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AUGUSTINE REGAN, C.SS.R.

ABORTION LAWS AND FETAL RIGHT TO LIFE

SUMMARIUM

Hodie tendentia in iure poenali civili de abortu notatur, ut principium olim admissum de inviolabilitate vitae intrauterinae derelinquatur aliud substituendo de *qualitate* vitae tuenda sive matris et familiae vel societatis sive quodammodo etiam ipsius fetus.

1. Traditio iuridica anglo-americana quae ius commune — « common law » — vocatur, postea a statutis confirmata, exemplum praeclarum praebet influxus christianismi in mores populorum. Imo a statuto anglico 1803, quod primum *statutum* est abortum prohibens, hic ut delictum punibile proclamatur, non tantum a momento « vivificationis », ut quondam in iure communi. sed perdurante toto gestationis tempore, i.e. a primo conceptionis instanti. Similiter in Statibus Unitis tum per interpretationes iudicum tum per legislationem positivam abortus ut delictum consideratur a primo conceptionis momento.

Gradatim tamen fit erosio principii quod vita intrauterina ut sacra considerari debet, cuius terminus deplorabilis sed forsitan non ultimus in Anglia est statutum 27 Oct. 1967, et in Statibus Unitis decisio Tribunalis Supremi 23 Jan. 1973. Simul ubique fere ubi leges abortum prohibent vel valde constringunt agitatio contraria habetur eo fine, ut videtur, ut tandem aliquando abortus res sit optionis liberae mulieris praegnantis, servatis a iure servandis.

2. Quaeritur igitur de habitudine fetus ad ordinem iuridicum naturalem omnem legem positivam et humanam antecedentem, et asseritur eum ad hunc ordinem pertinere videri a primo conceptionis momento inquantum non datur ratio dubitandi quin hoc etiam momento habeatur persona humana, ad quam pertinet ius vivendi in ipsa notione personalitatis radicaliter inclusum. Ordo enim iuridicus naturalis statim oritur ubi habetur habitudo inter personas earumque actiones: est ordo a socie-

tate particulari protegendus et promovendus, praesertim ubi agitur de iure omnium fundamentalissimo ad vitam. Ergo abortus est delictum contra ipsam humanitatem a societate particulari severiter puniendum non tam nomine proprio quam nomine totius communitatis humanae.

3. Conformiter omnino ad hanc veritatem fundamentalem Organismus Nationum Unitarum — UNO — anno 1959 declarationem emisit de vita infantis etiam *ante* partum lege protegenda.

Delineantur ergo quaedam propositiones de modo quo se habere debeant status et societas civilis respectu problematis de abortu, qui inquantum directe intenditur per se omnino prohiberi debet: practice tamen potest et debet permitti saltem in casu dirae necessitatis, scil. ad vitam matris salvandam. Utrum haec permissio ad alios casos omnino exceptionales extendi possit ex circumstantiis dependet: anti-abortistae huiusmodi casus admittere possunt ne leges de abortu ulterius relaxentur, vel ut stadium ad prohibitionem latiorem efficiendam.

Leges vero abortum prohibentes parum efficiunt nisi simul omni conatu laboratur ut conditiones sociales abortui faventes omnino e medio tollantur.

In his *Commentaries on the Laws of England* published between 1765 and 1769 the distinguished jurist Sir WILLIAM BLACKSTONE, interpreting the common law of England with respect to abortion, insists that « life is an immediate gift of God, a right inherited by nature in every individual; and it begins in the contemplation of law as soon as the infant is able to stir in its mothers womb »[1]. Were he in possession of the data of modern biology and embryology he would almost certainly have said that life began at conception, and have extended the protection of law to that moment. Be that as it may, what is of interest and importance is that for the common law, as understood in those times, it was not necessary to wait for the birth of a child for an attempt on its life to be regarded as criminal[2], and such attempts were criminal not because the

[1] (Oxford; Clarendon Press) v. 1 pp. 125-126. Cited By G. GRISEZ, *Abortion: the Myths, the Reality and the Arguments*, (N. York, 1972) p. 188.

[2] The century before *Blackstone* wrote, the eminent British judge and legal scholar, Lord COKE, whom the former follows, interpreting the common law re attacks on fetal life, said that if an animated child is aborted so as to be born dead, it is not the crime of homicide, but a « great misprison », that is a serious offence, just short of a capital crime: if it dies after birth, it is the crime of

right to life was conferred on the child or created by human society or its laws, but because « life is an immediate gift of God, a right inherited by nature in every individual ».

For BLACKSTONE and COKE, who wrote within a context very different from that of our modern pluralistic and secularizing society, there was nothing strange in the proposition that society has to gear its customs and enactments in accordance with man's dependence on the Creator, from Whom he has received rights and obligations in view of his transcendental destiny. Thus abortion of the « quickened » fetus was automatically a criminal offence, as it was an offence against a fundamental, human, God-given right. To-day, in an atmostphere of human self-sufficiency, when complete human self-fulfillment is being sought within human society, the unborn, buried within the maternal womb and incapable of normal social communication, are being more and more regarded as having no rights that society need recognise [3]. Their very right to life is being legally suppressed not only in so far as such rights are considered to conflict with the rights to life of other people, but because if they are not killed the *quality* of life will suffer. In so far as laws concerned with abortion restrict its practice, the primary concern is the protection of maternal health. This protection being safeguarded, the way is opened to abortion on demand.

This study will take a very brief look at some modern laws on abortion with their tendency to go the whole way towards abortion on demand (I), then say something of the insertion of the human fetus into the natural juridical order (II), with a view to drawing certain conclusions concerning what should be the attitude of criminal law in this burning problem of contemporary society (III).

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murder. *The Third Part of the Institutes of the Laws of England,* (London, 1654), pp. 50-51. GRISEZ, *op. cit.*, p. 187.

[3] Thus Professor PAUL RAMSEY speaks of « the complete erosion of religious regard for nascent life in a technological and an abortifacient era ». *The Sanctity of Life, Dublin Rev.*, Spring 1967, p. 22.

I. WHITHER LEGALIZED ABORTION?

Not all anti-abortion laws, which have been numerous, and stretch back a long way into legal history, have been concerned with safeguarding fetal right to life. This latter aspect, if it did not absolutely begin with the influence of Christianity, certainly owes to this influence the strong emphasis it has received. Thus laws prohibiting or limiting induced abortion roughly come under two heads, which are not mutually exclusive: those namely, whose scope is to protect the right of life of the unborn, and those whose scope is concerned with the rights of others, who will be affected by their death.

Pre-Christian laws or those reflecting a non-Christian mentality, including the Jewish law, where they condemned abortion, did so mainly in terms of the rights of the father, which were violated. Nevertheless there are not wanting nuances that abortion was or could be an offence against human life[4]. The early Christians condemned abortion as murder, even though this was modified with the introduction from Greek philosophy of the idea of successive animation. However, this does not mean that aborting the unsouled fetus was considered lawful, and canonical effects of such a crime were extremely severe, equating it with homicide itself[5].

If English common law, and afterwards English statute law, until very recently, are to be considered a good example, civil law in Christian Europe imitated ecclesiastical law in condemning the killing of the unborn, even though, apparently,

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[4] See GRISEZ, *op. cit.* pp. 185-186 for some enactments of Roman law immediately before Christ, and in the first two centuries A.D. They are not concerned with fetal right to life as such, but seek to forbid abortion for family, social and racial reasons. For Jewish law see NOONAN, *An Almost Absolute Value in History*, pp. 6 ff in the volume edited by himself: *The Morality of Abortion. Legal and Historical Perspectives* (Harvard Univ. Press, 1972), and B. HONINGS, *Aborto e Animazione Umana*, (Rome, 1973) pp. 55-59. Though there is no explicit prohibition of abortion as such, that is, as an attack on fetal life, there can be little doubt that the Jews came to regard it as a violation of the spirit of the decalogue precept which forbids killing. For various nuances see Rabbi ISAAC KLEIN, *Dublin Rev.*, Winter 1967, pp. 382-390.

[5] NOONAN, *art. cit.* pp. 18-22, HONINGS, *l. cit.*, pp. 102-116.

in common law it was a crime to abort a fetus only after « quickening ». Abortion was forbidden by statute only in 1803. Statute law from then on considered abortion as a crime at any stage of the pregnancy, but only after quickening was it punishable by death. In 1837 the death penalty for it was abolished, the same punishment being applicable to abortion at all stages of gestation. In 1861 the abortion law was recast, but retained the same concern for the protection of the unborn: for example, traffickers in abortifacients were liable to three years penal servitude [6].

The legalizing of abortion in English law

The process began with a law passed in 1929 permitting abortion where necessary to save the mother's life, but maintaining its illegality in other cases [7]. Nine years later occurred the famous case of *Rex vs Bourne*. Bourne was a leading London gynaecologist who publicly announced he would abort a fourteen year old girl with psychiatric indications, who had become pregnant as a result of being raped by some soldiers. Arrested after the operation and brought to trial, he was acquitted of any breach of the abortion law, the judge in his charge to the jury having accepted the plea of counsel for the defence, that it was not possible to separate life from health. Thus the 1929 act was to be interpreted as allowing abortion also when the continuation of the pregnancy would seriously endanger the mother's health. Bourne himself had testified he would not have aborted her if the girl had been of normal mentality, but he feared that if the pregnancy had continued she would have suffered serious detriment in her already precarious mental equilibrium [8].

The 1929 act had legalized what had for some time been

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[6] GRISEZ, *op. cit.*, p. 189. In common law a child in the womb was said to be « quick » when the mother felt it move. This was actepted as legal proof that the child was ensouled. Cf. DAVID W. LOUISELL and JOHN J. NOONAN Jnr., *Constitutional Balance*, in the vol. referred to in footnote n. 4, edited by the latter, p. 224.

[7] GRISEZ, pp. 189-190.

[8] For details see *Law Reports*, 1939, 1, p. 687, *The Georgetown Law Journal*, Winter, 1960, pp. 173-174.

the practice, as action for a criminal offence had not been brought, where abortion had been done in good faith to save a mother's life. It was a question of life against life. The decision in the Bourne case invoked as a justifying cause the preservation or safeguarding, not of life itself, but the *quality* of life: for this also fetal life could be directly sacrificed. A wedge had been driven into the meaning of the law, which there is no reason to think its framers would have accepted. Court rulings and precedents were built up in the same sense, there was much activity and lobbying on the part of pro-abortion leagues and committees, so that the stage was reached which has culminated in the abortion act of 1967: and things might well go further.

Abortion Act of 27 Oct. 1967. Subject to certain conditions, such as the need, apart from urgent cases, of the opinion of two regular medical practitioners, and that of having the operation done in an approved place, pregnancy may be terminated where opinion is formed in good faith: « (a) that continuation of pregnancy would involve risk to the life of the pregnant woman, or injury to the physical or mental health of her or any existing children of her family, greater than if the pregnancy were terminated... or (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped »[9].

Thus the *qualiy of life principle* covers children already born as well as the mother, and is even extended to the unborn child, who can be destroyed because he is not considered fit to live, although guilty of no crime. Abortion is no longer a dire necessity to save another's life, it is a recognised means of family planning and population control[10]: so that in the name

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[9] The act came into force six months after receiving the royal assent on the date indicated above. The text of the act may be seen in *Halsbury's Statutes of England, Sec. Ed. Contin. Vol.,* 1967, pp. 492-497, A. HODERN, *Legal Abortion: the English Experience,* (Oxford, 1971), p. 275. For an analysis and criticism, see JOHN M. FINNIS, in the vol. edited by NOONAN, pp. 208-214.

[10] This becomes very significant with the easier and safe abortion techniques being placed every day at the disposal of all who want them. See below, n. 85.

of the affluent and comfortable society hundreds of thousands of defenceless humans are condemned to die [11].

Ruling of the U.S. Supreme Court, 23 Jan. 1973

This decision at one fell swoop set aside as irrelevant and unconstitutional anything in common law tradition that forbade killing the unborn, as an assault on the fundamental right to life; this no longer obtains, at least, up to the end of the sixth or even seventh month of gestation. The above tradition had been taken over from English common law and clarified by various state enactments. The history of such statutes reflects in general the progress of science, which tended to pin-point the moment of the beginning of specifically human life at the moment itself of conception, so that any distinction between the penal effects of aborting a quickened and unquickened fetus tended to disappear. Therapeutic abortion to save the mother's life was legalized by a Connectitut statute as early as 1860, and by 1965 this was the position in all states except four [13].

However, as in England, agitation for less restrictive abortion laws were not long confined to cases of dire necessity to save the mother, but stress was on legalizing abortion because of a woman's alleged right to dispose of the fruit of conception, as though it were part of her body [14]. Appeals to higher courts against the constitutionality of restrictive abortion laws more or less on such grounds became more and more frequent, and met with a good measure of success [15]. Finally the Supreme Court virtually struck down all state laws prohibiting abor-

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[11] Some figures will be given later on.

[12] *The Times* (London) Jan. 23, 1973, pp. 11 and 8.

[13] GRISEZ, pp. 190 ff.

[14-15] *Ibid.*, LOUISELL and NOONAN, *art. cit.*, pp. 230-239, K.D. WHITEHEAD, *Respectable Killing*, (N. York 1972), pp. 75-87. It is interesting that the idea of the (unviable) fetus being part of the mother's body, which is used as far back as 1884 in a judicial decision of O.W. HOLMES (cf. GRISEZ, pp. 365-3660) was invoked by SANCHEZ in the seventeenth century, and by others, as applicable to the unanimated fetus whose direct expulsion they sought to justify when a danger to the mother's life. See our former article, *St. Mor.* 10 (1972) pp. 168-170.

tion during the first six or seven months of pregnancy, in two decisions, overriding abortion laws in Texas and Georgia. Seven justices out of nine ruled that a woman may not be penalised for having an abortion approved by her doctor during the first three months of pregnancy; nor for the next three, that is, till the time the fetus might live, if born, but subject to the state's authority to set standards of maternal health. The state can legislate to forbid abortion during the last three months of gestation, or to allow it for the life or health of the mother[16].

The basis of the decision was located by the court « in the Fourteenth Amendment's concept of personal liberty ». Thus the Court has interpreted this concept in such a way that the law must renounce all right to protect the life of an unborn human whose mother wishes to destroy him, albeit with the approval of her doctor[17]!

Situation in other countries

This varies very greatly from an absolute prohibition of abortion in some places, such as Spain, Portugal, Ireland, and

[16] The ruling assumes that after six or usually seven months the child can live outside the womb. Used as we are to thinking about abortion as the expulsion of the *unviable* fetus, it seems strange at first to hear about aborting a fetus which is thought to be viable. However, a viable fetus prematurely delivered can be allowed to die, not putting it in an incubator, or not using whatever means are available to keep it alive. Abortion then should be taken to indicate « any untimely delivery procured with intent to destroy the fetus » (cf K.D. WHITEHEAD, *op. cit.*, p. 15, quoting GLANVILLE WILLIAMS in his *Sanctity of Life and the criminal Law*). In the Supreme Court decision, even up till the ninth month, there is room for state legislation allowing abortion for the life or health of the mother, health being understood, as medical judgment decides, « in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well being of the patient ». Quoted from NOONAN, as in n. 17, p. 324.

Thus American states can legislate to allow abortion even after seven months, whereas «under present English law, evidence of pregnancy for a period of twenty-eight weeks or more is accepted as *prima facie* proof that the the mother is pregnant of a child capable of being born alive, and no abortion may be carried out after date ». ST. JOHN-STEVAS, *The Tablet*, 3 June 1972, p. 514. Thus the case referred to below, n. 38, was not illegal because of the age of the fetus (26 weeks).

[17] For commentaries on the decision see J.R. NELSON, *The Christian Century*, Feb. 28, 1973, pp. 254-255, J. NOONAN, *Judicial power and the right to life*, *The Tablet* April 7, 1973, pp. 323-326.

most of Latin America, to the liberalised abortion laws of Japan, Russia, and communist countries generally. In fact it was in Soviet Russia that experimentation began with liberalised abortion in 1920: after various changes over the years, abortion is a matter of free choice up till the third month, from then on health reasons are required. From 1948 Japan has liberalised abortion, but to be legal they must be induced in approved hospitals or clinics. Scandavian countries vary amongst themselves, but in general abortion is easily had in a legal way. Federal Germany, France and Italy allow abortion only rarely, in the two latter countries danger to the mother's life being the one reason permitted by law [18].

However, there is scarcely a country in to-day's world where, if abortion on demand does not exist, there is not agitation and lobbying to modify, or even to abolish, all restrictive legislation, except perhaps in what concerns safeguarding the life and health of the mother [19]. Is the civilised world moving then —

Towards abortion on demand?

There is no doubt that extreme pro-abortionists are aiming precisely at this goal [20]. An argument widely used for a wider legalizing of abortion is that existing laws which forbid or drastically restrict it do not actually prevent it but drive it

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[18] Cf. R.F.R. GARDNER, *Abortion: The Personal Dilemma* (Exeter, 1972) pp. 34-40; A. HODERN, *op. cit.*, pp. 219-274; G. PERICO, *Regolamentare L'Aborto, Aggiornamenti Sociali,* 1971, pp. 630-632; *Id., Supplemento,* pp. 4-6. For present Italian law *Id.* pp. 632-634, 6-9; D. MONGILIO, F. D'AGOSTINO, F. COMPAGNONI, *L'aborto, Riv. di Teol. Mor.,* luglio-settembre 1972, pp. 355-368.

[19] See authors and works referred to in the previous note.

[20] « Basing itself on the premise that "it is the right and responsibility of every woman to decide whether and when to have a child", the Planned Parenthood — World Population statement concludes by recommending « the abolition of existing statutes and criminal laws regarding abortion, and the recognition that advice, counseling, and referral with regard to abortion is an integral part of medical care ». GRISEZ, p. 259. The statement from which he quotes is the mimeographed *Statement of Policy on Abortion* of Nov. 1968. For other significant policy statements of anti-abortion law associations and their representatives, see the same author pp. 257-266.

underground, and so produce all the attendant evils of clandestine abortion, the shocking malpractice of the unqualified practitioner, high maternal mortality, widespread and permament detriment to maternal health, the horrible and fiilthy atmostphere of crude butchery, and contempt of the law. One can understand the sincerity of people arguing this way, while they protest they are opposed to abortion in itself and insist that the net result of legalizing abortion will be an overall reduction of the number of slaughtered babies and the near elimination of the trade of the illegal abortionist and its evils[21].

However, even if it were a fact that legalized abortion largely eliminated the back street practitioner, the abortion debate cannot avoid deeper issues, and these deeper issues, which are concerned with the alleged right of man to dispose of unborn life, and consequently the duty of society to support and protect this right by law, are being canvassed more and more explicitly. The recent rulings of the U.S. Supreme Court assert precisely the alleged right just referred to, and this in the name of liberty. It is true that the Court is not directly concerned with moral but with *legal* rights: in theory the decisions do not say more than that a woman who asks for or has an abortion cannot be punished[22], so that it is quite conceivable that the seven justices who made them detest abortion in itself. However in a region concerning something so fundamental and so fundamentally the concern of society as the right to human life — and no magic web of words will ever be able to conceal that the unborn is a living human — the law cannot be permissive without seeming to give moral

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[21] For example, Fr. R. DRINAN S.J., who is as much opposed to abortion as anyone, goes so far as to advocate that the state, apart from safeguarding maternal life and health, should not legislate to forbid abortion during the first six months of gestation. See below, pp. 301-302 and n. 76.

[22] However, it is expressly said that her « *right* » is located in the Fourteenth Amendment's concept of personal liberty. Cf. NOONAN, *art. cit.*, p. 323: which seems to make nonsense of Chief Justice WARREN BURGER's remark: « Plainly, the Court to-day rejects any claim that the Constitution requires abortion on demand ». *Ibid.*, p. 324.

approval to what it permits [23]. In fact, it is a function of law, not only to forbid or enjoin certain actions by way of authoritative direction, but also to educate and illuminate concerning fundamental social values, which cannot fail to be moral.

Thus easy or liberalised abortion laws are tending to smother the voice of conscience, so that, in the social conditions they foster, women, who otherwise would never have thought of aborting a child who is unwanted, will now do so doctors, who would once have scorned to practice it, will at times tend to change their opinions; psychiatrists and social workers are more liable to have recourse to it [24]. The point is not so much that they do so, as that they do so convinced, at least superficially and in what is sometimes an almost inextricable mixture of good and bad faith, that abortion is morally justified.

Liberalised abortion fits so easily into the pattern of contemporary society, with its sexual permissiveness, with its overemphasis on personal independence, with its growing secularization tending to the exclusive stressing of this-world values, with its blind faith in technology and submissiveness to technocracy. It fits with a mentality fostered by current philosophies distrustful of metaphysics, which admit no knowable reality which is not the object of sense experience and empirical observation, which fails accordingly to distinguish between law and law — human and divine, positive and natural — and so between right and right. What morality there is, has its source merely in man made law and custom. By a peculiar paradox which does not lack its own internal logic, man's almost complete independence is accepted along with the right of the state to authorise the elimination of defenceless humans without number.

If the state can authorise abortion, and thus make it for many morally good on an ever widening scale, there can be no obstacle to its authorising abortion on demand. The principle of the sacrosanct character of innocent human life and

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[23] Cf. *S. Theol. 1-2ae, q.* 92, *a.* 2.

[24] Cf. A. HORDER, *op. cit.*, pp. 121-127.

the state's obligation to protect it has gone: abortion on demand, already a recognised legal right in many countries, stands stark and clear as the terminus of the road opened up by permissive abortion laws [25].

Has the human fetus an inviolable right to life, that the state and society are bound to protect?

II. Natural juridical order and the human fetus

Whether one wishes or acknowledges it or not, it is impossible for the laws of any reasonably well regulated society not to reflect and enforce fundamental values of natural morality, based on that law which is constituted and imposed by human reason in accordance with the basic tendencies of human nature. The quotation from Blackstone, with which this study began, is evidence that legal scholars have realized this basic element of natural law in the common law tradition, and have seen it in the prohibition to abort the quickened fetus.

However legal theory is becoming every day a more complex and difficult study as laws reflect varying sociological conditions, and legal philosophers formulate their ideas under the influence of current trends of thought, or go back to the masters of the past for fresh inspiration. There is also the interpretation of the courts, and the jurisprudence of lawyers, which not infrequently manage to give a law or a constitutional clause a meaning undreamt of at the time it was framed: sometimes in fact a meaning seeming exactly contrary to what was originally intended [26].

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[25] « Eight months after the 1967 Abortion Act became law a senior gynaecologist was to say »... all in all we did not expect a very great change in practice from that obtaining before the Act. We thought there would be a slightly more liberal attitude to the problem, for that, after all, was the purpose of the new law. How wrong we were". Gardner, *op. cit.*, p. 75. The senior gynaecologist cited is T.L.T. Lewis writing in the *Brit, Med. Journal,* 1969, 1, p. 241.

[26] Cf. Louisell and Noonan, *art. cit.*, p. 238, who remark: « Historically, the invalidation of a statute on the ground of vagueness has been the technique for judges to use when they disagree with the rationale of a legislative determination, and when they can find no other way of rejecting what the legislature has

KANT introduced a sharp division and separation between law and morality, the latter being confined to internal motives, the former being concerned with external actions which must conform with an external standard set by law: but in this latter sphere too everything is based on the categorical imperative [27]. Thus the contemporary neo-Kantian legal philosopher KELSEN proposes a theory of pure law: law as law is not good or bad except in reference to the closed legal system in which it is found. It must be traced back to its fundamental norm — *Grundnorm* — which amounts to the factual authority of the legislator or ruler [28].

The English jurist and legal philosopher JOHN AUSTIN had already in the last century outlined a similar theory. For him law is « a rule laid down for the guidance of an intelligent being by an intelligent being having power over him ». Its power is in the command of a sovereign who is not bound by any legal limitations, even those imposed by his own laws [29]. The influence of this approach can be readily seen in the utterances of eminent British jurists of to-day, for whom law is one thing and morality another, the two being completely separate. A law is valid as law once it has been constitutionally enacted by parliament [30]. Similar ideas are found in the writings and judicial rulings of the influential American jurist OLIVER WENDELL HOLMES Junior, for thirty years judge of the U.S. Supreme Court [31].

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done ». For an authoritative account of various approaches to law and its interpretation from the days of the great Greek philosophers, see W. FRIEDMANN, *Legal Theory* (London, 1968).

[27] Cf. FRIEDMANN, *op. cit.*, pp. 27, 159.

[28] *Ib.*, p. 276.

[29] *Ib.*, p. 271.

[30] As the legal axiom has it: « the king can do no wrong ». One can understand what was meant by a well known British parliamentarian, who is also an eminent jurist, that if Parliament duly enacted a law enjoining that all blue eyed babies be killed, it would be perfectly valid as law. It doesn't follow he thinks it would be good morals. (See *The Times* (London) May 13 1946 for report of a speech by Sir HARTLEY SHAWCROSS, M.P., K.C.).

[31] Cf. Ch. D. SKOK, *Prudent Civil Legislation According to St. Thomas and Some Controversial American Law*, (Rome, 1967), pp. 174-179, for some of HOLME's leading ideas on the nature of law.

If the above were to be admitted, morality need not and should not enter into the sphere of civil law, state, or society, so that the only rights the legislator recognises in his legislative capacity are those conferred by the law he frames or interpretes. Political science, ethics or religion might speak of a natural or God-given right to life and so on: they might insist that such rights be incorporated in the existing legal framework, but if incorporated, such incorporation is not the recognition of their previous existence in another sphere, but is their one and only basis in the sphere of civil law, which confers and creates them.

Arguing from a social contract or Hobbesian theory of society, which presupposes the citizens concede their rights of complete independence in return for the state's protection, one could say that the contract itself creates a legal right to life, but such a right would not be had in the case of individuals who are not yet or who are no longer capable of consenting to live in this or that society. Thus the unborn, the idiot, the senile in mind as well as body, can have no legal right to live: they can be left unprotected to be disposed of by the euthanasia, whether the « fetal euthanasia » [32] called abortion, or the euthanasia meted out to the already born, because considered burdensome and useless. In fact there is no reason why at both ends of life a certain measure of euthanasia should not be compulsory — as a means of population control, at the one end, and as a means of ridding the state of unproductive burdens at the other.

To preach that law has no moral content will inevitably make the state with its enactments a source and shaper of social morality in its own right, as so much of social living is impossible without the regulation of law. Abortion and euthanasia will be assumed as morally right because they are according to law, and the law itself will grow more liberal as these assumptions are more widespread and more deeply rooted [33].

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[32] The term applied to abortion by Prof. P. RAMSEY, *The Sanctity of Life*, *Dublin Rev.*, Spring 1967, p. 378.

[33] PIUS XI has appositely said: « There are those who think that whatever

If however there is, antecedently to any particular society, a natural juridical order between person and person, which every society must recognise, and if the human fetus is found already within this order, then society must take measures to safeguard and protect the most fundamental of human rights, even as pertaining to the human fetus — the right to life itself. Any law violating this right will be intrinsically evil, and any law permitting the destruction of the unborn can be justified only within narrow limits, and in the measure of the necessity of the situation.

A. *The natural juridical order*

It is of the essence of man to be related to other men, not inertly and passively as two peas in the same pod, but eventually, at least, consciously and actively, each recognising in other men so many reflections of himself, each identifying himself with his neighbour [34]. The fundamental goods he wishes for himself he must wish for others — and this basic natural love is the foundation of *right* in the sense of *ius*, here meaning *natural* right, antecedent to every positive law. A man loving himself loves his own good, above all his life and the things without which he cannot be, or live: without which he cannot evolve humanly. Such things, especially his life, are his *right* — things adjusted to him from the intrinsic constitution of his being; and as he claims such as his right, he must allow identical rights to others in so far as they are men, other selves, whom he loves naturally in the basic community of human life [35].

This amounts to saying, of course, that man sees, accepts, and adjusts himself to the order of mutually respected rights because he is a person — one able to know and possess himself as ordained to, or rather co-ordinated with others. And here

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is permitted by the laws of the state, or at least is not punished by them, is allowed also in the moral order ». *Casti Connubii,* AAS XXII (1930), p. 589.

[34] Cf. Vat. II, Const. *Gaudium et Spes,* Caput 11, *De Hominum Communitate,* especially nn. 24, 25, 26. 32.

[35] *S. Theol, 2-2ae, q.* 57, *aa.* 1. 2.

precisely he sees and accepts the *natural juridical order*, defined by DEL VECCHIO as « the objective co-existence of human actions according as they are co-ordinated by an ethical principle »[36]. It is the effective recognition of rights between man and man, stemming from natural love, that effectively assures that the human condition is not the law of the jungle, that man does not plunder and murder his brother, that the weak are not oppressed by the strong, that man does not exploit his fellow for his own advantage.

At what point does man enter this natural juridical order? It is obviously at the moment he is first a person. But to be a person, and thus be found within the natural juridical order, must he consciously accept himself as related to others? If so, there is no case for saying that the human fetus is already a person, belonging as such to the natural juridical order. But surely it does not make sense to talk of *becoming* something which you were not a moment before merely in the fact of recognising what you are already, namely, where personality is involved, by recognising yourself as related, open to others. If man cannot know his obligations in the natural juridical order before he recognises himself as part of it, it does not follow that others have no obligations towards him. These juridical obligations are there and must be recognised from the moment he is, and is a person.

If then the human fetus is already a person, others, the human community as such, individual human societies, must recognise and accept their obligations towards him as a person, in particular their obligation not to suppress his very being, even though it is the quantitatively infinitesmal being of zygote or morula, that is not yet implanted within the protecting shelter of the maternal womb.

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[36] « (Il diritto) inteso come la coesistenza oggettiva delle azioni umane, secondo un principio etico che le coordina ». Quoted by P.-M. VAN OVERBEKE, *Droit et Morale, Rev. Th.*, 1958, p. 287, n. 1 For a development of the notion of the natural juridical order in the line of the thought of S. Thomas see the above article: also M.-J. LAVERSIN, *La Loi* (Ed. de la Rev. des Jeunes, Paris, 1935), pp. 279-341.

B. 1. *The fetus as person*

In a not so theological moment Bishop ROBINSON writes: « It seems safe to assert that when an embryo or fetus is spontaneously aborted we do not customarily regard it as a person. By what freak of logic, then, can we assert that if an abortion is deliberately induced the fetus becomes a person? » [37]. However those who think induced abortion is killing a human being have no difficulty in conceding that when spontaneous abortion occurs it is a person who dies. In hospitals where abortion is practised as legally authorised, aborted fetuses, it is said, are thrown into dust-bins or incinerators [38]. We can be sure that in hospitals where induced abortion is eschewed as an attack on human life, fetal remains resulting from miscarriages are reverently disposed of. In essence one pays them the respect owed to the dead [39].

Probably it is only when some public issue concerning the unborn arises, as the present abortion issue, that the average person ever adverts to the possibility of a fetus being a person [40],

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[37] J.A.T. ROBINSON, *Christian Freedom in a Permissive Society* (London 1970) p. 53.

[38] GARDNER speaking of the working of the English Abortion Act reports some spectacular incidents of which the most famous was the Glasgow case of January 1969. An unmarried student was aborted at twenty-six weeks pregnancy. The fetus was placed in a bag and handed to the incinerator attendant who, half-an hour later, heard a whimper. The theatre attendant asked if he knew what what the bag contained, said it was a « kiddie », that he knew it was alive and he agreed it was a « bloody shame ». The child was then placed in an incubator but died some eight hours later. At the inquiry the Procurator-Fiscal asked: « You are not suggesting that because it was an abortion operation the people in charge just put the baby aside and did not bother with it. To this the professor of medical jurisprudence replied « Yes. I think that is exactly what happened ». *Op. cit.* p. 84. Facts are reported in the *The Times,* May 22 and 23 1969; *The Scotsman,* May 24, 1969.

[39-40]. It is encouraging that in England itself, in spite of the liberal Abortion Act of 1967, a public furore was caused by allegations that experiments were being proposed to be carried out on aborted fetuses. See N. St JOHN STEVAS in *The Tablet,* June 3, 1972, who goes on to say: « The fetus, even under present English law, is not treated as a more object without rights, but has its claims at law even though these have been gravely curtailed by the recent Abortion Act (p. 514) ». Cf. GARDNER, *op. cit.* p. 85.

Certainly, if some well meaning people who at the moment see no objection to liberalised abortion laws, or even abortion on demand, could see even a six

but it would be a fair assumption that he does not think of it as a thing. Certainly an expectant mother and her husband longing for the birth of their child do not think of it in this way. No doubt, what the naked eye of a non-scientist would see in a zygote would be vastly different to what would be seen by a biologist or embryologist examining it through a microscope, but there is a vast difference too between what the former sees in a piece of metal and what is discovered there by a nuclear physicist. In neither case is there a contradiction between the different visions, but if we would know what is really there, whatever be the appearance to the naked eye, we must be guided by expert knowledge: by the empirical scientist in what concerns the sensible reality, by philosophical reflection if we are to decide whether or at what stage the zygote, embryo, or fetus, is or becomes a person.

B. 2. *Concerning the person*

Philosophers will never have done discussing the meaning of the person; which indeed we seem to know till we try to pin-point its essential element. However it is clear that in this visible world nothing whose status is lower than that of man is a person, while personality connotes such excellence that God Himself is a person, and would be known as one, even if faith did not assure us that, in fact, He is Three Persons.

Man is a person not merely because he is over and above the visible beings around him, but because this superiority consists in a wholeness, separateness, and independence in his being and action, which at the same time tends to enter into communion with the other beings he knows as other selves, capable in reciprocal action of giving back the love they receive from him, as he gives back the love he receives from them. Thus the most precious and characteristic relation between man and man is that of friendship — a certain inner communication of life, sentiment and ideals: something impossible

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week old fetus being aborted, when it it already can be recognised as having human features, they would have another, and very firm, opinion.

to have with an animal, though we can regard it with real affection, and care for it as a pet or even companion [41].

However a person does not cease to be one because, for some reason not connected with his nature, normal human communication is no longer possible with him, nor is a human being a non-person because he has never had and will never have the expedite capacity of such communication in this world. For one thing, he possesses his separate entity, his metaphysical wholeness, which can never be part of another being; and, for another, the basic capacity for self-communication remains, however impeded it may be. And, as we know man is an immortal spirit, we know also that this capacity is going to be actuated in a hereafter. Thus, one who is dear to us, but has lost his expedite power of human communion through some brain injury or senility, remains dear and the object of our human love. The idiot from birth is still vastly above the brute animal, and parents will tell you proudly they think the world of their mongol child, because it is theirs. They are responding to the instinct telling them that it is truly another human, that buried somewhere within it is the mysterious quality of personality which, if it could be released and actualized, would make the child appear fully what it actually is. It is said that the relationship of a mother to an idiot child is often a love-hate one: even while she feels and manifests repugnance for the abnormal fruit of her womb, she is conscious of her need and desire to love it — not only for what it should have been, but for what it actually is, a being, with the essential kernel of human personality, in the tragic situation of being unable to assert itself, and enter into the normal ways of human communication.

The foregoing observations make it clear that human personality finds itself on two levels — the person revealed and manifested in his self-communication, and the person as that basic, mysterious reality, which antecedes all conscious and active communication [42].

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[41] Cf. St. THOMAS on the meaning of friendship, *S. Theol.*, 2-2ae, *q.* 23.

[42]. Cf. J.B. LOTZ, *Person und Ontologie, Scholastik* 1963, pp. 335-60, which

B. 3. *The person revealed in self-communication*

When S. Paul exhorted Christians to « bear with one another charitably, in complete selflessness » [43], he was telling them to act as Christian *persons*, for openness to others, emphasised these days in stressing the I-Thou relationship, means precisely that a person is for others: he must actualise himself in complete selflessness.

Being becomes itself more perfectly as it passes the threshold of consciousness, and sees itself as the root and bond of communion between being and being. Arrived at this point it is personal, and the person, therefore also the human person, knows himself as such by seizing himself in his peculiar uniqueness, but also as related to other persons as he goes out to encounter them in knowledge and love, which is simultaneously knowledge and love of himself. He knows himself and other persons as immeasurably superior to the things around him, and his perceived openness to others is the perception of openness to the vast horizons of being itself. This marks him to himself as in a true sense indestructible: because his life is orientated to the beyond, neither he himself nor any other human has the right to destroy him [44]. Not to kill is then a primary precept of natural and evangelical justice, expressing and applying the deeper law of charity: but it has to be integrated with the affirmative precept of doing good, enjoining not merely not to destroy the life of the human person, but to co-operate in the building up of a social order, which will be a stable community of love.

B. 4. *The person as constituted*

Man knowing, loving, communicating, and thus realizing himself, thus finding himself as a person, is, in the great phrase of Pascal, a being who transcends himself. His development

has appeared in English in *Philosophy To-day* 1963, pp. 279-97. This article is a valuable analysis and confrontation of the scholastic and modern notions of personality, showing their basic similarity.

[43] *Ephes.* 4, 2.

[44] Cf. A. REGAN, *The Worth of Human Life, St. Mor.* VI (1968) pp. 253-270.

and the acts whereby he achieves it are not accidental, if considered in the framework of human totality, that is, if the term is understood as suggesting that human development, especially in the communication of man with man, is merely joined or annexed to something else, it alone having basic importance.

As though to emphasise this, there is among Catholic thinkers a certain moving away from the traditional concept of person, as formulated by Boethius and elaborated by S. Thomas [45]. Thus person is conceived not primarily in terms of substance, in the scholastic sense of a being who is the subsisting subject of accidents, whose being inheres in and depends on the substance, but in terms of relation: a man constitutes himself in that self-sufficiency which makes him a person in so far as he relates himself to the world around about him. Therefore the human person is not to be thought of as a pre-existing inner reality, whose *actus secundus* is to step out of himself into his environment [46]. The personalism of to-day, it is contended, places the dominant stress in the concept of person on the relationship to community, discarding in favour of this approach the old insistence that a person must be a substance or *suppositum* [47].

However it is anything but evident that to do full justice to the relational-community aspect of person, so popular these days, one has to forget that a person is a being that *subsists*, that has being in itself, and of which accidents, inhering in it or proceeding from it, as actions or operations, are predicated. The fact that a person, as distinct from lower supposits, acts with rational consciousness, and has, within limits at least, a certain dominion over his actions, a certain independence and freedom in acting, and the fact that he consciously relates to others in love and communion, indicate

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[45] Cf. *S. Theol.* P. I, *q.* 29, *art.* 1.

[46-47] Thus, for example, W. RUFF, *Individualität und Personalität*, *Theol. und Philos.* 45 (1970) 1, pp. 25-59. It seems that this author conceives the substantiality traditionally ascribed to a person not as though it were in the person in himself apart from his environment, but in the relationship he achieves with the latter: « der Mensch konstituiert sich in seinem (geistigen) Selbstand nur, *indem* und *sofern* er sich auf die ihn umgebende Welt bezieht », (p. 30, n. 32).

a prior independence in substantial being. Not to recognise this, seems to leave the much vaunted, and extremely important, relationship-community aspect of personality hanging in the air. Also, why neglect or minimise the uniqueness of the operating subject as *subject*, and in what way has the distinction between potency and act, subject and operation been invalidated? Is it not precisely by seizing and returning to itself as subject that the person finds and realizes himself in the community of persons? It is not a question of opposing substance and operation, as though two separated realities, nor of numerically adding then, but of seeing them as a vital unity: *substantia est propter operationem*, but this amounts to saying *substantia est propter seipsam operantem* [48].

B. 5. *When is a person?*

A human being who actively communicates with his fellows is certainly a person, and nobody is going to maintain he ceases to be one when he temporally ceases to be active, as when he is asleep. Those who look for the constitutive of human personality in what a man does in relating himself consciously to his environment, especially to other humans, rather than in what he is as an intelligent supposit, would probably insist on the personal status a man has won for himself by his having consciously entered into personal relationships: thus to save his continued personality in spite of occasional inactivity.

This seems equivalent to what DANIEL CALLAHAN says in

[48] H. ROTTER considers it theologically intolerable - « theologisch untragbar » - to speak of the actuation of oneself in consciousness and freedom as something accidental; *Die Geistbeseelung im Werden des Menschen, Zeitschr. für Kath. Theol.* 93 (1971) 2. p. 171. Maybe; but it seems to depend on the terminology and the point of view. If the scholastic thinks of the rational subject of consciousness and freedom as a substance and so as a person, he was first in the field, but he can agree with the phenomenologist that a man's conscious and free acts are not accidental in the sense of being unimportant, even if he insists that the substance, which is the person, finds itself, relates to the environment, returns to itself, in its self-consciousness and freedom. Neither ROTTER or RUFF (see previous note) really seem to get away from supposing what they are trying to reject - that a person is already a person in the being that precedes its actions.

his effort to open up a more liberal approach to the moral problem of abortion: for him the fetus is at no stage a human person, so that abortion cannot be described as « the destruction of a human person for at no stage of development does the conception fulfill the definition of a person, which implies a developed capacity for reasoning, willing, desiring and relating to others » [49].

Certainly one who has a *developed* capacity of performing acts proper to a person is *dynamically* more a person than one who has not, but it is perfectly gratuitous and self-contradictory to claim that without due development — and who is going to judge when it is there? — one is not a person: unless one is going to say that one arrives at personality as one arrives at a legal age to vote. If personal actions are not constituted as such by legal recognition but are acts that flow from a man's personal nature, then he must be a person from the moment he has the faculties to produce them, even though there may be factors — as a tender age or some sickness — which prevent the actuation of the power implicit in those faculties [50].

Though much more cautious than CALLAHAN in the conclusions he would draw from postulating that a fetus is not as yet a person, E. POUSSET shares the view that having human life or the status of a human being is not automatically the same as being a human person; to be which, one must be recognised by society as a subject of rights, and must be endowed with a role to play in this society. He does not think it follows from this that the unborn has no rights that need be recognised, for he has originated from the union of two human persons; or that he has no social role to fulfill in the hope he represents for the community. He would approach the problem of abortion in the context of the dialectical tension between what is not yet, and what will be — the « will be » being already contained in, but transcending the « not yet »,

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[49] D. CALLAHAN, *Abortion; law, choice and morality* (The Macmillan Co. 1971) p. 497.

[50] We must apply here: *plus et minus non variant speciem.*

so that the man to be is already there in the man who, as yet, does not exist [51].

So far, the main thing to quarrel with seems to be the ambiguity in this approach to the concept of human person, and what appears to be a confusion between the natural juridical order and the order legally constituted in this or that society. POUSSET himself is at pains to set aside certain consequences of making the person depend on society for his very being as a person, and within the limits of his own thought seems to do so quite consistently. However the tendency he shares with CALLAHAN to see the person as one who relates to society by virtue of being actually inserted in some particular society has, in other hands, been so manipulated, as to yield consequences apt to shock more moralists than those, who, maligned or not, are credited with being dogged by a preconciliar mentality [52].

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[51] E. POUSSET, *Être humain déjà,* Études 3339 (1971), pp. 502-519.

[52] In the same issue of *Études* carrying the article of POUSSET, and immediately following it, is an extract from a letter of L. BEINAERT, *L'Avortement est-il un infanticide?* (pp. 520-523); commenting on the issue raised by POUSSET he suggests tentatively: a. that abortion is not a form of infanticide, since an embryo or fetus is as yet a human being not having entered into human society, with its own personal name and being recognised as a human being like others; b. though it does not follow from the above that abortion is not a thing generally to be forbidden, it opens the way for a re-appraisal so as to allow for new perspectives, more in line with contemporary moral evaluation, which does not condemn abortion so completely that there cannot be certain cases in which to induce it will be lawful, not only to save the mother, but also for eugenic reasons etc. P. ANTOINE, relying heavily on the new principle that to be a man one must be recognised as such by the community, thinks that there might possibly be cases where, with misgivings certainly, abortion is the solution, though such will not be normal. *Cahiers Laënnec,* 31, (mar. 1971) *Naître à une vie d'homme,* pp. 17-25. With a somewhat similar approach A.J. LEIJEN thinks abortion cannot be unconditionally excluded in a hopeless situation, *De legende van het kind; de orde van het spreken en de abortus, Tijdschrift voor Theologie* 10 (1970) 259-272. (We have access to this article only through the summary given by A. AUER, *Zur Diskussion über Schwangerschaftsabbruch, Theol. Quartalschrift,* 151 [1971] p. 200).

More radical is the approach recently put forward by J.M. POHIER, for whom the biological fact that great numbers of fertilized ova never reach implantation, or are spontaneously aborted even after implantation, or never develop a brain formation capable of supporting intelligent activity, shows that such fetuses are not really human beings. Even if biologically sound, a fetus

To decide when there is a human person we have to decide when or from what point there is an intelligent subsisting, that is, independently existing being, who, because intelligent, has the capacity of relating to other such beings, even though there are factors which here and now prevent such a capacity from being actualised. One can possibly best tackle the question by moving forward from the moment of conception itself, comparing it with two other moments in the process of human gestation, which can, and have been put forward, as the moment of personhood [53].

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can be still less than human on ether criteria, vg. because it is not the fruit of a love union, because the need of family limitation, social conditions and so on, make it undesirable that it be accepted by its parents or society. (*Lumière et Vie*, XXI, 1972, n. 109). Thus the way is open to liberalized abortion, even on moral grounds, completely at odds with the Christian tradition.

Finally, the influence of such methods of re-thinking the whole moral problem of abortion is seen in *Nouveau Dossier sur l'Avortement;* which appeared in *Etudes*, Jan, 1973, pp. 55-84, over the names of fourteen signatories, various experts, including three Catholic priests and one Protestant professor of theology. Less radical than POHIER, it calls for a revision of the law to allow abortion more easily, as *socially justifiable* in rare cases where it amounts to a refusal to create an inhuman situation: otherwise, though to abort is not to murder, seeing the fetus is not yet human, to refuse its humanisation by refusing to accept it into society is intolerable (p. 73). Cf. T.W. GLENISTER, *The rights of the unborn, The Tablet*, 16 June 1973, pp. 557-559, where reference is made to the severe criticism of G. MARTELET, in *Le Monde.* A later issue of *Études* (Août.-Sept. 1973) carries, as a continuation of the *Dossier sur l'avortement*, a sound and balanced article by B. SESBOUÉ on the early Christian attitude to its morality, *Les Chrétiens Devant l'Avortement* (pp. 262-282). However a later article by the review's editor, Fr. B. RIBES, gave renewed cause for uneasiness and has provoked a firm rebuke from CARDINAL MARTY, as head of the French Episcopal Conference, stating the Church's unyielding opposition to any attack on fetal life from the moment of conception. (See numebers of October and November 1973).

In *Rev. Thomiste* (Jan-Mars 1973) Dr. CHAUCARD has, on biological grounds, strongly re-acted against the views of Pohier and various writers in *Études* (pp. 33-44), and in an appendix to his article PAUL GRENART has exposed fundamental philosophical fallacies in the *Dossier* (pp. 44-46).

[53] P. RAMSEY ponders four possibilities as to « when a new life first has the sanctity that claims protection....; the moment of origin of the genotype, the time of implantation, the time of segmentation, and the development of the fetus in the first 4-8 weeks ». *Points in Deciding about Abortion*, in the volume edited by J. NOONAN, already referred to, p. 64.

The moment of conception[54]: To-day it is stressed that each human individual is absolutely unique: he is like other humans in essential human qualities, he will normally have certain close similarities both of mind and body with his parents and siblings, education and environment will assimilate him to others who have been subject to these same influences, but all the above similarities will be external to the inner nucleus of selfhood, which makes him the unique individual he necessarily is, who will never be repeated.

Conception which, strictly speaking, like gestation itself is a process rather than a single moment signifies the union of spermatazoon and ovum as the result of the union of man and woman in the sex act: the twenty three chromosomes of the former unite with the twenty three chromosomes of the latter, so that the resulting fecundated ovum is identical with neither of the two sex cells from whose union it is derived. Nor is it just a juxtaposition of the latter, which penetrate each other so that the chromosomes (rod-like structures which carry the genes which will determine one's characteristics) immediately set in process cell division by *mitosis*, a process in which the division of the cell does not imply a diminishing of the cromosomes; because immediately before division these arrange themselves into two sets of forty six each, so that cells originating in this way have the same number as their parent cells.

On the contrary, the twenty three chromosones in each of the uniting sex cells at conception are the result of another kind of cell division called *meiosis*.

When one remembers that in the cells which make up the living organism the chromosomes are constantly interchanging their genes; that therefore no two ova or two spermatozoa are exactly alike in their genes; that the diverse genes carried by the chromosomes in the sex cells will, if conception occurs, be interchanged with each other to an unpredictible extent;

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[54] Neither conception nor nidation nor the formation of the brain cortex is a moment in a mathematical sense, as though they happened at a single bound, but are rather gradual processes from the previous stage. Cf. GRISEZ, *op. cit.*, p. 13.

that, with cell division by mitosis immediately beginning, such interchanging will continue in the same unpredictable way, one begins to realise how impossible it must be to predict with any kind of security the individual who will result from any given act of sexual intercourse. One cannot predict the genetic make up, the bodily characteristics that will develop, and as a result, the mental and spiritual qualities, that will not be unrelated to the foregoing, of such an individual. PAUL RAMSEY has said we have here on the level of biological science something approximating to *creatio ex nihilo*. The scientist can explain that the individual who has been conceived is the result of certain genetic combinations: he cannot see forward and say that this or that individual will in fact result from the union of sex cells, nor say afterwards why it has thus come about [55].

The non-Catholic moralist ROBERT NELSON puts it excellently: « Each human being is unique and irreplaceable... This is self-evidently the case for every conscious person who knows himself to be an *ego*. With respect to unborn life, it has long been assumed to be true; to-day it is *known* to be true. According to recent genetic studies, long before it is possible to imagine that a human being possesses individualized consciousness, the uniqueness of genetic structure has been determined by the union of male and female genes. Theodosius Dozshansky, the Nobel laureate in genetics, says that the possible variations of human genotypes constitute so vast a number as to be equal theoretically to the number of atoms in the universe. Uniqueness does not wait upon one's being born and becoming a conscious person; rather each combination of ovum and spermatozoon initiates unique life » [56].

Does then the advent of a new human person coincide with conception? That a singular uniqueness is already there is beyond doubt: the human zygote is a new, living, reality, different from the living cells of the parents who have produced it, independent of them in its being, even though for the period

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[55] *Art. cit.* pp. 67-69.

[56] J. ROBERT NELSON, *The Christian Century*, 31 Jan. 1973, p. 125.

of gestation the fetus will live by drawing oxygen and nourishment from the mother through the placenta. Can it be said to have the intelligence and openness required for personality? And is the uniqueness already present, singular though it be, the uniqueness also of indivisibility proper to a person? [57]. These two problems must be briefly considered before arriving at an answer about the first moment of personhood; and their consideration will bring us to reflect on the possibility that this moment may be, approximately at least, either the moment of nidation or, some four weeks or more subsequently, the moment of the formation of the cerebal cortex.

Moment of implantation (*nidation*): This refers of course to the time, a week or a little longer after conception, when the fertilized ovum, now called the *blastocyst*, lodges itself in the uterus, begins to form the placenta, and, if all goes well, will grow and prosper in the uterus till birth. The obvious importance of this stage in fetal devolpment makes it a candidate for the honour of being the moment of personhood, but its real importance in this respect seems to be that it normally puts an end to the possibility of *segmentation*, whereby the fertilised ovum is split into two or more to produce identical twins or triplets etc. It is argued therefore that since by definition a person is an indivisible unity, personhood cannot be there till the possibility of segmentation has passed or till, segmentation having occurred, two or more persons come into being. Thus for DONCEEL, « defenders of immediate animation must admit that a person may be divided into two. This is a metaphysical impossibility » [58].

The difficulty is not as formidable as it looks: even if one rules out the possibility that a fertilised ovum, which segmentates, does so because of some intrinsic quality normally

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[57] The unity of the zygote may not necessarily amount to anything more than that it is divided genetically from the parents who produce it with its own genetic character. Cf. GRISEZ, *op. cit.* pp. 26-27, who refers to L. LOEB, *The Biological Basis of Individuality* (Springfield, Ill., 1945), pp. 3-26.

[58] R. DONCEEL, *A Liberal Catholic's View*, p. 43 in: *Abortion in a Changing World* (ed. ROBERT HALL M.D. (New York and London 1970).

[59] Cf. GRISEZ, *op. cit.*, p. 25.

lacking [59], there seems no difficulty in supposing that the *physical* division of the fertilised ovum, zygote, or blastocyst, leaves the previously existing *metaphysical* person intact, who remains as the unifying principle of one of the resulting segmentations, while the other or others develop as part of new persons which come into being [60]. Or, to use a terminology less common these days, God simply infuses new rational souls as the need arises. We have in fact a good example that division in a man's physical, or better perhaps, bodily being does not necessarily injure the metaphysical unity of his person in organ transplants between living humans. A kidney given by someone to save the life of another need not impair the basic unity of his person. The example takes us even a little further in illustrating the above solution to the problem, as the transplanted kidney is now animated by a new rational soul, and can be said to be inserted into the reality of another person.

Moment of formation of cerebal cortex: In a number of recent studies W. RUFF argues forcibly that the growing fetus cannot be a person till the brain is sufficiently formed to be a substratum of rational life [61]. He considers the so called genetic programisation, whereby from the first or early moments of conception one can read, as it were *a priori*, the development of the zygote into the mature individual in a uniform line, without leaping over gaps, inadequate to decide that there is already personal unity. There is the indiscernible possibility of segmentation, and environmental factors may impede

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[60] G. ERMECKE, *Abtreibung: Moraltheologisch gesehen, Arzt und Christ,* 18 (1972) p. 71. This article has been re-printed from *Theol. und Glaube,* 1, 1972, pp. 23-34. There are biologists and other scientists who see nidation as *the beginning of pregnancy,* as for example, Dr. P. ECKSTEIN, *British Med. Bulletin,* Jan. 1970, p. 58, which is contradicted by Dr. D.M. POTTS in the same issue of the same periodical, p. 65. Whether or not *pregnancy* begins with nidation can be a matter of terms, but the danger can be to conclude fallaciously that because it (i.e. pregnancy) begins with nidation, *life* does not go back to fertilization. Cf. RAMSEY, *art. cit.,* p. 65.

[61] W. RUFF, *Das embryonale Werden des Individuums, Stimmen der Zeit,* 168 (1968), pp. 107-119; 327-337; *Das Streben des Menschens u. die Feststellung seines Todes, Ib.* 182 (1968), pp. 251-261; *Individualität und Personalität im embryonalen Werden, Theol.* u. *Philosophie* 45 (1970), pp. 24-59; *Die Menschwerdung Menschlichen Lebens, Arzt und Christ* 17 (1972) pp. 129-137.

normal brain development. Just as irreparable brain damage determines the end of human life properly so called, even though respiration and heart beat are still possible, so irreparable brain damage or brain malformation in the fetus determines that it will never be specifically and properly speaking, a human being.

However, too many questions remain unanswered. By what right is it asserted that the principle of life in a normally developing fetus is not specifically human, seeing that it is going to develop in a uniform process into a normal individual? The capacity for normal brain development must be actively present from the beginning and hence the radical capacity of rational acts. Even if this normal development does not occur, it still does not follow that this radical capacity is absent for it has not been shown that the life giving principle is not specifically rational, though impeded in its informing virtue by a defective organism [62]. Again, the comparison between a non-developed, or malformed fetal brain which, in this second case, will make the exercise of rational life permanently impossible, and one which has suffered irreparable injury in later life, after one has exercised normal rational activity, seems unfounded. In one case there is either movement towards normal formation or there has occurred some obstacle that impedes this movement, in the other case rational activity has irreparably broken down, so that movements of which an organism is still capable can be presumed the residual result of the animation once present [63].

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[62] See n. 64.

[63] Nobody claims to know or be able to detect the moment of philosophical death, when the vital rational principle, whatever one may call it, is no longer there. The justification for removing with a view to a life-giving transplant a vital organ, as the heart or liver, from a person who exhibits the symptoms of irreparable brain damage, and conerning whom there is no founded hope that he will ever again be capable of rational activity, is that there is no reason to think that there is still the principle of rational life, or at least, that removing a vital organ will accelerate its departure. Even if, with the aid of a heart and lung machine, vital motions, such as respiration and heart beat are detectable, there is no reason to think they come from the persistance of some intrinsic vital principle — whether a rational one, or a vegetable one, educed after the former's departure — as though (in the latter

Finally, and possibly most fundamentally, this approach seems to stem from a certain dualism, as though personality or rationality were something apart from the bodily organs which it uses as instruments without informing their very being. Thus personality seems to be built on a sufficiently developed brain formation as a kind of foundation for its exercise, while remaining, so to say, enclosed in itself. With such an approach it is only too easy so to refine the meaning of abortion, as though to expel the fetus which has not yet, or never will have, a formed cerebal cortex were not an attack on the life of a person [64].

Conclusion: It seems then we must go back to conception itself to find the first moment of personhood. It is then that we have a new being, subsisting independently, absolutely unique and already rational, not merely in its further orientation, but in so far as the inner principle informing it and giving it being is already rational. If it were not, it would be impossible to explain its inner development into a subject of rational acts. Hence what distinguishes a person from a non-person is already there, including also its openness to others. Its very existence is of its nature a living, concrete response to the mighty call of the Creator, and this first response will be in due time called upon to become articulate and authentic when it enters into conscious relations with its fellows and its God [65].

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hypothesis) we could infer that the medieval scholastics were right in postulating a vegetable or non-rational soul at the beginning of gestation. The rational soul, or life principle, not only informs the matter of the body, but is the efficient cause of vital movements, and its efficiency can continue after it has gone, as when someone can still be impelled by a push, which has ceased.

[64] H. ROTTER (see above n. 48) is correct, so it seems, in objecting that RUFF compromises the unity of human development by postulating a principle of rational life only at the time of formation of the cerebral cortex, but he seems to be straining Rahner's principle of autotranscendence — *Selbsttranszendenz* — to breaking point, when he suggests that a life principle which will become *indivisible* is initially *divisible* in itself, while being always identical with itself as a growing body. See *ib.* pp. 176-178.

[65] Surely the fact that the zygote is already genetically determined to develop into the mature human without having to leap over gaps in the evolving process means that its corporal and visible being is just as much an

Implicit of course in all the above is that the biologist or empirical scientist as such cannot enter into the mystery of personality. He can indicate only the organic conditions necessary that there be a human being, can tell us what should be the state of development of that organism for there to be the actual exercise of rational life and human emotion. The philosopher, especially the Christian philosopher, and theologian, must try to elucidate the intangible realities of spirit, soul, person whose presence the scientist can indicate, bowing before a mystery beyond his ken [66].

C. *Inalienable and inviolable right to life of the unborn in the natural juridical order*

This conclusion hardly needs further stressing. Particular societies or their laws do not confer personhood, or the rights inextricably bound up with it, least of all the right to life, which is absolutely basic: this right they are bound to respect even

indication of the presence of a principle of rational and spiritual life as articulate and coherent speech, for example, will later be an indication of rational activity.

Besides the works already referred to one can consult for biological data Dr. A. HELLIGER, *Fetal Development, Theol. St.*, Mar. 1970; V.G. LEONE, *Quando comincia la vita?*, in the vol. *L'Aborto, Diritto o Crimine* edited by E. POLLI and C. BETTINELLI, (Milan 1972). These two articles are from the pen of experts in embryology. For an account of various theories on animation, under philosophical, scientific, and theological aspects, one can consult, B. HONINGS, *op. cit.* pp. 17-53: for a theological evaluation, M. ZALBA, *L'Inizio della Persona Umana nelle Recenti Ricerche della Scienza, Med. e Mor.*, Rome 1972, pp. 29-64. Dr. P. CHAUCHARD has said recently that that a human being commences at the moment of conception is, scientifically, absolutely certain, all the specific and individual features of the new being, especially the future brain, being already materially present in the nuclear acid of the genes (DNA), which is the organ of programisation. *Le Monde,* 7 Avril 1971, quoted by R. TROISFONTAINES, *Faut-il legaliser l'avortement*, N. Rev. Theol., 93 (1971), 497-498. In the article referred to above (n. 52) CHAUCARD once again insists: « c'est une certitude biologique absolue que l'être humain commence à la conception » (p. 34).

[66] There may be a certain ambiguity and latent materialism in the words of GEORGE W. CORNER, but they can be understood by those who see spirit and matter as distinct, but nonetheless conceive man as an indivisible, spirit-body, or body-spirit, unity, in a perfectly acceptable sense: « Humbly employing such vision as may be granted to an embryologist, I declare that the spirit of man, all that makes him more than a beast and carries him onward with hope and sacrifice - comes not as a highborn tenant from afar but as a latent potentia-

in the unborn. There is no reason convincing enough to make us think they become persons after being conceived, and not at conception itself. Certainly it makes complete nonsense to say they are persons only at some moment arbitrarily determined by law, or even at birth or ot the moment of viability.

Nor can it be said that the unborn is a world in himself, cut off from communication with fellow humans. From the moment a woman who has had sexual union with a man undergoes some physical or mental change indicating the presence within her of a fertilized ovum, a human, a tiny human, is signalling that he is there, that he has a right to live and grow within the protective, nourishing shelter of his mother's body. This becomes truer as the gestation proceeds, with the felt stirrings in the womb, with the swelling of the body of the mother to be, a burgeoning tabernacle of life.

Such signs of a new life, as yet unborn, are a truly human demand for love, and for the elementary justice that must respect the basic human right to live, inseparable from even the tenderest and most helpless human. They are human actions in the profound sense of being basic and spontaneous actions of humans, to which other humans must respond with conscious acts of acknowledgement and love. Thus we have a wondrous co-existence of human actions to be coordinated by the profoundest of all ethical principles — that of love —, to verify Del Vecchio's definition of the natural juridical order.

We must now pass on to the implications of this for the proper framing and administration of abortion laws, whose main purpose must be to safeguard fetal life from the very beginning, though in to-day's pluralistic society every exception is not to be ruled out, at least on the level of legal administration, and, maybe, also on the level of law making itself [67].

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lity of the body. The spirit, with the body, must grow and differentiate, organizing its inner self as it grows, strengthening itself by contact with the world, winning its title to glory by struggle and achievement ». *An Embryologist's View, Abortion in a Changing World,* 1, p. 15.

[67] The burning problem of abortion continues to occasion an endless flow of literature on its various aspects. *Riv. de Teologia Mor.* (Luglio-sett. 1972) contains a bibliography, with comments on various recent books or articles,

III. Abortion, criminal law, and society

Del Vecchio's definition of the natural juridical order rightly stresses that it co-ordinates human actions according to *ethical* principle: thus it does not depend for its existence or its validity on positive man made law.

Whatever one may call it, this natural juridical order is receiving great attention, and is being given great prominence at the present time. Thus there has been the United Nations' *Universal Declaration of Human Rights,* which in 1959 was supplemented by a *Declaration of the Rights of the Child,* which stated in its pre-amble that « the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before* (italics added) as well as after birth »[68]. Thus the civilised nations of to-day would extend to the child unborn the protection they would extend to the impotent members of the human race everywhere, from which it would seem to follow that any attack on unborn life is to be regarded as an outrage of the same category as oppression of racial or religious minorities, religious intolerance, slavery, or of the kind of war crimes which were dealt with at Nürnberg. Such things are to be condemned not only in the name of this or that society, but in the name of the human community as such, to which every human person belongs from the first moment of his personhood. Thus when the question

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so far as they touch, especially, moral and legal aspects (pp. 355-388), but mistakenly lists the works of D. Callahan, and O. Grisez as the works of non-Catholics (p. 378), an error which in the case of Grisez is incomprehensible. A few works later than those there listed have already been referred to in this study, to which one can add the excellent reflections in the editorial pages of *The Month,* May 1973, *A New Catholic Strategy on Abortion,* pp. 163-171; M. Zalba, *Il Problema dell'Aborto nella Tradizione della Morale Cattolica, Rassegna di Teologia,* 13, Nov.-Dic. 1972, pp. 369-388; G. Garbelli, *Regolamentazione o Liberalizzazione dell'Aborto?* Ed. Paoline 1972; P. Ramsey, *Abortion: A Review Article, The Thomist* XXXVII (1973), 1, pp. 174-226 (a penetrating critique of the work of D. Callahan); Gertrude Fussewegger, *Qual, als Wohltat serviert — Zur Discussion um das strafrechtliche Abtreibungsverbot, St. der Zeit,* Dez. 12, 1973, SS. 811-819; A. Serra, *Aborto eugenico, diritto-dovere o delitto? La Civ. Catt.,* 20 ott. 1973, pp. 110-124 and above all the volume edited by G. Caprile, *Non Uccidere. Il Magistero della Chiesa sull'aborto,* Rome 1973.

[68] Quoted from Louisel and Noonan, *art. cit.* p. 259. Cf. S. Lener, *Aborto Procurato e Legislazione Statale, Civ. Catt.,* 1972, 1, p. 334.

arises as to the role of a particular society in protecting the life of the unborn, it is interesting but not really vital to inquire whether or not, or to what extent a child in its mother's womb belongs to the society in which she finds herself [69]. What matters is that it is unalterably a member of the larger community, or society of humanity itself and that, as a consequence, anti-abortion laws are framed fundamentally in the name of this vaster community, which is the embodiment of the natural juridical order. Each individual state or society must in its own way be the instrument of the human community, safeguarding and furthering basic human rights, applying to those who violate them sanctions which should carry the endorsement of that same universal community of humans [70].

Hence any approach to state laws regarding abortion must commence by assuming society's obligation to protect human life from the moment of conception [71]; whatever might be the concrete circumstances which might require a certain very limited permissiveness by way of avoiding greater evils. Thus, as a fundamental principle, we assert:

a. *The attitude of the state, and of the society it represents, towards abortion must reflect the fundamental and indeclinable*

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[69] For something of the rather bewildering variety of interpretation of common law in the Anglo-American tradition, and of statute law in U.S.A., see GRISEZ, *op. cit.*, pp. 361-423; LOUISELL and NOONAN, *art. cit.*, pp. 220-230.

[70] This universal community was recognised by pre-Christian thinkers as Aristotle, Cicero. St. Augustine saw it embodied in the Christian Empire, as the *Civitas Dei*, a concept which exerted its influence throughout the Middle Ages. With the break up of European unity and the appearance of the modern nation state, the Catholic founders of International Law, Francis of Victoria and Francis Suarez, brought, as a key concept for the solution of problems of colonisation and war, the old idea of the universal community, Suarez claiming that a state could wage punitive war as the agent of this community. The same basic idea would justify tribunals such as Nürnberg for the judgment and punishment of war crimes, as being against humanity; the setting up of an international police force; the imposing of sanctions on delinquent nations etc. Abortion, antecedently to, and over and above all prohibitions of this or that particular society, is a crime against humanity.

[71] It is said « from the moment of conception » because even if some doubt that there is specifically human life or a human person from then, we are not in the region where such a doubt can be acted upon, for to destroy a life

obligation, that human life be protected from the moment of conception.

Thus far agreement may be more general than would appear at first sight, but only because the proposition is ambiguous enough to fit various points of view, or suppositions, about the basic moral issue. However, it will not please those whose approach to the abortion problem is based on complete sexual freedom, or those for whom woman's liberation means her complete emanicipation from any kind of legal or moral compulsion to bear children [72], or those again for whom, whether it is moral or immoral to abort a child, it must be left by society to the free decision of the woman concerned, as being her own private affair [73].

Nevertheless there are very many, for whom it concerns the state that fetal life be not arbitrarily disposed of, even though their views are much broader than those of the average opponent of liberal abortion laws. For example, it has been argued that liberalised abortion, allowed by law, diminishes the overall number of abortions by largely eliminating the back street practitioner — a point already mentioned and to which we must return later.

Finally, let us note that those who do not accept the abso-

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which is probably human, even though probably not, is to be indifferent to human life as such. Again, as advances made daily by embryology more and more clearly push back the beginning of specifically human life to the moment of the union of ovum and spermatazoon, we have a well grounded assumption, against which no convincing argument has as yet been found. From a moral point of view it seems to us with D. BONHOEFFER, *Ethics* (London 1964), that the vital point which makes induced abortion absolutely immoral is that God is intending to create a human being (p. 175). Here, being concerned with the natural *juridical* aspect, which is concerned with offences against persons, we emphasise that even the zygote is a person.

[72] In English speaking countries the Australian, Dr. GERMAINE GREER, has made herself a noted apostle of women's liberation, understood in this radical way. Other countries too have their women's liberation movement, no less radical, as evidenced, for example, in Italy by the book of E. BENOTTI, *La Sfida Femminile: Maternità ed Aborto,* (Bari 1970). For some account of the movement in Italy see S. LENER, *La Disumanità dell'Aborto e Il Diritto, Civ. Catt.,* 1972, 1, p. 139, and for a brief overall conspectus G. PERICO, *Regolamentare l'Aborto?, Aggiornamenti Soc.* Nov. 1971, p. 635-636, *Supplemento,* pp. 9-10.

[73] Thus the rulings of the U.S. Supreme Court

lute inviolability of fetal life, because for them personhood is not there from conception but at some later stage of gestation, as nidation, or formation of the cerebral cortex or central nervous system, or for whom to be a person one must be accepted by society or have the expedite capacity to communicate with other persons, will not regard the inviolability of fetal life as being absolute, or so clearly absolute from the beginning [74]. Thus for them the concrete requirements for the state to fulfill its obligation to protect fetal life will not be the same as for those who see an absolute inviolability from conception itself.

We pass now to a second proposition:

b. *The above basic obligation cannot be duly fulfilled without positive legislation forbidding abortion.*

As already noted, England for many centuries was content with a common law prohibition of abortion applicable only from the time of « quickening », when one could be certain of the presence in the womb of a live human being. However the vagueness of this criterion made statute law necessary with its more precise wording, especially as the frontiers of specifically human life in the womb were being continually pushed back with the progress of science, so that anti-abortion laws of to-day ignore any distinction between the quickened and the unquickened, and apply presumably to any stage of gestation [75].

Will then in modern conditions the state best fulfill its obligations towards fetal life by withdrawing from the field of abortion till the time of viability, insisting only, as with any other medical or surgical procedure, that it be carried out by authorised practitioners and with proper facilities? Strange as it may seem, such a proposition has been put forward by R. DRINAN S.J., on the ground, amongst others, that liberalised abortion laws mean that the state arrogates to itself the power

[74] W. RUFF draws as a consequence of his opinion that human life, specifically so called, can be there only with the formation of the cerebral cortex, that fetal life is absolutely inviolable only from this point, that is, where development has been normal, after the sixth week of gestation. *Arzt und Christ, loc. cit.* p. 138, 1, 2, 3. For other views see above n. 52.

[75] Cf. GRISEZ, *op. cit.*, pp. 189-192.

to decide that in certain conditions the fetus has no right to life. Abandoning the field entirely means that the problem of fetal right to life is untouched, being solved neither one way nor the other. He considers it likely that the overall number of abortions would decrease, as it would be easier to detect and crack down on unlicensed practitioners, but more importantly the pernicious impression would be avoided that the state can dispose by law of fetal or other innocent life. Even though there might be more abortions, basic respect for life would be greater than with a liberalised law [76].

However, exactly the opposite would seem to be the case. Admittedly there are regions of private morality that are beyond the competence of the state to regulate; but this cannot possibly obtain when there is question of the basic social value of human life. For the state to abandon all attempt to legislate to protect this value, in the case of those who are least of all able to protect themselves, is to resign its right and obligation in about the most fundamental way possible. To say to its citizens — « do what you like about killing your unborn, provided they are unviable and the killing is done in a medical way » — is considerably worse than to say — « you can kill them in certain specified cases ». In a matter so basic and so vital a largely ineffective law is better than no law, for its very existence has a profound pedagogical value and function, pin-pointing, as it does, that fetal life is sacred, and remains so, no matter how often it is taken [77].

The next proposition takes us to the heart of the contemporary problem concerning abortion and criminal law, so that its formulation and explanation are matters of great difficulty and delicacy.

c. *Ideally, prohibition of abortion by state law should coincide with its prohibition by natural law, where this is clear and certain. Practically, in to-day's pluralistic society, the law*

[76] .Thus in various lectures and articles, as *The Right of the Fetus to be born, The Dublin Rev.*, Winter 1967-67, pp. 365-381.

[77] For a severe critique of DRINAN, see GRISEZ, *op. cit.*, pp. 455-458.

can and usually should admit one or other well defined exception - not by way of positively authorising abortion, as though it had the power to dispose of fetal life, but by way of exempting from penal sanctions.

The first part of the proposition is evident enough: a well ordered society, striving sincerely to realise itself in the good conduct of its citizens, will express its abhorrence of abortion by laws or customs prohibitiong it as prohibited by the law of nature. Difficulties however arise from the apparent supposition that the natural law on the matter is clear to everyone of good will. Men of good will will readily concede that abortion at the mere whim of a woman, or for a trivial reason, is immoral. Many of them will hesitate to condemn, or will even positively approve therapeutic abortion to save a mother's life [78].

A Catholic fortified by the teaching of the Church may have

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[78] Opponents of liberalised abortion laws, such as the English Act of 1967, are by no means confined to Catholics, as is sometimes implied, even though others may at times have a more permissive attitude. The book of R.F.R. GARDNER, already cited here several times, is a severe critique of the Abortion Act in itself, and in its working out, by a sincere non-Catholic Christian, a practising gynaecologist, who hates abortion and would remove the social factors favouring it, even though on a practical level he would not absolutely exclude inducing it in certain extreme cases (see for example p. 192). ALECK BOURNE himself, the gynaecologist, who triggered a wider interpretation of the law as it was back in 1938, by aborting a teen-age girl of psychiatric tendencies after multiple rape, is a very humane man who acted from the best of motives, and he has been appalled by the direction things have taken (see extracts from his *A Doctor's Creed*: *Memoirs of a Gynaecologist*, London 1963, quoted by GARDNER pp. 41, 44, 109, 169, 205). - Much good work is being done in England by combined efforts of Catholics and non-Catholics to undo some of the effects of the 1967 Act (see *The Tablet*, 10 Mar. 1973, pp. 237-239, for an account of recommendations of *The Society for the Protection of Unborn Children* to the Lane committee which has been inquiring into the working of the Act). - It is also worth recording that, as Professor NOONAN reminds us in discussing the decision of the U.S. Supreme Court; « In Michigan and Dakota crushing majorities of the people had, as recently as Nov. 1972, rejected the demand that abortion be allowed on five month-old fetuses » (*The Tablet*, April 1973, p. 325, col. 3). In Australia, with a predominantly non-Catholic population, the Parliament of W. Australia rejected a proposed bill for liberalised abortion, while early this year (1973) a similar proposal was crushingly defeated in the Federal Parliament, after much united campaigning by Catholic and Protestant Churches.

no doubt that direct abortion is always morally wrong [79], but he cannot expect others to be equally convinced, or to accept the authority of the Church when they are not persuaded by ethical argument. It is one thing for the natural law to be clear and certain in itself, but another for it to be clear and certain for everybody, even of those who accept its existence and sincerely

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[79] We must not lose sight of the fact, or let others lose sight of it, that the teaching of the Church is to be sought primarily in the pronouncements of the *Magisterium*, as found in the official utterances of Pope, either in his personal or collegiate magisterium, and of Bishops in union with him. — If one asks what is the weight and authority of the Magisterium's age old condemnation of abortion, it seems that G. ERMECKE is correct in considering it to be an infallible interpretation of natural law - not in the sense of a pronouncement *ex cathedra*, but as a firm, constant, unvarying teaching of the universal *Magisterium — non effatio infallibilis, sed effatum infallibile* — and this is so far as induced (direct) abortion involves an attack on innocent life (*art. cit.* p. 68). This seems to be the thought of Pope PAUL himself who, speaking on this theme referred recently to the Church's: « unchanged and unchangeable moral teaching » — *la mai mutata ed immutabile sua dottrina morale* — (*Ai Giuristi Cattolici*, 9 Dic. 1972, G. CAPRILE, *op. cit.*, p. 39, n. 51). A study of the numerous episcopal declarations found in CAPRILE would confirm this. — However, this is not to say there is no room for scientific and philosophic speculation as to the beginning of specifically human life in the maternal organs: those, for example who would postpone this beginning to implantation or formation of the cortex and say this allows for abortion for very grave reasons up till such time, may not, and we think, do not, have good philosophical or theological reasons for their contention, but are not formally contradicting anything taught infallibly by the Magisterium on abortion as such. — On the contrary those who, tentatively and provisionally at least, are looking for some opening in traditional teaching to allow abortion in case of rape or incest etc. (see above n. 52), or who would argue that personhood comes only with acknowledgment by society, with a view to liberalising traditional teaching condemning abortion are opening up a path, which, if pursued, would lead to formally contradicting the Church's infallible teaching condemning direct killing of innocent humans. — Again, to keep this teaching intact and coherent, the maintaining of the distinction betwen *direct* and *indirect* killing (or abortion) is vitally necessary, as we would otherwere be reduced to saying that induced abortion is morally wrong unless there is a good reason to allow it (see our former article *St. Mor.* 10 (1972), pp. 198-206; E. HAMEL, *La Morale Cristiana di fronte all'Aborto, L'Aborto: diritto o Crimine?*, pp. 32-35; G. VISSER, *Aborto Diretto Sempre Illecito?, Problemi Attuali di Teologia;* Pas-Verlag 1973, pp. 86-91; for a contrary view, L. ROSSI in various writings, the latest being his article in *Dizionario Enciclopedico di Teologia Morale*, Rome 1973, p. 273).

The morality of aborting a fetus as the one means to save the mother is a theological problem that never dies, and some contemporary moralists are wondering if the Church's apparent prohibition, even for this reason, of in-

seek to guide their conduct thereby. Thus in a pluralistic society, one has to move to the practical level by way of inquiring into the possibility, even the desirability, of the prohibition of abortion by criminal law being less than absolute.

The case for the law permitting abortion where genuinely necessary to save a woman's life, or at least where a qualified medical practioner is conscientiously convinced that it is, is a strong one, and will hardly be challenged; and this holds in spite of the fact that the progress of medicine has gone very far towards eliminating the necessity of abortion for this purpose. For one thing, the very rarity of the case closes the door to abuse, and a doctor having recourse to abortion on this pretence easily or frequently will quickly be shown up as incompetent or criminal, if not both. There will be those who in the aforesaid rare cases will be conscientiously convinced that they are morally bound to save a mother who can only be saved by an induced abortion [80] — so that a permissive law is justified on the principle that it is allowable to permit the lesser of two

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duced abortion cannot be refined to allow it in the case (happily more rare every day) where if nothing is done *both* will die: thus recently G. VISSER, (*art. cit.*, pp. 91-96), carefully distinguishing it from the case where the child can be born alive, but with the certainty or near certainty of the death of the mother. He argues on the ground that the God given right of an innocent person to life does not so clearly amount to its inviolability where an unborn child is already inevitably condemned to death, while the mother will die only if one abstains from aborting the child. In this case abortion does not amount to more than changing the cause of death: an argument he proposes not without admitted misgivings. We share the reservations of M. ZALBA (*art. cit.*, pp. 383-388): it seems that here is a case where man must bow before the inscrutable Will of God in the mystery of life and death. — However, even where the teaching of the Magisterium seems irreformable, theologians act rightly in submitting it to rigorous examination to see whether and to what extent it really is beyond all question; but as B. HÄRING has well noted: « A doubt by some theologians does not invalidate the official position: later discussion may even strengthen it and bring forth more convincing arguments » (*Medical Ethics, St. Paul Publications,* 1972, p. 104).

[80] One can argue that there is, in a pluralistic society, no moral justification for a law which would penalise what is an offence only in the eyes of a religious minority, who have no chance of convicting the majority.

evils [81]. The very occasional death of a fetus, especially if it is not likely in any case to be born, is a lesser evil than to restrict a doctor's freedom to do what he thinks he should do to save life [82]. Finally, there is the very practical consideration that what is allowed by traditional Catholic teaching, under the heading of *indirect* abortion, can loosely be classified as abortion to save the mother's life, though the therapeutic procedure is not a means to this end in its abortive aspect, the abortion being rather a result happening in the course of its saving action [83].

Should the sale and use of certain abortifacients be prohibited by law, which are popularly regarded, or even classified as contraceptives? Good examples are the so called I.U.D, the « morning after » pill, and (when perfected) the « once-a-month birth control pill », which it is hoped to base on a hormonic substance called *prostaglandins* [84]. Surely the answer is in the affirmative. Such devices, aiming to prevent nidation, rather than fertilization of the ovum, are, or will, if allowed, become instruments of the most inveterate type of abortion. A woman using them regularly can become pregnant over and over again, aborting the conception, without knowing it. Such usage can consti-

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[81-82] Cf. PIUS XII to the *Fifth International Congr. of Catholic Italian Jurists*, where he lays down the principle that the suppression of error or moral and religious deviation cannot be an ultimate norm of action: there can be higher goods in the interests of which it is better not to impede certain things which are wrong (6 Dec. 1953) AAS XLV (1953), p. 749. Cf. G. PERICO, *art. cit.*, pp. 644-646, 18-20.

[83] Cf. GRISEZ, *op. vit.*, p. 429, who inclines also to think that *in the present situation* — he speaks of course of U.S.A. — legal permission of abortion after forcible rape would be justified; this, because of a present social consensus in favour, which we should try to change gradually. An objection is that prompt medical attention, where it can be had, can prevent conception (few, if any, Catholic moralists to-day would regard this as contraception in the condemned sense).

[84] « It is too early fully to assess the role of the prostaglandins in terminating pregnancy, but preliminary experience suggests, that the compounds have great promise ». A. HODERN, *Legal Abortion: the English Experience* (Oxford 1971), p. 101. He goes on to explain that when this type of abortifacient is perfected a woman will be able « to use a prostaglandin pessary whenever, against her whishes, a period is delayed: the physician of the future may be called in only to check for side-effects and to preevnt damage to the health of the mother ».

tute a classic case of *ignorantia affectata,* and breed the most callous indifferentism and cynicism in regard to the value of fetal life, and the lofty functions of maternity [85].

Next something must be said about the impracticality and ineffectiveness of liberalised abortion.

d. *Liberalised abortion according to law is no half-way house between rigorous legal prohibition with maybe one or other carefully defined case not subject to prosecution, and abortion on request; nor does it justify itself on the principle of permitting the lesser of two evils, seeing that on the contrary it adds to the evil of an already evil situation.*

1. Some, as G. PERICO [86], understand by the term *liberalised abortion* a legal situation, such as now evists in the United States, in which it is regarded as a merely private affair; the English situation in which abortion is legally permitted in a wide variety of cases, easily verified by a broad interpretation of the law, is for him a system of legally regulated abortion, along with others somewhat less indulgent [87].

For our present purpose, it seems more convenient to apply the term *liberalised abortion* to abortion according to laws notably more permissive than those which restrict it drastically or forbid it entirely, as was the case in most countries with a Christian inheritance until recently, and as still obtains in some of them even at the present time. Once this rigid control or prohibition begins to disappear, we are already in the process of *liberalisation,* whose ultimate or culminating point is only too likely to be the legalisation of abortion on request [88].

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[85] Cf. GRISEZ, *op. cit.*, pp. 428-429; ERMECKE, *art. cit.*, p. 72; R. TROISFONTAINES, *Faut-il légaliser l'acortement? N. Rev. Théol.*, 93 (1971) pp. 507-508, who makes the shrewd remark that such easy methods of abortion will make it easier and more convenient than contraception, so as to throw the whole question of family limitation open to new and deeper discussion. One can add that in this way the prophetic wisdom of *Humanae Vitae* will be seen by many of its present contestants.

[86-87] *Art. cit.*, pp. 629-631, 3-6.

[88] Cf. S. LENER, *Civ. Catt.* 123 (1972. 1) pp. 331 ff.

Leaving aside the fact that for various associations pledged to legalise easier abortions, each further liberalisation of the law is an avowed step towards abortion on demand [89], it can be asserted that to relax the traditional prohibition of abortion beyond the point of making therapeutic abortion exempt from prosecution where performed in genuine good faith to save the mother's life — not merely her health — can hardly fail to initiate a snowballing process towards the result, desired or undesired initially, of abortion on demand; whatever might be the wishful thinking of those who think broader abortion laws can stave off this ultimate catastrophe.

The English experience is enough to show this: even though the very liberal abortion law now in force in that country is not, in theory, one which allows abortion on demand, it is hardly more than a step away [90]. Therapeutic abortion in the strict sense, even when it is objectively immoral, at least has the excuse that it is a way of escape from an anguishing dilemma involving the conflict of life with life. Beyond that borderline, abortion not punishable by law tends to be accepted as a means of removing undesirable or undesired children [91], and thus to grow into a recognised means of family planning — especially to-day when abortion techniques are available almost as easily as contraceptives [92], and are more effective [93]. Even if the law were to be carefully framed so as to make it clear that it does not approve abortion but makes it merely non-indictable, with the inevitable spread of the practice nobody is going to regard it as only that. Legislators themselves will bless it in the legal sphere, people will accept it as having the blessing of law, and

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[89] See above n. 20.

[90] Cf. GARDNER, *op. cit.*, pp. 63-86 and *passim*. Certainly the law, as it stands, does not really amount to abortion on demand, but doctors who want to abort can find a legal excuse without difficulty. See the quote from HINDEL and SIMMS, abortion lobbyists, from their article *How the Abortion Lobby Worked, Political Quarterly*, 1968, 39, 269 in GARDNER, p. 68.

[91] « The Minister for Social Services told Parliament in March 1970 that but for the Abortion Act there would have been a further 20,000 illegitimate children now alive ». GARDNER, *op. cit.*, p. 85.

[92-93] See above nn. 84-85.

from that point the step is short and easy to regarding it as morally justifiable [94]. The moral right to abort being thus accepted with only very intangible boundaries, why should it any longer concern the law to interfere at all, save within the limits imposed by the demands of public health, and need for competent medical intervention? [95].

2. The cry of many pro-abortionists has been and still is: « better have abortions done legally and skilfully than illegally and unskilfully with high maternal mortality », adding, often enough, that with the elimination of back street abortions the overall number of abortions in a community would be diminished [96].

What, in fact, has happened? Turning again to the English experience, one thing abundantly and alarmingly clear, that has disturbed even some parliamentarians who voted for the 1967 Abortion Act, is that the number of legal abortions has increased alarmingly. « Abortions, which were 22,256 in 1968, the year in which abortion was legalised, last year (1971) amounted to

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[94] See the words of PIUS XI cited above n. 33.

[95] For example, the state of California, U.S.A. passed a fairly liberal Therapeutic Abortion Act, allowing abortion where continuance of pregnancy constitued a substantial risk to the life or health of the mother, and where pregnancy resulted from rape or incest. This became law of 8 Nov. 1967, but less than two years later, on 9 Sept. 1969, the Supreme Court of California held the law unconstitutional because infringing on « the woman's right to life and to choose whether to bear children. The woman's right to life is involved because childbirth involves risk of death ». See J.M. KUMMER, *New Trends in therapeutic abortion in California, Obstet. Gynec.*, 34: 883-6 (1969), quoted by A. HODERN, *op. cit.*, p. 260, who goes on to report that KUMMER saw the possibility of interpreting the Californian abortion law so liberally that « any woman wanting her pregnancy terminated could be accomodated » (*ibid*). In view of this, and similar stretching of law in popular and judicial interpretation, the rulings of the Supreme Court of U.S.A. 23 Jan, 1973 had a kind of inevitability. See also JOHN M. FINNIS, *Three Schemes of Regulation*, in the vol. edited by NOONAN, pp. 172-219.

[96] Cf. St. JOHN-STEVAS, *Abortion and the Law, Dublin Rev.*, Winter 1967-68, pp. 289-290, *The Tablet*, 5 Feb. 1972, p. 99, K.R. WHITEHEAD, *op. cit.*, *op. cit.*, pp. 114-121, where it is shown how grossly exaggerated figures computing maternal mortality as a result of backstreet abortions tend to be.

126,774 and are still increasing » [97]. If one looks for evidence that this stupendous increase in *legal* abortions has been offset by a corresponding decline in *illegal* ones, it is not forthcoming; in fact indications are to the contrary. « In calculating these (back street abortions), much reliance has been placed on the number of "spontaneous" or incomplete abortions admitted to hospital. But the figure for these (53,128) in the twelve months after the act is slighly larger than for the twelve months before tha act came into operation, when it was 51,701 » [98].

Likewise in other countries which have been liberalising their abortion laws, figures tend to show an overall increase in the number, sometimes giving reason to believe that even clandestine abortions have somewhat increased [99].

Two things are here very important. The first is that psychological and other factors which lead women to seek to have their abortions secretly, and thus to seek out the illegal practitioner, do not disappear with a wider legalising of the evil [100]. The other is what ST. JOHN STEVAS underlines as the worst effect of the English act, and what he says obviously applies to other similar acts: « It has made people abortion-minded. Women who before the Act would never have thought of having an abortion are now demanding one as of right » [101]. It has been claimed also that the Abortion Act has done much to lessen opposition to abortion amongst various branches of the medical profession [102].

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[97] ST. JOHN-STEVAS, *The Tablet ibid.* These figures are those officially presented by the Registrar General 1971. *Registrar General's Statistical Record of England and Wales, for the Year 1971. Supplement on Abortion.*, (London 1973).

[98] GARDNER, *op. cit.*, p. 95.

[99] Cf. J.M. FINNIS, *art. cit.*, pp. 182-184; G. BRUNETTA, *Dati sull'Aborto. Aggiornamenti Soc. Suppl.*, 12 Dic. 1972 for figures.

[100] S. LENER, *Aborto Procurato e Legislazione Statuale, Civ. Catt.*, 123 (1972), 1, p. 381. He mentions the desire or need of many women to conceal their pregnancies, and even more the fact of them having had abortions, further a subconscious sense of guilt aroused by so much public discussion, especially with the modern liberalising tendencies, which they try to avoid by having their abortions secretly.

[101] *Ibid.*

[102] See above n. 24.

A final proposition can only be broadly indicated here, as its due development would require another article.

e. *Necessary as it is to maintain, or work for, the restoration of rigorous abortion laws, they will have their real effectiveness in proportion to their being seen as reflecting abhorrence of a society for an evil, whose social causes it is pledged to remove.*

Sound law must reflect sound morality not just in the sense that it can be reduced to or based upon sound moral principles, but also in the sense that it must be informed by the sound moral sense of the community whose will it expresses. It is notorious that certain countries that have retained rigorous abortion laws are not known for the zeal of their legislators and ruling classes for social justice. A century or so ago England had her rigid abortion laws, but was not much concerned as a nation for the children of the poor. It must be conceded that some advocates of liberalised abortion laws are genuinely concerned with the quality of human life, for whose improvement so much has been done and is being done in contemporary society. Paradoxically, there is much concern for the care of the crippled or handicapped child [103], while more helpless ones are being massacred in their mothers' wombs.

The four propositions stated above regarding abortion legislation must, in places where liberalised abortion laws have already begun or are far advanced, be regarded as expressing ideals to be worked for. The way back to a truly Christian legislation will be hard and gradual, and could involve a strategy making it necessary to tolerate laws which are far from the ideal, even to accept them temporally as a lesser evil, which is not to approve unreservedly of their content [104].

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[103] Thus a London Sunday newspaper has recently concluded a successful campaign for the awarding of extensive damages to the thalidomide children; it did not conduct any similar campaign to protect the unborn at the time the abortion law of 1967 was under discoussion, and has given it at least general approval.

[104] It is one thing to vote or work for a less liberalised law as the only alternative to a more liberal one, or as part of a campaign to return to a ri-

The long, hard fight must be informed with the spirit of charity and inspired by zeal for social justice. The Church's Magisterium with its rigid attitude to abortion, which will remain unchanged because it is unchangeable, insists also on the justice and love owed to all men as God's children, and hence on the creation of an ever more just social order. Pius XI, who so strongly condemned abortion in *Casti Connubii* is also the Pope of *Quadragesimo Anno* and *Divini Redemptoris;* Pius XII, who insisted on the God-given right to life of the unborn child, insisted also on justice and peace between and within nations; John XXIII condemned abortion in an encyclical which expressed his paternal love for all mankind; Paul VI is the author not only of *Humanae Vitae,* but also of *Populorum Progressio* and *Octogesima Adveniens.* Finally, Vatican II insisting on the obligation to protect human life with the greatest possible sollicitude from the very moment of conception, insists in the very same document — *Gaudium et Spes* — on universal love and the basic equality of all men to be acknowledged in a truly Christian social order.

This attitude has been found in more than one of the recent episcopal statements condemning abortion, showing a pastoral zeal for those exposed to the danger of solving their terrible problem in so drastic a way, and exhorting Christians to work for an order of society where the problem will be much less likely to occur [105]. Some bishops have offered practical help to the unfortunate woman, who sees abortion as the only way to rid herself of an unwanted child or one she cannot support, by guaranteeing help and also to find it a home [106].

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gorous prohibition eventually, and another thing to vote for it as a good in itself, as though easier abortion were a social good. In the former spirit a Catholic committee headed by BISHOP CASEY has made to the Lane Committee certain suggestion designed to prevent the working of the 1967 Abortion Act amounting to abortion on demand, but within the terms of the Act itself. *The Tablet, ibid.,* pp. 119-121.

[105] See for example the doctrinal note of the *French Episcopal Commission for the Family, La Doc. Cath.,* 7 Mars 1971, n. 1581; CAPRILE, l. c. pp. 83-97.

[106] In England the diocese of Shrewsbury, followed in this by others, such as Leeds and Salford, has offered its help to any mother faced with an

The abortion problem will not be solved just by law, however sound theoretically, but it will not be solved without laws emanating from the human and Christian heart of the community, and administered with the prudence, wisdom and compassion, that the goodness and even majesty of law demand.

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unwanted pregnancy, who is prepared to allow the baby to be born and not aborted: this help involves no expense to herself, and includes whatever care she wishes for the baby after birth. *Joint Pastoral of Bishops* C. GRASAR and J. BREWER of Shrewsbury. See *The Month,* 10 April 1973, p. 170.

Also in Great Britain there are organisations called *Lifeline* which are non-denominational and aim to reduce the number of abortions by sympathetic understanding of the plight of expectant mothers, who are offered material help. They are sympathetically counseled so they can make their own decision, without being pressurized.