1. Over the two-year life of its modified abortion law, California experienced a 133% increase in hospital abortions. "The ratio [of abortions to live births] appears to be increasing rapidly." CALIFORNIA BUREAU OF MATERNAL AND CHILD CARE, THIRD ANNUAL REPORT ON THE IMPLEMENTATION OF THE CALIFORNIA THERAPEUTIC ABORTION ACT 2 (Jan. 1970) [hereinafter cited as THIRD ANNUAL REPORT]. Yet in the midst of this increase, it was claimed that illegal abortions had not decreased. *See* Monroe, *How California's Abortion Law Isn't Working*, N.Y. Times, Dec. 29, 1968, § 6 (Magazine), at 10, col. 1. Britain's hospital abortion rate has risen geometrically. *See* SHAW, ABORTION ON DEMAND 7 (1969).

On the other hand, statistics on illegal abortion and abortion deaths in the United States have been grossly exaggerated. Byrn, *Demythologizing Abortion Reform*, 14 CATH. LAW. 180, 183-85 (1968).

136 Merton, *The Other Side of Despair*, THE CRITIC, Oct.-Nov., 1965 at 13, 15.

137 Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 560 (1902).

138 Skinner v. Okla., 316 U.S. 535 (1942).

139 Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969).

140 The equal protection argument is explored in MINORITY REPORT, *supra* note 87, at 67-68. As pointed out therein, no violence is done to the fourteenth amendment principle of equality by punishing abortion less severely than murder. The law recognizes "degrees of evil" and states may treat offenders accordingly. Skinner v. Oklahoma, 316 U.S. 535, 540 (1942). Killing an unborn child may very well involve less personal malice than killing his afterborn counterpart. An abortion to preserve the life of the pregnant woman is not violative of human equality. The choice in such a situation is between saving one life (the mother) or losing two (the mother and the child). The purpose of the abortion is *to save life*,

The novelty of the proposition, if it be so, need not disturb us. From its original intent to safeguard Negroes against discrimination by Whites, the fourteenth amendment has evolved into a broad guarantee of equality both to artificial persons and to all natural persons irrespective of citizenship, sex or race.[141] In an era of increased sensitivity to human rights, it would be the ultimate in irony if the corporation which manufactures the instruments used to abort the unborn human child was entitled, as an artificial person, to equal protection of the law, while the unborn child, who is in all respects qualitatively human, is deprived of that protection.

Second, in order for the Equal Protection Clause to remain viable, it must include every natural human being within the state. Natural human beings cannot be denied equality by the simple expedient of categorizing them as non-persons. If that were so, all sorts of "non-quality," non-functioning groups of human beings might, by simple redefinition, become sub-human and fair game for legally-sanctioned discrimination. Sociologist Andrew Greeley indicated:

> Indeed, those who think that overpopulation is what is destroying our environment (instead of the venality of business and corruption in American government) might want to ponder other methods of population control such as the antiseptic disposal of unwanted infants or the elimination of people over 60.
>
> There have been other societies which have seen nothing wrong with killing the very young and the very old and surely the argument in favor of "liberal" abortion bills which permit a human being to be killed when it is 25 weeks old could be stretched easily enough to include, say a baby, 25 weeks after it has been born or a retired person, say, 25 weeks after he is retired.[142]

It is noteworthy that Glanville Williams, in addition to expounding the morality of infanticide, also favors legalized euthanasia.[143] A euthanasia bill followed the abortion bill in Parliament and though it was defeated, the Euthanasia Society in England continues to press for "reform" of the law.[144] Lord Dawson of Penn, speaking in favor of an earlier bill, invoked the discriminatory quality-of-life-cum-functional-utility theme:

---

the very value which the law of homicide seeks to preserve. The gist of abortion-on-demand is, however, the discriminatory destruction of a burdensome and unwanted life. The principle of legal necessity which permits an abortion to save life also applies to post-natal human beings, *e.g.*, the mountaineer, roped to a companion dangling below, who cuts the rope to save his own life rather than perish with his companion whose death is inevitable anyway. MINORITY REPORT, *supra* note 87, at 72. Some (including the author) may entertain doubts about the morality even of an abortion to preserve life; however we must admit that legalization of such abortions does not attack the sanctity of life and fundamental human equality as essential underpinnings of our law.

141 *See*, SCHWARTZ, *supra* note 90 at §469.

142 Greeley, *supra* note 133.

143 WILLIAMS, *supra* note 105, at 311.

144 The history to date of the activities of Euthanasia Societies in England and the United States is traced in Ayd, *Voluntary Euthanasia: The Right to be Killed*, Medical-Moral Newsletter, Jan. and Feb., 1970, at 17. One editorialist comments that despite the defeat of the euthanasia bill,

> the realist may suspect that the slippery slope is already visible both in England and here in America. . . . Anglo-American jurisprudence has, in its abortion reforms, already begun to tolerate the destruction of one human being . . . to promote the convenience and comfort of another person. *America*, May 2, 1970, at 463.

> This is a courageous age, but it has a different sense of values from the ages which have gone before. It looks upon life more from the point of view of quality than of quantity. It places less value in life when its usefulness has come to an end.[145]

The techno-morality which justifies abortion-on-demand of necessity embraces infanticide and euthanasia.

Pastor Richard John Neuhaus warned of the irreparable harm to the ideal of equality which results from espousal of the quality of life jurisprudence:

> In other lands and in other times, the termination of the life process for reasons of general welfare or convenience has been countenanced (such reasons have included racial and ideological considerations), but these are not very encouraging examples. The "fragility of the membranes of civilization" (J. F. Kennedy) cautions against moving in this direction.[146]

The idea that all men are created equal cannot coexist with the counterfeit common good which sees equality as something external to man, to be manipulated by society in order to achieve the quality life.

C. Coercion versus Freedom

Can a society which embraces the techno-morality of quality of life permit its citizens to reproduce at will? Probably not. Thomas Merton warned:

> the claim of science and technology to expand the capacity of the human person for life and happiness is basically fraudulent, because technological society . . . is concerned purely and simply with the functioning of its own processes. Human beings are used merely as a means to this end . . .[147]

Thus, the right to reproduce could well be subordinated to current standards of quality control. Ashley Montagu wrote:

> I consider it a crime against humanity to bring a child into the world whose fulfillment as a healthy human being is in any way menaced or who itself menaces . . . the quality of the society into which it is born.[148]

At first blush, there seems to be a conflict between the right of privacy which allegedly mandates against interference with a woman's decision to abort, and the purported right of society to label as "a crime against humanity" the insistence of a woman, in non-quality circumstances, to bear a child. If privacy protects the decision to abort, why does it also not protect the decision to reproduce?

The answer is simple: the right of privacy is limited. Compelling state interests may justify intrusion upon it. Proponents of abortion-on-demand argue that the fetus's right to live is not such a compelling state interest. This is not

145 Quoted in Ayd, *supra* note 144, at 17.
146 Statement submitted to the Governor's Commission Appointed To Review New State's Abortion Law, quoted in MINORITY REPORT, *supra* note 87, at 74.
147 Merton, *supra* note 136, at 17.
148 *Supra* note 108.

to say, however, that other interests might not be considered paramount — especially when they directly concern the smooth functioning of the quality society.

One of these interests may be the control of population. As a plaintiff in the New York abortion actions, Dr. Alan F. Guttmacher urged the primacy of "the right to choose whether and when to bear and raise children."[149] On the other hand, as population planner, Dr. Guttmacher wrote:

> Still, the task of reducing birth rates is a difficult one. There are deeply rooted cultural and psychological obstacles to its accomplishment. The basic question remains: Can equilibrium or even slowing of population growth be achieved by voluntary means or will coercive measures by governmental ukase be necessary? It is my belief that voluntary measures should be tried in the critical decade ahead. *If the rate of population growth has not been slowed to 1½% or less by then, coercive measures may be necessary.*[150] (Emphasis added.)

Although *Griswold v. Connecticut*[151] assures to the marital partners the right to use contraceptives, it may not assure to them the right not to use contraceptives.

With increasing frequency, one hears and reads polemics for compulsory contraception.[152] Can compulsory abortion be far behind? Professor Charles E. Rice points out that if the fetus's right to live is subordinated to the right of privacy, and if the right of privacy is in turn subordinated to society's plan to achieve quality through compulsory contraception, then compulsory abortion, as a back-stop to compulsory contraception, is a clear and present danger.[153] Dr. Kingsley Davis of the University of California favors compulsory abortion for out-of-wedlock pregnancies[154] and Dr. Harold Francis of the United Liverpool Hospital foresees compulsory abortion as a means of population control.[155]

It might be claimed that across-the-board compulsory birth control (by contraception or abortion) is non-discriminatory and therefore unobjectionable. But this is merely to say that a universal loss of a particular valued freedom (by the general reordering of values within the framework of ordered liberty) is preferable to a discriminatory deprivation of freedom. This may well be so; nevertheless, it is still a loss of an important human freedom. Further, whether the compulsion will be non-discriminatory is much to be doubted. For instance, schemes to withhold tax exemptions from the multi-child family obviously will disadvantage the poor. Some plans call for compulsory abortion and contraception only for unwed mothers,[156] and substantial efforts are being made to

149 Brief for Plaintiffs, *supra* note 7, at 85.
150 Guttmacher, *Planning the Family of Man*, in 1970 MEDICAL WORLD NEWS, OBSTETRICS & GYNECOLOGY 25 (1970).
151 381 U.S. 479 (1965).
152 *See, e.g.*, Young, Alverson and Young, *Court Ordered Contraception*, 55 A.B.A.J 223 (1969); Lamm, *The Reproductive Revolution*, 56 A.B.A.J. 41 (1970). A review and analysis of the compulsory birth control movement are contained in RICE, THE VANISHING RIGHT TO LIVE 125-29 (1969).
153 Rice, *Abortion: Orwellian Considerations*, Twin Circle, Nov. 23, 1969, at 3, col. 1.
154 Ayd, *Liberal Abortion Laws*, AMERICA, Feb. 1, 1969 at 130, 132.
155 The Tablet, May 28, 1970 at 7, col. 7.
156 *See, e.g.*, text accompanying note 154 *supra*; Young, Alverson & Young, *supra* note 152.

legitimatize coercive sterilization of women receiving Aid to Dependent Children.[157]

One of the problems with the quality of life jurisprudence and its norms of "usefulness" and "dollars" is, as has been shown, its incompatibility with the ideal of fundamental human equality.[158] Non-quality individuals are devalued or excluded from the human species altogether depending on the quality-prejudice of the moment.[159] An alternative to universal compulsory birth control could very well be selective coercion of those non-quality individuals. In the New York abortion actions, plaintiffs' witness, Dr. Natalie Shainess testified:

> Q. Would you favor legislation which would define a minimum quality of life of the female . . . in order for her to be permitted to have a child in this state?
> A. Let me answer that in this way. It is such a general question that it is awfully hard to answer.
> But if one could define — and I think it would take time to sit down and think them out — certain conditions, then I would.[160]

Dr. Garret Hardin stated:

> If the total circumstances are such that the child born at a particular time and under particular circumstances will not receive a fair shake in life, then she [the mother] should know — she should feel in her bones — that she has no right to continue the pregnancy. . . .
> It may seem a rather coldhearted thing to say, but we should make abortions available to keep down our taxes, but let us not hesitate to say this if such a statement will move legislators to do what they should do anyway.[161]

If statutorily compelled abortions of non-quality individuals seem far-fetched, one need only recall the blackest mark on American jurisprudence, *Buck v. Bell*,[162] wherein the Supreme Court sanctioned the compulsory sterilization of mental defectives. Bearing in mind current "scientific" claims that Negroes are genetically inferior,[163] one might anticipate an argument for compulsory abortion of the disadvantaged similar to the following:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacri-

157 *See* RICE, *supra* note 152, at 141-42, 146 for a critique of these plans.
158 See text accompanying notes 126-46 *supra*.
159 *Cf., e.g.*, O'Connor, *On Humanity and Abortion*, 13 NATURAL L.F. 127 (1968); Knutson, *When Does a Human Life Begin? Viewpoints of Public Health Professionals*, 57 AM. J. OF PUBLIC HEALTH 2163 (1967). Since "[w]e are all partially disabled because mental and physical perfection — like all other perfections — is only for diagrams," E. CAHN, THE MORAL DECISION 217 (1955), the quality decision is bound to reflect current prejudice.
160 Deposition of Natalie Shainess, M.D., at 108-109.
161 Address delivered at the Second Annual California Conference On Abortion, May 11, 1969, quoted in N.Y. Times, May 12, 1969, at 66, col. 5. Not all proponents of compulsory birth control favor selective coercion of the disadvantaged. *See, e.g.*, Guttmacher, *supra* note 150.
162 274 U.S. 200 (1927).
163 *See* Edson, *Jensenism*, N.Y. Times, Aug. 31, 1969, §6 (Magazine), at 10, col. 1.

> fices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.[164]

Fortunately, any attempt to legislate discriminatory coercive abortion will encounter substantial judicial barriers. The Supreme Court, in striking down a statute providing for the sterilization of a particular class of felons in *Skinner v. Oklahoma*,[165] did not expressly overrule *Buck v. Bell* but "the *Skinner* decision did betoken an attitude of judicial hostility toward sterilization, perhaps as an outgrowth of the use of it in Nazi Germany."[166] Hopefully the Court will manifest a similar hostile attitude toward compulsory abortion. In *Shapiro v. Thompson*,[167] the Court struck down a statute conditioning the receipt of welfare payments on a one-year residency in the state. This burden was considered so oppressive as to effectively deprive the poor of their right of interstate travel. The right of the poor to reproduce is no less valuable.

Psychological coercion of the poor is probably a more immediate threat than statutory compulsion. Such coercion has already been noted in the case of contraception,[168] and psychiatrist Harold Rosen, M.D., warns that "[w]ith some the desire for an abortion is physician-induced."[169] Testifying in the New York abortion actions, plaintiff Robert E. Hall, M.D., asserted, "Clinic patients don't — almost never request abortions, it's very rare."[170] Presumably the poor will have to be educated as to the availability of abortion. The opportunities for subtle coercion are unlimited.

Coercion fits naturally into the quality of life jurisprudence, but freedom and coercion cannot coexist. Nor can we risk the threat of coercion of the disadvantaged who have yet to reap the full harvest of freedom.

D. Brutality versus Decency

The techniques of abortion, as recently described, are worth contemplating:

> According to Dr. H. P. Dunn, a Fellow of both the Royal College of Surgeons and the Royal College of Gynaecologists and Obstetricians,

---

164 Buck v. Bell, 274 U.S. 200, 207 (1927).
165 316 U.S. 535 (1942).
166 RICE, *supra* note 152, at 143-44.
167 394 U.S. 618 (1969).
168 *See* Ayd, *Birth Control and Public Policy: A Viewpoint*, Medical-Moral Newsletter, March, 1966, at 4.
169 Rosen, *The Emotionally Sick Pregnant Patient: Psychiatric Indications and Contraindications to the Interruption of Pregnancy*, in THERAPEUTIC ABORTION 219, 220 (Rosen ed. 1954).
170 Deposition of Robert E. Hall, M.D., at 94. Contrary to charges that current abortion laws discriminate against the poor, *see* United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C. 1969), it may be that the poor have fewer abortions primarily because they do not ask for them. It has also been noted that the poor typically come under a doctor's care at a relatively late stage in pregnancy when an abortion may no longer be safe and when the initial mental stress of pregnancy has abated, thus precluding a psychiatric abortion. *See* MINORITY REPORT, *supra* note 87, at 80-81. In any event, one assumes that almost every law is harder on the poor than the rich. That is what being poor is all about. Indeed, it might be argued that criminal laws, especially, discriminate against the poor since social conditions in the ghetto foster crime. This is hardly a reason for repealing our penal codes. Finally, it has been held that laws are not unconstitutional because in their general application they are harder on the poor than the rich. *See* Babbitz v. McCann, 310 F. Supp. 293, 298 (E.D. Wis. 1970) (abortion statute); Moya v. DeBaca, 286 F. Supp. 606, 609 (D.N.M. 1968), *appeal dismissed*, 395 U.S. 825 (1969) (garnishment statute).

> one of the methods used is: "to dilate the entrance to the womb, then insert a large forceps and drag out the baby and the afterbirth. This is not as easy as it sounds. The surgeon must work by touch alone. He gives a tug — a tiny arm comes away; then other fragments of the body. The head is always difficult; the skull gets crushed; the eyeballs protrude. All the time the bleeding is profuse. When the abortion has been completed," writes Dr. Dunn, "the problem of the disposal of the remains has to be faced by the nursing staff. Incineration is the favored method. So ends the life of another human being — thrown out with a mess of blood clots and dirty swabs, unwanted, unremembered."
>
> Another method of abortion described by Dr. Dunn is as follows: "The woman has a general anaesthetic, an abdominal incision, the womb is incised from top to bottom and the baby lifted out. It makes some weak movement of its arms and legs, and tries to breathe. Sometimes it manages a pathetic cry like a kitten; then after a few minutes it dies an asphyxial death and lies coldly in a stainless steel bowl."
>
> The third method is the most "scientific." "A large needle," Dr. Dunn tells us, "is inserted through the abdomen into the womb and a strong solution of salt or glucose is injected. The baby can be felt to make a few convulsive movements, and within a few minutes it dies. In about twenty-four hours labor starts and the already disintegrating baby is delivered."[171]

Abortion is a brutal and violent procedure which is fundamentally repugnant to the philosophy of medical practice. The *New York Times* quoted an obstetrician, "You have to realize that obstetricians by training and practice are geared to bringing new life into the world, not destroying it. For many of us, religious objections notwithstanding, abortions simply go against our grain."[172] It has been reported that the massive abortion rate in Hungary "is resulting in increased depressive reactions and breakdowns among guilt-ridden Hungarian physicians."[173] In Oregon, obstetrical residents in state-supported hospitals rebelled against the assembly line of abortions which they were called on to perform under the state's new abortion law.[174] Mrs. Jill Knight, a Member of Parliament, reported that one London surgeon removes the fetus with the amniotic sac intact so that nurses will not hear the cry or see the movement of hands and feet.[175]

It seems that many doctors who voted for relaxation of the law in one poll or another are having second thoughts, with the result that a large number of abortions are being performed in a relatively small number of institutions.[176]

---

171 Matt, *Murderous and Ghastly*, Wanderer Reprint (1970) (reprinted from The Wanderer, Feb. 26, 1970). A new technique "literally sucks up the unborn child and macerates it beyond recognition." Pro, *A California Doctor Speaks His Mind . . . and Heart*, Twin Circle, May 24, 1970, at 2, col. 1, 11, col. 1.

172 N.Y. Times, May 30, 1970, at 50, col. 8.

173 Ratner, *A Public Health Physician Views Abortion*, 7 CHILD & FAMILY 38, 42.

174 DeMaria, *New Laws, New Problems*, in 1970 MEDICAL WORLD NEWS, OBSTETRICS & GYNECOLOGY 36 (1970).

175 Diamond, *supra* note 57, at 38.

176 In California, 8 hospitals, with only 8 per cent of the live births in 1968, accounted for 40 per cent of the abortions. Only 34 hospitals have performed as many as 100 abortions over the two-year life of the California law. THIRD ANNUAL REPORT, *supra* note 135 at 3. Britain and Hawaii are having similar experiences. *See* SHAW, *supra* note 135 at 7; N.Y. Times, June 8, 1970, at 1, col. 2. A poll of British doctors revealed that two-thirds are now in favor of a more restrictive law. SHAW, *supra* note 135, at 8.

Doctors are now becoming fearful that as the demand increases they may be coerced into the practice of abortion.[177]

The cruelty of abortion-on-demand is not irrelevant to its legality. "Canons of decency" are a part of the morality of justice.[178] For instance, some of the tests of a denial of fourteenth amendment due process are ". . . conduct that shocks the conscience,"[179] ". . . methods too close to the rack and the screw to permit of constitutional differentiation,"[180] and ". . . force so brutal and so offensive to human dignity. . . ."[181] In *Rochin v. California*,[182] the Supreme Court mandated the exclusion of evidence forcibly extracted from an accused by a stomach pump. The Court said, ". . . to sanction the brutal conduct . . . would be to afford brutality the cloak of law."[183] Curetting a child is no less brutal than pumping a stomach.

Abortion has another dimension *vis-à-vis* decency. Historically, the removal of an individual from the law's protection was regarded as punishment for a crime. For instance, in the early common law, a person accused of a felony, in his status as fugitive, might be outlawed, "put outside the king's peace and protection," and the outlaw could then be killed with impunity.[184] Abortion-on-demand is the equivalent of outlawing the unborn child. He is punished, in his status as unborn, by being removed from the law's "peace and protection."

In *Robinson v. California*,[185] the Supreme Court held that punishment for a status was cruel and unusual within the prohibition of the eighth amendment to the Constitution. If punishment of an addict, *qua* addict, is cruel and unusual, then so too is punishment of the unborn, *qua* unborn.[186] It is no excuse for the infliction of cruel and unusual punishment upon the unborn child that he is unwanted by his parents or society or that he may be burdensome to both. Persons may not be punished ". . . whose only crime . . . and whose main offense usually consists in . . . disturbing *by their presence* the sensibilities [of others]."[187]

It has been said that "[t]he Eighth Amendment expresses the revulsion of civilized man against barbarous acts — the 'cry of horror' against man's in-

177 See Pro, *supra* note 171 (recounting complaints to medical boards and threats of law suits against California doctors who refused to perform abortions). The pressure may also be exerted by the press. For instance, the New York Times characterized the reluctance of doctors to get involved in "the messy business of abortion" as "foot-dragging medical conservatism." N.Y. Times, June 8, 1970, at 29, col. 1.

178 Rochin v. Cal., 342 U.S. 165, 169 (1952).

179 *Id.* at 172.

180 *Id.*

181 *Id.* at 174.

182 342 U.S. 165 (1952).

183 *Id.* at 173.

184 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 604-605 (5th ed. 1942).

185 370 U.S. 660 (1962).

186 In the New York abortion actions, plaintiffs argued that anti-abortion statutes impose cruel and unusual punishment upon the pregnant woman. Brief for Plaintiffs, *supra* note 7, at 132-35. Such statutes do not punish the status of being pregnant; they punish the voluntary *act* of abortion. "The point of the Robinson case is that there was no overt act committed. The Supreme Court condemned a criminal conviction for status only." Rubin, *Constitutional Aspects of the Model Sentencing Act*, 42 F.R.D. 226, 228 (1968).

187 Fenster v. Leary, 20 N.Y.2d 309, 315, 229 N.E.2d 426, 430, 282 N.Y.S.2d 739, 744 (1967).

humanity to his fellow man."[188] Abortion-on-demand seems to be just such a barbarous practice. It is essentially incompatible with the ethical-legal ideal of decency.

The value system of abortion-on-demand is opposed to those first moral principles which underlie our law: the sanctity of life, fundamental human equality, freedom, and decency.

III. Whose Morality?

Law and morality interact with each other. Morality is a source of law but ". . . morality and law stand in a reciprocal relation. Moral attitudes and standards may themselves be a product of law."[189]

A. The Consensus as Shaper of the Law

If morality is a source of law, then law must bear some relationship to the moral consensus. The moral consensus, in turn, must be distinguished from majority opinion and current trends in thought on a particular issue. The consensus is not majoritarianism; rather, it consists of the profound first principles which a society holds to be true, indeed, self-evident.[190] In America, these are the sanctity of life, fundamental human equality, decency and freedom.

Examples of the primacy of consensus over majoritarianism are not wanting. For instance, we do not measure a Negro's right to equal treatment by current prejudices. Here, neither popular vote[191] nor public opinion poll[192] is a relevant reference point. The maelstrom of public opinion is not the mainstream of Constitutional morality. Instead, the Negro's rights are determined by reference to the first principle of fundamental human equality regardless of current popular opinion on the issue involved. "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."[193]

Popular polls cannot, therefore, decide the ethical-legal validity of abortion-on-demand. The issue of the human rights of a human-in-being, whether he be adult Negro or Caucasian fetus, must be resolved in the context of relevant Constitutional-moral principles, and abortion-on-demand does not, as has been shown, measure up to these first principles.[194]

It should be emphasized here that popular polls on abortion are all but useless as indicators of even a majority opinion. Typically such polls ask "Would you favor relaxation of abortion laws to legalize abortion in the case of ———— ————?" An affirmative response may well mean that although the respondent is morally opposed to abortion as a violation of the sanctity of life, he does

188 Robinson v. Cal., 370 U.S. 660, 676 (1962) (Douglas, J., concurring).
189 FREUND *supra* note 91, at 42.
190 *See* Murray, *Natural Law and the Public Consensus*, in NATURAL LAW AND MODERN SOCIETY 48, 48-49 (1962).
191 *See* Hunter v. Erickson, 393 U.S. 385, (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).
192 *See* Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907, 914 (N.D. Ill. 1969).
193 Hunter v. Erickson, 393 U.S. 385, 392 (1969).
194 See text accompanying notes 93-188 *supra*.

not wish "to impose his morality on others." A more meaningful poll would ask the question: "Do you consider that legalization of aboration in the case of ———————— is consistent with the principle of the sanctity of life?" The question would be preceded by an explanation of the *facts* of life before birth.

In New York, it is extremely doubtful that a majority favor abortion-on-demand. The new law was opposed by the New York State Medical Society,[195] and by influential religious leaders who had previously favored a limited modification of existing law.[196] Some legislators expressed their personal opposition to abortion-on-demand, but voted for the bill on the theory that abortion is a matter of personal choice.[197] Finally, a poll taken in December of 1967 revealed that less than eleven percent of the people polled favored legalized abortion where the motive for the abortion is the unwantedness of the child.[198]

Some commentators defend legalization of abortion-on-demand because they believe that society no longer considers abortion immoral. Sociologist Reverend Joseph P. Fitzpatrick expressed his personal abhorrence of abortion but implied that the action of the New York legislature was defensible because "If a majority of citizens no longer accepts a moral code, is it wise policy to attempt to enforce the moral code by law?," and "The decision of the New York State Legislature indicates that the consensus of opinion necessary to support a law is no longer present in the case of abortion legislation."[199] Father Fitzpatrick obviously mistakes majoritarianism for consensus, and, further, he assumes that a majority actually favored the abortion-on-demand bill. Implicit in his statement, too, is the idea that legislators are free to vote on questions involving fundamental constitutional morality according to the will of a majority of their constituents. However, in a case involving segregated housing, it was held that even if the legislators were correct in their uniform assessment of public opinion, " . . . they cannot acquiesce in the sentiment of their constituents to keep their neighborhoods White and to deny admission to Negroes via the placement of public housing."[200] Fundamental human equality overrides public opinion. Unfortunately, Father Fitzpatrick's conception of consensus and the obligation of legislators could justify legalized racial oppression as easily as it justifies legalized abortion-on-demand.

Jurisprudent Patrick Devlin takes a position similar to that of Father Fitzpatrick, seeming to indicate, albeit ambiguously, that anti-abortion laws ought to be repealed because society no longer appreciates the "sinfulness" of abortion.[201] What was said about Father Fitzpatrick's approach to abortion applies equally to that of Lord Devlin.[202] In addition, there is a certain in-

195 *See* N.Y. Times, Mar. 31, 1970, at 82, col. 2.
196 Knickerbocker News (Albany), Mar. 23, 1970, at 12A, cols. 1-6.
197 *See, e.g., id.*, Feb. 10, 1970, at 2B, cols. 2-7 (quoting Assemblywoman Mary Ann Krupsak).
198 OLIVER QUAYLE & CO., A SURVEY OF PUBLIC OPINION ON ABORTION IN NEW YORK 17 (1968).
199 N.Y. Times, Apr. 12, 1970, §1, at 48, col. 3.
200 Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907, 914 (N.D. Ill. 1969).
201 P. DEVLIN, THE ENFORCEMENT OF MORALS 23-24 (1965).
202 *See* Gianella, *The Difficult Quest for a Truly Humane Abortion Law*, 13 VILL. L. REV. 257, 268 (1968):

> If a community evidences a growing inclination to ignore the most basic rights of

consistency in Lord Devlin's ideas. Elsewhere, he seems to consider morality in law as a sort of seamless web, no part of which can be tampered with without destroying the whole and society with it.[203] If this be so, then anti-abortion laws should remain undisturbed because proponents of abortion-on-demand advance their proposals in the context of the new morality of quality of life. As so viewed, legalized abortion-on-demand should signify to Lord Devlin not only a vast increase in total abortions[204] (because of a further and accelerated moral devaluation of unborn human life), but also a predictable change in attitude toward infanticide and euthanasia. The web is in danger of being torn apart.

Devlin's adversary in an extended jurisprudential debate, utilitarian H. L. A. Hart, also favors relaxation of abortion laws[205] but this may be because he misunderstands the nature of the issues. The only objection he sees to abortion is that it will promote promiscuity and he finds that sexual immorality is rife anyway; hence liberty should prevail.[206] Elsewhere, Hart has agreed that

> since all social moralities, whatever else they may contain, make provision in some degree for such universal values as individual freedom, safety of life, and protection from deliberately inflicted harm, there will always be much in social morality which is worth preserving even at the cost in terms of these same values which legal enforcement involves.[207]

Perhaps if Hart had considered abortion in terms of these universal values, instead of as a problem in sexual morality, he might have reached a different conclusion.[208]

For the time being at least, the sanctity of life, fundamental human equality, freedom and decency remain as the American ethical-legal consensus. Abortion-on-demand and the quality of life jurisprudence are the antitheses of that consensus. (Indeed, it is difficult to see how there could have been an abortion movement without a quality of life jurisprudence.)

B. The Consensus as Shaped by Law

If abortion-on-demand is widely legalized, can the consensus survive?

The interaction of law and morals, as has been noted, is reciprocal.[209] Law shapes morality, especially when it touches the constitutional-moral principles which are the American consensus. Professor Paul Freund observed, "When claims are raised in lawsuits that invoke these ethical-legal standards, the

---

a helpless minority, one should not regard the repeal of criminal laws enforcing those rights as the appropriate response of the leaders of society. Instead they should seek to instill or revive an appreciation of and respect for the rights protected by law.

203 DEVLIN, *supra* note 201, at 114-15.
204 See note 135 *supra*.
205 H. L. A. HART, THE MORALITY OF THE CRIMINAL LAW 46-48 (1965).
206 *Id.* at 48.
207 H. L. A. HART, LAW, LIBERTY AND MORALITY 70 (paperback ed. 1966).
208 *See* B. MITCHELL, LAW, MORALITY, AND RELIGION IN A SECULAR SOCIETY (1967) for an analysis of the Hart-Devlin debate, and see particularly *id.* at 80-81 for a critique of the position of each on abortion.
209 See text accompanying note 189 *supra*.

opinions of the Court are bound to contribute to our more general thinking about social justice and ethical conduct."[210] Suggestions that legalization of abortion will merely put the law in a position of neutrality with respect to fetal life,[211] or that the law should be repealed because it is unenforceable,[212] or that anti-abortion laws encourage the criminal abortionist to cater, at high prices, to an inelastic demand for abortion,[213] fail to take into account not only the phenomenon of the law as teacher, but also the jurisprudence of the pro-abortionists. As already shown, legalized abortion results in an enormous increase in total abortions,[214] and the jurisprudence of abortion-on-demand encompasses infanticide, euthanasia and perhaps, discriminatory coercive abortion.

It has been argued that feticide on the one hand, and infanticide and euthanasia on the other, are fundamentally different and that experience in other countries fails to bear out the dire predictions of an erosion of respect for life.[215] The argument fails for several reasons: First, the underlying quality of life jurisprudence of the abortion movement has surfaced only recently. It is not a haphazard, ad hoc philosophy. Theoreticians have expounded it comprehensively and cohesively.[216] Second, the techno-morality of this jurisprudence has been abetted by the recent explosion of new techniques for the control and manipulation of life.[217] In techno-moralism, know-how often determines

---

210 FREUND, *supra* note 91, at 35; see L. FULLER, THE LAW IN QUEST OF ITSELF 135-38 (paperback ed. 1966).

211 Address by Father Robert Drinan, International Conference on Abortion, Sept. 6, 1967 (quoted in Brief for Plaintiffs, *supra* note 7, at 143). The concept of State Action under the Fourteenth Amendment severely circumscribes alleged government neutrality in the area of basic human rights. Proponents of abortion-on-demand seek to place the unborn child beyond the law's protection specifically for the purpose of vesting in private persons the option to kill the child with impunity. Experience has shown that where abortion laws are relaxed, the total number of abortions rises dramatically. See *supra* note 135 and *infra* note 214. Given (a) the known purpose of the proponents of change, (b) the anticipated impact of relaxation of the law on the lives of thousands of unborn children, and (c) the protection which anti-abortion laws presently afford to the unborn human child, the result of repealing such laws is an affirmative governmental involvement in the private decision to kill. *See* Reitman v. Mulkey, 387 U.S. 369 (1967), wherein the Supreme Court determined that repeal of a fair housing provision affirmatively involved the state in racial discrimination. The Court said:

> Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of § 26, and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court. *Id.* at 378-79.

Repeal of anti-abortion laws constitutes, not governmental neutrality, but governmental involvement.

212 E. SCHUR, CRIMES WITHOUT VICTIMS 38-40 (1965). In this respect some have compared anti-abortion laws to Prohibition; however, there are fundamental distinctions between the two. First, drinking or the abstention therefrom is hardly in close proximity to the first principles of Constitutional morality. Second, as Professor Paul Freund points out, it ultimately appeared that Prohibitionists opposed drinking not so much for the pain it caused to society or to the drinker, but for the pleasure which the drinker derived from it. FREUND, *supra* note 91, at 42. No such remoteness of morality or confusion of motives exists with respect to abortion.

213 H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 342-44 (1968).

214 *Supra* note 135. It has been estimated that in New York City alone abortions under the new New York statute may reach 50,000 a year. N.Y. Times, June 8, 1970, at 29, col. 6.

215 Gianella, *supra* note 202, at 274-75.

216 *See, e.g.*, WILLIAMS, *supra* note 105; J. FLETCHER, MORALS AND MEDICINE (1954); J. FLETCHER, SITUATION ETHICS (1966).

217 *See* ROSENFELD, THE SECOND GENESIS (1969); TAYLOR, THE BIOLOGICAL TIME BOMB (1968).

morality and we are invited to "play God" with human life.[218] Third, the breaking of the genetic code[219] and the development of the new medical specialty of fetology, which concentrates on the fetus as a human patient,[220] are changing the human-ness of the fetus from an intellectual, noumenal abstract to a popular, phenomenal reality. We can no longer avoid the realization that abortion kills a human-in-being. Fourth, growing pressures for population and pollution control and for the reduction of welfare lists provide a fertile field for the cultivation of the quality of life jurisprudence as public policy.

Taking account of this milieu, one political scientist ruefully concluded, "I do not see how a society committed to this value system can stop short of legalizing infanticide."[221] He even predicted the argument that will be made:

> Existentially, this child is and will always be incapable of anything that we can recognize as a personal act. He is not a person by any test that we can regard as valid. Instead, he is one of nature's mistakes, a mass of badly organized matter that should have attained personality but did not.[222]

Euthanasia and infanticide raise the spectre of Nazi Germany. Too often, one thinks of the Nazi experience as an insane aberration rather than as a natural and proximate consequence of the quality of life jurisprudence. Dr. Frederic Wertham found the origin of the Hitler-era disrespect for life in "tendencies in psychiatry (and not only in German psychiatry) to pronounce value judgments not only on individuals, on medical grounds, but on whole groups, on medicosociological grounds."[223] He continued:

> Most influential was the book *The Release of the Destruction of Life Devoid of Value*, published in Leipzig in 1920. Its popularity is attested by the fact that two years later a second edition became necessary. The book advocated that the killing of "worthless people" be released from penalty and legally permitted. It was written by two prominent scientists, the jurist Karl Binding and the psychiatrist Alfred Hoche. The concept of "life devoid of value" or "life not worth living" was not a Nazi invention, as is often thought. It derives from this book.[224]

What the life devoid of value is to euthanasia, the quality of life is to abortion. The medicosociology is identical in each case.

The danger of the quality of life jurisprudence is in the cultural climate which it creates and fosters. In that climate, genuine humanitarians may well become indifferent executioners without even realizing it. Several years ago, three doctors were tried in Germany for their part in Hitler's euthanasia program for mental defectives. They claimed in defense that as young, inexperienced doctors,

---

218 *E.g.*, AUGENSTEIN, COME LET US PLAY GOD (1969); *see* SULLIVAN, *Wider Detection of Prenatal Flaws Expected to Spur Abortions*, N.Y. Times, June 13, 1970, at 11, col. 1.
219 *See* WATSON, THE DOUBLE HELIX (1968).
220 *See Medicine's Newest Patient: The Fetus*, ROCHE MEDICAL IMAGE, Feb., 1968, at 6, 10.
221 Canavan, *History Repeats Itself*, AMERICA, May 21, 1966, at 738, 739.
222 *Id.* at 742.
223 WERTHAM, *supra* note 123, at 160.
224 *Id.* at 161.

they had been "seduced idealists" who felt no sense of personal guilt for their conduct since they were assured at the time that they were acting for the good of mankind.[225] The seduced idealism did not stop at euthanasia of mental defectives. Hannah Arendt maintains that the final solution of the Jewish problem, implemented as it was by the sophisticated science of gas chambers rather than the crude violence of firing squads, was closely connected with Hitler's euthanasia program for the mentally ill.[226]

Devaluing even the most "useless," non-quality human life, even for the most "humanitarian" of reasons is a dangerous undertaking.

Abortion-on-demand directly attacks the ethical-legal principles of the American consensus. If abortion-on-demand is widely legalized, it is doubtful that the consensus will survive. Justice Brandeis' warning in a famous dissent is apposite here: "*Our Government is the potent, the omni-present teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious.*"[227]

C. The Future of the Consensus

There are some observers who claim that the moral consensus has already broken down.[228] Indeed, America may have entered a situation of anomie, that social climate characterized by a confusion of goals produced by a breakdown in the consensus.[229] The individual simply does not know what is right and what is wrong.[230] In the morning, he vigorously proclaims the ethical-legal principle of the sanctity of life in a protest against war; in the afternoon, he subverts that principle in a protest against anti-abortion laws. One is told of the dawning of a new age of social awareness; yet the destruction of an unwanted child *in utero* is the ultimate renunciation of social responsibility. The alienation of parent from child in Eastern Europe[231] and Japan[232] has been attributed to a youthful cynicism toward traditional intra-family relationships, generated by the prevalence of abortion-on-demand. Despite these precedents, America searches elsewhere for the causes of her "generation gap."

The American people appear to be at a crossroads. Either the American consensus survives or it is undermined by the quality of life jurisprudence. There are hopeful signs both in the growing awareness that legal restraints are necessary to protect the integrity of human-ness from a rampant techno-

225 N.Y. Times, May 24, 1967, at 11, col. 1.

226 H. ARENDT, EICHMAN IN JERUSALEM 106 (rev. ed. 1965); see RICE, *supra* note 152, at 61-66. Rice argues that

> euthanasia is the logical end of the current agitation for abortion. More precisely, a coherent defense against euthanasia requires a strong offensive against abortion. Both of these subordinate the right to live to the lesser needs of others or to the social design of the state. *Id.* at 66.

227 Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

228 *See* A. HACKER, THE END OF THE AMERICAN ERA (1970); M. EVANS & M. MOORE, THE LAWBREAKERS (1968); and Cogley, *supra* note 1, for a diversity of viewpoints on the breakdown in the consensus.

229 *See* E. SUTHERLAND & D. CRESSY, PRINCIPLES OF CRIMINOLOGY 103 (7th ed. 1966).

230 *Id.*

231 *See* Harrison, *On the Futility of Legalizing Abortion*, 95 CAN. MED. ASSOC. J. 360, 362 (1966).

232 R. SHAW, ABORTION ON TRIAL 131 (1968).

morality,[233] and in the rebellion of doctors against the horrors of assembly line abortions. But perhaps it is merely a matter of time before doctors, along with lawyers, become the "seduced idealists" of Nazi Germany.

At this critical time, an explicit answer is needed to the question of whose morality is being incorporated into law when anti-abortion laws are repealed by legislatures or overturned by courts. The author has attempted to supply the answer. Recently Harriet Pilpel, a lawyer and long-time crusader for repeal of anti-abortion laws, wrote:

> As our laws in the United States are repealed or liberalized or declared unconstitutional, it becomes clear that only half the battle is won and that public and professional attitudes and the will (or lack of will) to implement the freedom conferred are also crucial.[234]

Repeal of the law, in Mrs. Pilpel's view, must be followed by a change in "attitude" and "will." Could it be that the quality of life jurisprudents are imposing their morality on all Americans and Americans don't even know it?

233 *E.g.*, HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENT, *supra* note 20.

234 Pilpel, Book Review, N.Y. Times, June 14, 1970, § 7 (Book Review), at 6, col. 1. (Mrs. Pilpel is counsel to Planned Parenthood World Population and the Association for the Study of Abortion.)