STORMING THE GATES OF A MASSIVE CULTURAL INVESTMENT:

RECONSIDERING *ROE* IN LIGHT OF ITS FLAWED FOUNDATION AND UNDESIRABLE CONSEQUENCES

*Hunter Baker**

> "Tell me yourself – I challenge you: let's assume that you were called upon to build the edifice of human destiny so that men would finally be happy and would find peace and tranquility. If you knew that, in order to attain this, you would have to torture just one single creature . . . and that on her unavenged tears you could build that edifice, would you agree to do it? Tell me and don't lie!"
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> "No, I would not," Alyosha said softly.
>
> "And do you find acceptable the idea that those for whom you are building that edifice should gratefully receive a happiness that rests on the blood of a tortured child and, having received it, should continue to enjoy it eternally?"
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> "No, I do not find that acceptable," Alyosha said . . . .[1]

I. INTRODUCTION

The Supreme Court's decision in *Planned Parenthood v. Casey* stands for the proposition that *Roe v. Wade*[2] will not be overturned, regardless of its questionable Constitutional basis, in part because of mass reliance on the *Roe* decision by American women and in part because of the Court's self-conscious concern for its legitimacy in American governance.[3]

Given the firm footing upon which the American woman's right to an abortion for any reason finds itself, one might ask why yet another article should be written demanding reconsideration of that right's status. The first answer to that question is that I and millions of others have asked ourselves the questions posed by Dostoevsky about the balance of the suffering of even one child for the sake of the *happiness* of many men and women and have answered, "No, I do not find that acceptable." And we never will, no matter how many euphemisms about

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1 FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 296 (Andrew H. MacAndrew trans., Bantam Books, Inc. Classic ed. 1981) (1880) (quoting a conversation between the characters Ivan and Alyosha).

2 410 U.S. 113 (1973).

3 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

choice and *removal of products of conception* serve as bricks in the foundation of that abstract edifice of human happiness.

But a second answer exists as well. It is found in changed circumstances, a legal doctrine traditionally invoked by a party attempting to cancel a contract. There is a traditional story that the American people have understood as an explanation for abortion's legal existence and uneasy acceptance. However, the story is an unfolding and epic drama that is beginning to develop new chapters that threaten to change the entire message and meaning of the conditions under which we deem abortion worthy of Constitutional protection. This article is intended to narrate the plot of those new chapters, re-examine the foundations of the woman's right to an abortion for virtually any reason, and ask questions about the soul of the American people.

The new chapters to be explored deal with the Court's unfortunate step into a void that, in short order, became a surprisingly well-defined landscape formed by the advent of ultrasound technology, by the massive cultural investment in abortion by American society, and, finally, by the likely effects of that investment as technological advances in the detection of fetal genetic characteristics promotes the practice of eugenic abortion.

This article will conclude that the Supreme Court must find a constitutional right to life for the fetus as a matter of intellectual honesty and out of necessity for the future of a society whose technological reach may well exceed the Court's grasp. In so doing, the article will avoid the thoroughly explored waters of the federalism debate. The concerns raised here are so substantial as to defy exposure to the uncertain winds of the democratic process. Therefore, what is contemplated is nothing less than a complete pendulum shift from virtually unrestricted abortion rights to a presumption in favor of protecting fetal life rebuttable only by the strongest countervailing necessity.

A. Few Words on the Massive Cultural Investment

The title of this article uses the words "massive cultural investment" out of recognition that abortion rights have been utilized by large numbers of women in a high percentage of pregnancies. A necessary corollary is that many doctors have performed the procedure for financial compensation. It also follows that many males responsible for the terminated pregnancies have urged that women undergo the procedure or perhaps have even insisted upon it.

Part of the reason the Court chose not to reverse *Roe* in its decision in *Casey* was the simple fact that American women made heavy and sustained use of their new rights during the intervening decades. When

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the Court put its imprimatur of approval on safe, legal abortion, it gave abortion an aura of moral legitimacy.[4] Statistics from 1994 showed that there were 321 abortions for every 1,000 live births.[5] That means that one out of every four women who became pregnant that year chose to abort their baby. Imagine that for a second: *a quarter of all pregnancies result in abortion.*

Although she was part of the trio in *Casey* who stood on precedent to retain the right to abortion, Supreme Court Justice Sandra Day O'Connor observed that a generation has grown up expecting to be able to rely upon abortion to terminate pregnancies not only for reasons of rape, incest, and threats to their lives, but also because of instances of inattention, contraceptive failure, unwanted children, deformity, and even because the child is of the wrong gender.[6] The sheer fact that the procedure is performed approximately 1.5 million times a year is proof for any observer that America has made a massive cultural investment in abortion.

Given the size of the cultural investment and the fact that the modern American woman views her divorce with the biological imperative to be complete, it is extremely difficult to imagine the reaction to an end of that freedom. No doubt, the Supreme Court itself was mindful of the turmoil that would have been engendered by a contrary decision in *Casey*. No matter how poorly grounded the *Roe* decision might have been in terms of its personhood analysis or its federalism analysis, the Court could not reverse *Roe* without severely disrupting a routine facet of American life.

Neither the Court nor society will be eager to reconsider the right to abortion because both are guilty in the matter. The Court created the monster. Society embraced it to the point of terminating one-fourth of all pregnancies. To turn back now would mean that the Court would have to renounce the past three decades of abortion jurisprudence as a mistake. This renunciation would leave those Americans, who have availed themselves of the right to abortion, without legal justification for having taken lives in the name of reproductive freedom. It would also mean that women would no longer be able to use abortion as a means of birth control.

Only once before has the Court changed course after it had embarked on a journey with such far-reaching consequences. When the Supreme Court put an end to the practice of de jure segregation in

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[4] Robert A. Sedler, *Abortion, Physician-Assisted Suicide and the Constitution: The View from Without and Within*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 529, 543 (1998).

[5] *Statistics: Abortion Rate in '94 Lowest Since '76,* ABORTION REPORT (Am. Political Network, Inc.), Jan. 6, 1997.

[6] J. Bottum, *Facing Up to Infanticide*, FIRST THINGS, Feb. 1996, at 41, 42.

Brown v. Board of Education,[7] it faced the anger and the pain of the people who had relied for years on the unjust precedent set in *Plessy v. Ferguson* deciding that the doctrine of "separate but equal" would fully vitiate the constitutional rights of African-Americans.[8] The nation spent over twenty years after *Brown* working through the anguish of walking away from time-honored practices of unjust segregation. In *Casey*, the Court stared over the edge of the precipice once again to face the ire of the people as it considered an issue of basic justice. Regrettably, the Court blinked and took the path of least resistance.

II. THE TRADITIONAL STORY ABOUT ABORTION AND ITS CRITIQUE

Aside from graphic photographs of dead bodies or body parts of fetuses killed by abortifacients or instruments of abortion, perhaps the most powerful symbol invoked in the abortion debate is the bloody coat hanger. The coat hanger stands to remind us of the ever-looming spectre of deadly illegal abortions practiced in the dark alleys of America's towns and villages. On that coat hanger rests the traditional story about abortion.

A. The Story We Believe

The story is burned into the American psyche and goes something like this: In the days of the not so distant past, women were denied the most fundamental human rights, such as the right to vote, own property, or even to control their own bodies. There were terribly unfair double standards in those days. Although men were admired for having several sexual partners, the women who slept with them were considered whores. An unmarried woman who bore a child faced the disdain of the hypocritical community. Furthermore, women weren't afforded decent opportunities in education or employment. Therefore, a single mother had no way to support a child. These difficult and inequitable facts of life led women who were unmarried and pregnant to seek abortions so that they could avoid giving birth to children that they could not support. Such a child would certainly have been better off if it had never been born. Adding to the hardship of these women was the fact that abortions were not legal and therefore not safe. A woman's only alternatives in that regressive period were to clumsily attempt to abort her own child with a coat hanger (or other crude instrument) or pay a shady character, who had probably lost his medical license for negligence, to perform an abortion for her. Either circumstance was unsafe for the woman, so unsafe that thousands of women were maimed or killed each year —

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[7] 347 U.S. 483 (1954).

[8] 163 U.S. 537 (1896).

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human sacrifices to the impractical and unduly rigid ideal of protecting fetal life. Besides, how can anyone justify protecting a potential life, if the fetus is even that, when a real live woman is struggling to make it in the world? Only she bears the consequences of that ultimately personal decision of whether or not to have a child. Only she and God may be granted leave to determine whether to bring a new life into existence.

B. Critique of the Traditional Abortion Story

The above paragraph represents the traditional storyline for liberal abortion rights in the United States. It is a powerful story that has done its job well. The Supreme Court found the story so compelling that it arrogated Platonic Philosopher-King power to strike down every law banning abortions in the majority of states across the nation.[9] Americans have been similarly convinced. A consistent majority support the right of a woman to have a safe, legal abortion under some set of circumstances while holding their noses at the stench of a necessary evil.

It would also only be fair to say that the story contains more than a little truth. Many women did find themselves in the difficult circumstances described, especially single women and poor, married women who simply could not afford another mouth to feed. Furthermore, our society was and perhaps still is hypocritical in its evaluation of the relative merits of the sex lives of men and women.

Of course, the story would be incomplete without mentioning that adoption has always made sense under those circumstances. It is reasonable to suggest that, in an anti-abortion regime, adoption was chosen more often than illegal abortion. The availability of adoption notwithstanding, the story of the women who found themselves backed into a corner and facing a bloody coat hanger or a heartless back-alley butcher has been a compelling one.

Before going forward to the new chapters that have been added to the story since the advent of *Roe*, it is important to examine the dominant story given by the pro-choice movement and the *Roe* Court in order to evaluate its truthfulness and proper perspective in the nation's moral calculus.

1. On The Death Toll from Illegal Abortion

Let's begin with the bloody coat hanger. Is it true that thousands of women each year died from botched abortions? For the answer to that question, one may look to the very source of the claim. Dr. Bernard Nathanson was one of the original founders of NARAL, formerly the National Association for the Repeal of Abortion Laws, now the National

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[9] Roe v. Wade, 410 U.S. 113 (1973).

Abortion Rights Action League.[10] He also ran the country's largest abortion clinic in the years immediately subsequent to New York's repeal of its law against elective abortion.[11] With regard to the claims made regarding the number of women who died annually, Dr. Nathanson wrote:

> Our favorite tack was to blame the Church for the death of every woman from a botched abortion. There were perhaps three hundred or so deaths from criminal abortion annually in the U.S. in the sixties but NARAL in its press releases claimed to have data which supported a figure of five thousand. Fortunately the respected biostatistician Dr. Christopher Tietze was our ally. Though he never actually staked himself to a specific number he never denied the authenticity of these claims.[12]

The likelihood that only a few hundred women died from illegal abortions rather than thousands does not remove the fear of the coat hanger, but it does provide a less compelling counterpoint to the 1.5 million fetuses killed by abortions every year. It also establishes the willingness of members of the pro-choice movement to exaggerate the dangers of illegal abortions and the effectiveness of legal abortion in order to establish their case. By reducing the risk of death from infection, the widespread availability of antibiotics since the 1940's, rather than abortion's current legality, is a more likely hero in saving the lives of women who have abortions.[13]

2. On the Logic of Legalizing Abortion to Prevent Injuries to Women

That bloody coat hanger leaves another question that should be visited before moving forward. Does the demonstrated fact that people will harm themselves to achieve an aim forbidden by law justify the repeal of that law, particularly where that law is based on a just and moral notion such as protecting preborn life?

Parallels can be drawn to the drug problem. Outlawing the discretionary choice of adults to freely consume narcotics arguably has less support as a basic justice issue than outlawing the destruction of fetuses. In the case of the drugs, one can at least argue with confidence that there is not another person directly involved. If you want to damage your own life, then so be it. But in the case of abortion, one cannot confidently assert that only the woman is affected. Even pro-choice advocates recognize that some kind of life is ended by abortion. Despite the fact that abortion affects another life while drug use may not, we have not decided as a society to make drug use legal as a response to

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[10] BERNARD N. NATHANSON, M.D., THE HAND OF GOD 5 (1996).

[11] *Id.*

[12] *Id.* at 102.

[13] *See id.* at 91-92.

addicts hurting themselves on impure substances or stealing from others to support their habit. The simple point is this: it is inconsistent to allow emotional blackmail to change the law with regard to abortion but not with regard to drug abuse. Our society's inconsistency in its treatment of drug users versus women who wish to abort is not by itself sufficient reason to change course, but it is an important item to keep in mind when considering the traditional story about abortion.

3. Is Preventing Women from Harming Themselves in the Course of an Illegal Abortion Worth the Price?

Given that we have made the choice to legalize abortion at least partially in order to prevent women from harming themselves through inexpert attempts to abort, then perhaps we should consider the price of that decision. If the price of saving three hundred women each year from fatally injuring themselves is 1.5 million fetuses, then perhaps the question should be revisited. Five thousand unborn children are terminated for every woman saved. Even if half of those 1.5 million would still be destroyed if abortion were illegal (which is a very liberal assumption), that still leaves a whopping 2,500 unborn children killed for every woman saved. In short, for every rhetorical bloody coat hanger, there is an even more intimidating mountain of crushing clamps and suction hoses intermingled with fetal flesh, bones, and organs. The imagery is inflammatory, but so is the reality which, regrettably, backs it up to the hilt.

Ultimately, however, the abortion debate will not yield to numerical reductionism. The debate has never centered on a cost-benefit analysis weighing the destruction of fetuses against a woman's freedom from the biological imperative, but rather whether fetuses should be destroyed at all. In their hearts, people answer yes or no.

C. Finally, a Few Words From the Early Feminists

When we first began our exploration of the traditional story about abortion, we spoke of a time when women clearly occupied a second-tier position in society, lacking even the right to vote. That era featured a feminist movement that preceded the Betty Friedans and Gloria Steinems of the sixties and seventies. Although they shared the later feminists' view that women deserved a greater share of equality in America, they did not share the same monolithic devotion to the availability of abortion on demand. Susan B. Anthony called abortion "child-murder."[14] Elizabeth Cady Stanton characterized it as

[14] *Marriage and Maternity*, REVOLUTION, July 8, 1869, at 4.

"infanticide"[15] and further proclaimed: "When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit."[16]

III. THE EMPEROR IS NAKED – EXPOSING FLAWS IN THE *ROE*'S VIEW OF HISTORY AND PERSONHOOD ANALYSIS

Standing alongside the traditional story about abortion is the Supreme Court's decision in *Roe*. The *Roe* decision put a substantial premium on the past, indicating its own "emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries."[17] The conclusions from history and ancient thought drawn by Blackmun's majority opinion form the foundation of the Court's endorsement of free access to abortion and thus serve as excellent targets for analysis.

A. On the Permissive Attitude of Ancient Western Society Toward Abortion

A point of some importance in the Court's opinion is the notion that the Greek and Roman societies, as most other societies from antiquity, were more permissive than pre-*Roe* America with regard to abortion.[18] Although pro-lifers like to point to the famous Hippocratic Oath that explicitly forbids a doctor's participation in abortion, Justice Blackmun's opinion in *Roe* accepts the modern deconstruction of the oath, which concludes that Hippocrates and Greek society never really believed abortion was morally wrong.[19] Instead, the abortion prohibition reflected the views of a smaller fringe group of Pythagoreans, who believed that a fetus was "animate" from conception.[20] Therefore, Blackmun concluded, the Hippocratic Oath cannot be the guiding light of the medical profession, but rather caught on in its current form because it squared well with the views of the rapidly growing Christian church.[21]

Indeed, this part of the traditional story also bears quite a bit of truth. A look at Greek and Roman society indicates that they were not living out the prohibition against abortion found in the Hippocratic Oath as Western civilization has understood it through the centuries. However, Blackmun failed to mention in *Roe* that abortion was not the

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[15] *Infanticide and Prostitution*, REVOLUTION, Feb. 5, 1868, at 1.

[16] Letter from Elizabeth Cady Stanton to Julia Ward Howe (Oct. 16, 1873) (recorded in Howe's diary, on file at Harvard University Library), http://www.feministsforlife.org/history/foremoth.htm (last visited Oct. 11, 2001).

[17] Roe v. Wade, 410 U.S. 113, 117 (1973).

[18] *Id.* at 130.

[19] *Id.* at 130-32.

[20] *Id.* at 131.

[21] *Id.* at 132.

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only acceptable means of birth control in those societies. George Grant wrote:

> According to the centuries old tradition of *paterfamilias*, the birth of a Roman was not a biological fact. Infants were received into the world only as the family willed. A Roman did not *have* a child; he *took* a child. Immediately after birthing, if the family decided not to *raise* the child . . . he was simply abandoned. There were special high places or walls . . . where the newborn was taken and exposed to die.[22]

The *Roe* opinion also failed to note that Christianity acted not only as a check against abortion but also as a check against the horrific practice of exposure described above. The two acts were rightfully seen as related. After all, both practices indisputably end the life of a small child. The Justinian Code, named for the sixth century Christian Emperor, explicitly declared both infanticide and abortion: "Those who expose children, possibly hoping they would die, and those who use the potions of the abortionist, are subject to the full penalty of the law – both civil and ecclesiastical – for murder."[23] The existence of the prohibition of abortion in the Justinian Code serves as a direct contradiction to Justice Blackmun's confident conclusion that:

> It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion . . . except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.[24]

Investigative journalists Risen and Thomas commented:

> Recent academic research, however, has debunked the widely held view that abortion before "quickening" was not a crime under English common law. In fact, both infanticide and abortion were criminal offenses, but in the Middle Ages they were punished, for practical purposes, by the ecclesiastical, or church, courts rather than by common-law courts.[25]

In sum, there is little doubt that Blackmun erroneously concluded that the criminal prohibitions on abortion of a non-quickened fetus were merely products of a bygone Victorian era.

Regardless of how poorly the Court characterized legal history, lingering questions remain. What does it mean that ancient Western societies prior to the Christianization of Europe freely engaged in the practice of abortion? Although Blackmun is certainly correct that

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[22] GEORGE GRANT, THIRD TIME AROUND 20 (1991).

[23] *Id.* at 38 (quoting CODE JUST. 18.51-52).

[24] *Roe*, 410 U.S. at 129.

[25] JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 6-7 (1998).

abortion was freely practiced in Greece and the Roman Empire for centuries, it is likewise clear that infanticide via abandonment and exposure had free reign during the same time period. The observation brings us to a deeper question. Does the fact that the Greeks and Romans freely practiced abortion lend any moral legitimacy to the same practice in our time? Certainly not. History tells us that through the practices of abortion, infanticide, and slavery and also through gladiatorial combat where human lives were taken for entertainment, those societies held human life, born and unborn, very cheap.

Earlier in the inquiry, we noted Justice Blackmun's dismissive attitude toward the Hippocratic Oath as a guide to medical conduct. Although he may have been correct to dismiss the origins of its prohibitions on abortion, he ignored its lasting influence. For example, the Declaration of Geneva Physician's Oath, adopted in 1948 by the World Medical Association as a response to the participation of German doctors in Nazi atrocities, explicitly states: "I will maintain the utmost respect for human life from the time of conception, even under threat, I will not use my medical knowledge contrary to the laws of humanity."[26] Further guidance could have been found in the 1959 United Nations Declaration of the Rights of the Child, which states "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[27]

B. On the Matter of When Human Life Begins

Justice Blackmun avoided the critical issue of when life begins when he wrote:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[28]

Prior to that declaration of impenetrability, the opinion in *Roe* actually went to the absurd length of discussing the Aquinian concept of ensoulment.[29] Whereas discussing ensoulment and other metaphysical

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[26] *Declaration of Geneva*, WORLD MED. ASSOC. BULL. 22 (1949). Interestingly, after undergoing several amendments, the Declaration now reads, "I will maintain the utmost respect for human life from its beginning . . . ." rather than from *conception*. *Declaration of Geneva*, World Medical Association, *at* http://www.wma.net/e/policy/17-a_e.html (last visited Sept. 30, 2001).

[27] *Declaration of the Rights of the Child,* G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959).

[28] *Roe*, 410 U.S. at 159.

[29] *Id.* at 133-34.

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quandaries achieves the goal of creating confusion about when the soul attaches to the human body, it tells us nothing about when life begins. Philosophers like Aquinas, Plato, and Aristotle could only speculate as to when the soul enters the body and when life begins. Yet the scientific knowledge of those thinkers on the matter, as compared to ours, is so miniscule as to be virtually irrelevant to the disposition of the question at hand. Discussing their views as a method for arriving at an answer to the question of when life begins is like consulting the Flat Earth Society in a dispute over time zones placed around the globe.

In reality, the question has long been answered. In the words of Dr. Jerome LeJeune, professor of genetics at the University of Descartes in Paris and discoverer of the chromosome pattern of Down's Syndrome, in testimony before a United States Senate Judiciary Subcommittee on the question of when life begins: "To accept the fact that after fertilization has taken place a new human has come into being is no longer a matter of taste or of opinion. . . . [I]t is not a metaphysical contention, it is plain experimental evidence."[30]

Several others testified to similar effect to the subcommittee.[31] For example, Harvard Medical Professor Micheline Matthews-Roth said, "[I]t is incorrect to say that biological data cannot be decisive. . . . [I]t is scientifically correct to say that an individual human life begins at conception."[32] Mathews-Roth went on to say, "[A] function of law is to help preserve the lives of our people, [and law should be based] on scientific facts."[33] Likewise, Dr. Watson A. Bowes, Jr. of the University of Colorado Medical School said, "[T]he beginning of a single human life is, from a biological point of view, a simple and straightforward matter – the beginning is conception. . . . This straightforward biological fact should not be distorted to serve sociological, political, or economic goals."[34] Similarly, Dr. Hymie Gordon, Chairman of the Department of Genetics at the Mayo Clinic, testified, "By all the criteria of modern molecular biology, life is present from the moment of conception."[35] Finally, Dr. Alfred M. Bongiovanni of the University of Pennsylvania School of Medicine said, "I am no more prepared to say that these early stages represent an incomplete human being than I would be to say that the child prior to the dramatic events of puberty . . . is not a human being."[36]

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[30] *The Human Life Bill: Hearings on S.B. 158 Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 97TH CONG. 10 (1982).

[31] *Id.* at 7-23.

[32] *Id.* at 17.

[33] *Id.* at 22.

[34] *Id.* at 25-26.

[35] *Id.* at 13.

[36] *Id.* at 45.

The testimony from the experts cited above are supported by standard textbooks on embryology or human biology.[37] This understanding of when human life begins is not a theory or a religious belief, but instead represents scientific fact.

Definite scientific knowledge about when life begins would seem to settle the argument about which *Roe* feigned uncertainty. But as with the other chinks in the armor of *Roe*'s reasoning (or the traditional story about abortion for that matter), even a clear statement of when life begins would not settle the argument, because the pro-choice contingent, not their pro-life counterpart, relies, not on scientific fact, but on a metaphysical definition of when life begins to justify their position. As long as the question remains metaphysical, doubt may still remain and abortion may still be justified. Physician and novelist Walker Percy observed:

> The onset of individual life is not a dogma of the church but a fact of science. How much more convenient if we lived in the thirteenth century, when no one knew anything about microbiology and arguments about the onset of life were legitimate. . . . Nowadays it is not some misguided ecclesiastics who are trying to suppress an embarrassing scientific fact. It is the secular juridical-journalistic establishment.[38]

All the metaphysical higgledy-piggledy simply creates a comforting sense of plausible deniability about when life begins. After all, the most commonly invoked line in the typical bull session about abortion maintains that the debate will never be resolved because of the disagreement about when life begins. But the truth of the matter is that there is no legitimate disagreement on that question. Life begins at conception, with every stage of development from that point forward being simply one of many stages of human development that occupy the spectrum between conception to death. It is the same genetic person who cycles through those stages. That cannot be said of the time before conception.

In any case, piercing the metaphysical veil that claims ignorance as to when life begins will fail to resolve the issue. Some pro-choice advocates, such as leading feminist Naomi Wolf, boldly admit that abortion represents a decision to end a child's life, but still maintain that the overriding value in the moral calculus is the woman's right to make that decision.[39]

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[37] T.W. SADLER, LANGMAN'S MEDICAL EMBRYOLOGY (John N. Gardner ed., 6th ed. 1990).

[38] Walker Percy, *A View of Abortion with Something to Offend Everybody*, N.Y. TIMES, June 8, 1981, at A15, *quoted in* GEORGE F. WILL, THE PURSUIT OF VIRTUE AND OTHER TORY NOTIONS 109 (1982).

[39] Naomi Wolf, *Our Bodies, Our Souls*, NEW REPUBLIC, Oct. 16, 1995, at 26.

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C. Subjecting the Fetus to Personhood Analysis

Although the *Roe* Court participated in constructing a metaphysical veil over the answer to the question of when life begins, its decision did not depend on metaphysics for its justification. In a very real sense, the justification by which the Court found that a fetus has no Constitutional right to life was much more brutal in the final analysis.

Acknowledging the stakes involved in its analysis of the fetus as a Constitutional person, the majority opinion states:

> The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.[40]

So here we have the real point of contention: regardless of whether the fetus is alive or is a human being (both questions which we have proven are known to science but that the Court declined to answer), the fetus is not necessarily a person for constitutional purposes. In fact, the Court said that the fetus is definitely not a constitutional person.[41] One of the majority's primary reasons for making that determination was that all of the state laws against abortion contained some kind of exception for the life of the mother.[42] The Court reasoned that if the fetus is a person who is not to be deprived of life without due process of law, then an exception for the mother's life would be out of line with the Fourteenth Amendment.[43] That objection was well answered by the language of a statement issued by a number of pro-life luminaries such as former Pennsylvania Governor Robert Casey, Eunice Kennedy Shriver, Sargent Shriver, legal scholars Michael McConnell and Robert P. George, and several others in anticipation of the 1992 Democratic Convention:

> Our moral, religious, and political traditions are united in their respect for the dignity of human life. Only in the most extreme circumstances do they permit the taking of life; both our traditions and our law, for example, forbid killing except in case of legitimate self-defense. And thus, analogously, the laws that protected the unborn prior to *Roe* and *Doe* always contained a "life of the mother" exception.[44]

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[40] Roe v. Wade, 410 U.S. 113, 156-57 (1973).

[41] *Id.* at 158.

[42] *Id.* at 157 n.54.

[43] *Id.*

[44] Governor Robert P. Casey et al., *A New American Compact: Caring About Women, Caring for the Unborn*, FIRST THINGS, Nov. 1992, at 43, 45. Other signers included Governor Hugh L. Carey; Peter S. Lynch; Carolyn A. Lynch; Mary Cunningham Agee;

But the real problem with Blackmun's analysis of the fetus' constitutional personhood is not whether he got it right in the details, but the fact that he asked the question at all. What makes the *Roe* analysis so grimly brutal is that the fetus' right to life is made to depend on her legal status as a "person" instead of on her membership in the human race — the normal requirement for having one's life protected by civilized governments. Looking back at that element of the decision, Notre Dame law professor Charles E. Rice charged:

> The decision, therefore, is effectively the same as a decision that an acknowledged human being is not a person and therefore has no constitutional right to live. The basic principle of Roe is the principle of the Holocaust, that innocent human beings can be defined as nonpersons and subjected to death at the discretion of others. It is the principle of the 1857 Dred Scott case, where the Court held that blacks could not be citizens and said that slaves were property rather than persons.[45]

Rice's statement may sound like so much hyperbole, but the analysis is logically consistent. The mere fact that fetuses were not protected from the founding of the republic until the middle of the 19th century (Blackmun's other objection to according personhood to the fetus)[46] provides little reason for the Court to have revoked the protection they came to enjoy, for it is quite obvious that members of the African race found themselves in substantially the same situation. One might have hoped that by the late twentieth century the Court would have decided that it was too late in the day to suppose that a human being could be subject to the same personhood analysis that had justified such pernicious practices as race-based slavery and genocide.

Rice remarked in further connection to the people as property paradigm:

> A person need not have every right – prisoners, minors, and aliens, for example, do not possess the full panoply of rights and privileges afforded under the Constitution – but a non-person has no rights whatsoever. *A non-person is no better off than property, entirely subject*

Hadley Arkes, Ph.D.; Marc Gellman, Ph.D.; Pastor E. Jean Thompson, D.D.; James Kurth, Ph.D.; Eunice Kennedy Shriver; Sargent Shriver; William E. Simon; Jeannie Wallace French, M.P.H.; The J.F. Donahue Family; Moshe Tendler, Ph.D.; David Novak, Ph.D.; William C. Porth, Jr., Esquire; George Weigel; Mary Ann Glendon; Sidney Callahan, Ph.D.; Patricia Wesley, M.D.; Ronald J. Sider, Ph.D.; Michael McConnell; Irene Esteves; Jon Levenson, Ph.D.; Rachel MacNair; Leon R. Kass, M.D.; Nat Hentoff; Christine Smith Torre, Esquire; Robert P. George, Ph.D.; Kathy Walker; Professor Gerard V. Bradley; Rev. Richard John Neuhaus; Micheline Mathews-Roth, M.D.; Edmund D. Pellegrino, M.D.

[45] Charles E. Rice, *Abortion, Euthanasia, and the Need To Build a New 'Culture of Life,'* 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497, 497-98 (1998).

[46] *Roe*, 410 U.S. at 138-39.

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to the whim of the owner and whatever permissible regulation the government may deign to impose.[47]

There are two important points to take from Rice's quote. First of all, the fact that fetuses do not possess the full panoply of constitutional rights does not necessarily mean that they have no rights at all. Indeed, prisoners, minors, and aliens continue to enjoy the most important civil right — the right to life. Second, as non-persons, fetuses occupy the same level of civil rights as property, which is to say, none other than those asserted by the owner. We see that dynamic at work when women press criminal charges against one who damages their fetus or sue a doctor for malpractice when their fetus dies or suffers injury. However, there is no penalty involved if the woman/owner hires the doctor as her agent to dispose of the fetus/property. Clearly, if the fetus has no rights of her own and can be disposed of at the will of her owner, then the only thing that matters in her death or injury is whether it was intended by the owner, her mother.

It is here that the reader should revisit the previously quoted words of Elizabeth Cady Stanton in 1871: "When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit."[48]

The treatment of fetuses as property deserves more attention and will be dealt with in the portion of the article devoted to eugenic abortion.

D. But Ultimately . . .

If this were a game of poker between *Roe* and the arguments against *Roe*, *Roe's* critique would be reaching across the table in good faith to retrieve the chips. However, the reach for the pot would be premature. The Court surely had access to the elements of the case against Roe's analysis of history and fetal personhood when it rendered judgment in *Planned Parenthood v. Casey*. Part of the Court's reasoning for not changing course as it did in *Brown* was that "no change in *Roe's* factual underpinning has left its central holding obsolete, and none supports an argument for overruling it."[49] Given the inquiry we just made into the matter, judge for yourself whether the majority's statement is true. Surely the case presented here provides as much justification for a change in the nation's abortion law as there was in *Brown* to change the law on segregation. After all, *Brown* relied quite a

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[47] Rice, *supra* note 45, at 499 (emphasis added).

[48] Letter from Elizabeth Cady Stanton to Julia Ward Howe, *supra* note 16.

[49] Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992).

bit on simple psychological insight in its pursuit of justice through desegregation.[50]

But *Casey's* ringing endorsement of *stare decisis* indicates that American abortion's tree has very deep roots indeed. It will take more than fatal blows to *Roe*'s logic to fell it. With that in mind, we look now to further developments that may finally make abortion so disturbing as to change the hearts and minds of America's people and their judiciary.

IV. CHANGED CIRCUMSTANCES – THE NEW CHAPTERS IN THE STORY OF AMERICAN ABORTION

A. Ultrasound – Window into the Womb and the World of the Living Fetus

> Those who approve of our current abortion regime sometimes claim that the child in the womb is simply an undifferentiated mass of tissue, an appendage to a woman's body. . . . Today, the sonogram has given us a veritable window into the womb and has enabled us to observe, in detail, the complex life of the child prior to birth.[51]

In a time when most Americans have seen the image of an unborn child through ultrasound, it is difficult to imagine that it played no part in what is arguably the Court's most consequential.

Dr. Bernard Nathanson, already mentioned as one of the founding fathers of NARAL, experienced increasing discomfort with the fact that he had presided over 60,000 abortions at New York's Center for Reproductive and Sexual Health, the first and largest abortion clinic in the Western World. What pushed him over the edge and caused him to repudiate his role in attaining the legalization of abortion in the United States was his encounter with ultrasound. He related that "[h]aving looked at the ultrasound, I could no longer simply go on quite as before."[52]

Not only did ultrasound have a massive impact on Dr. Nathanson, but also on medical knowledge about what goes on inside the womb. An examination of the 1969 edition of *The Cumulative Index Medicus* (a reference book listing the articles published in the world's medical journals) reveals a paltry five articles under the heading of "fetus, physiology and anatomy of."[53] Similar study of the 1979 edition uncovers 2,800 articles on the topic.[54] The 1994 *Index* contains close to 5,000 articles.[55] A visit to the National Institutes of Health's PubMed online

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[50] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[51] Casey et al., *supra* note 44, at 44.

[52] NATHANSON, *supra* note 10, at 144.

[53] *Id.* at 145.

[54] *Id.*

[55] *Id.*

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database is revealing.[56] Searching the database on the words "fetal physiology" for articles prior to 1960 returns zero results.[57] The same search with an end date of 1969 returns 3,686 articles.[58] Repeating the search with an end date of 1972 returns 8,104 articles.[59] Finally, a search to November 12, 2001 returns an astonishing 113,827 articles. Reflecting on the dramatic growth of medical knowledge about the fetus, Nathanson commented of the period in which *Roe* was decided: "As recently as that, we knew almost nothing of the fetus; when abortion on demand was unleashed in the United States, fetology essentially did not exist."[60]

He further reported:

> With ultrasound technology, we could not only know that the fetus was a functioning organism, but we could also measure its vital functions, effectively weigh it and estimate its age, watch it swallow and urinate, view it in its sleeping and waking states and move itself as purposefully as a newborn.[61]

Dr. Nathanson is not the only commentator to recognize the impact of ultrasound images on the abortion debate. Naomi Wolf, arguably today's most recognizable feminist and adviser to Vice-President Al Gore's 2000 presidential campaign, has written on the phenomenon from the pro-choice perspective.[62] She believes that the abortion rights camp will ultimately lose the debate if it maintains the old party line that the fetus is simply part of its mother or simply a mass of protoplasm in the face of revolutions in the fields of embryology and perinatology.[63] With regard to the pro-choice movement's static view of a rapidly changing field of knowledge, Wolf writes:

> This has led to a bizarre bifurcation in the way we who are pro-choice tend to think about wanted as opposed to unwanted fetuses; the unwanted ones are still seen in schematic black-and-white drawings while the wanted ones have metamorphosed into vivid and moving color. Even while Elders spoke of our need to "get over" our love affair with the unwelcome fetus, an entire growth industry — Mozart for your belly; framed sonogram photos; home fetal-heartbeat stethoscopes — is devoted to sparking fetal love affairs in other

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[56] National Center for Biothechnical Information, PubMed, *at* http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?db=PubMed (last visited Nov. 12, 2001). Developed by the National Center for Biotechnical Information at the National Library of Medicine at the National Institute of Health, PubMed is search service that provides access to more than 11 million citations both in medical journals and in online publications. *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] NATHANSON, *supra* note 10, at 145.

[61] *Id.* at 161.

[62] Wolf, *supra* note 39.

[63] *Id.*

> circumstances, and aimed especially at the hearts of over-scheduled yuppies. If we avidly cultivate love for the ones we bring to term, and "get over" our love for the ones we don't, do we not risk developing a hydroponic view of babies — and turn them into a product we can cull for our convenience?[64]

As far back as 1983, National Institutes of Health researcher John Fletcher and George Washington University Medical School professor Mark Evans posited the question of whether ultrasound could become a weapon in the moral struggle over abortion.[65] They found themselves driven to that question after noticing that ultrasound seemed to move the time of maternal-fetal bonding to a much earlier point than "quickening" when the mother first feels the baby move.[66]

In particular they reported two cases.[67] The first case involved a woman who had been beaten about the abdomen by her abusive lover.[68] An x-ray revealed that the woman was pregnant.[69] Subsequently, her doctor ordered an ultrasound to establish the date of conception and determine whether the fetus had been damaged by the abdominal beating she had received or by radiation from the x-ray.[70] After seeing the ultrasound, she agreed to answer questions about the experience.[71] When asked how she felt about seeing what was inside her, she replied, "It certainly makes you think twice about abortion!"[72] She further elaborated on her feelings after seeing the fetus move by saying, "I feel that it is human. It belongs to me. I couldn't have an abortion now."[73] A second patient, who had an ultrasound as part of a course of treatment establishing possible genetic risks for her child, reported similar sentiments, saying, "I am going all the way with the baby. I believe it is human."[74]

The statements of the two women are obviously anecdotal and do not pack the punch of a properly conducted study. But their statements tell us that which is intuitive. If a woman sees an ultrasound that shows a fetus moving inside of her much earlier in the pregnancy than quickening, then it only makes sense that the bottom line truth of abortion will be made more stark in her mind.

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[64] *Id.* at 29.

[65] John C. Fletcher, Ph.D. & Mark I. Evans, M.D., *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 NEW ENG. J. MED., 392, 393 (1983).

[66] *Id.* at 392.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

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At a minimum, ultrasound thrusts the knife of reason and scientific knowledge further into the heart of the *Roe* opinion to the extent that the opinion purports to stand for the proposition that confusion is the only certainty in the debate about when life begins. Although Naomi Wolf boldly stood up in the pro-choice ranks and declared that abortion does in fact take a life, her conclusion is that admitting the gravity of the act will give it more dignity in the minds of Americans.[75] But the next changed circumstance may leave us all wondering whether that is really true.

B. Genetic Screening and Abortion – Preferring One Child Over Another

> "On this side, the womb is barren and the marriages cold. There dwell an accursed people, full of pride and lust. There when a young man takes a maiden in marriage, they do not lie together, but each lies with a cunningly fashioned image of the other, made to move and to be warm by devilish arts, for real flesh will not please them, they are so dainty (*delicati*) in their dreams of lust. Their real children they fabricate by vile arts in a secret place."[76]

C. S. Lewis, *That Hideous Strength*

As our ability to determine the genetic characteristics of children before birth increases, the availability of legal abortion provides the perfect opportunity for parents to reject the child who does not meet their standards or meet their subjective preferences. The most obvious implication for eugenic abortion concerns children with genetically determined diseases, but the ramifications also extend to such traits as the child's sex, hair color, eye color, and even their behaviors.

1. Aborting the Child With a Genetic Disease

In the mid-1960's, Eunice Kennedy Shriver was one of the first to see abortion's threat to those who are born with disabilities.[77] Her mentally retarded sister was the source of her concern.[78] While those who favored abortion rights argued that prenatal testing and abortion could spare families the difficulty of raising children with birth defects, Shriver saw the spectre of a society that viewed human beings as disposable.[79] The more time that goes by, the more correct she seems to

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[75] Wolf, *supra* note 39.

[76] C.S. LEWIS, THAT HIDEOUS STRENGTH 271 (Simon & Schuster, Inc. 1996) (1945) (quoting the character Ransom).

[77] RISEN & THOMAS, *supra* note 25, at 17.

[78] *Id.*

[79] *Id.*

have been. A number of diseases have genetic links, including Lou Gehrig's disease,[80] Huntington's disease, cystic fibrosis, muscular dystrophy, sickle cell anemia,[81] and a list that expands with every advance in genetic research.[82]

Former Surgeon General Joycelyn Elders embraced abortion as few public officials ever have. Her personal honesty was breathtaking when she articulated the position that abortion serves an important public health purpose by lowering the number of Down's Syndrome children born.[83] In order to support her position, she cited a study showing that the number of infants with Down's Syndrome born in Washington State had diminished by 64% due to the effects of legal abortion.[84] Founder of Prison Fellowship and author Chuck Colson and author Nancy Pearcey note this new take on abortion, in which it "was no longer treated as a wrenching tragedy, a decision reached with agonizing reluctance," but rather "was a positive good – a means for improving the species."[85]

Dr. Elders' assertion raises a number of issues. Her statement equated the abortion of Down's Syndrome children with an improvement in public health. In so doing, she completed the loop that most public health authorities who endorse genetic testing leave open. Yes, prenatal testing can help in eliminating the incidence of genetic diseases like Down's Syndrome, but the problem is that it requires the tool of abortion to do so. Indeed, the incidence of Down's Syndrome babies was 64% lower thanks to *Roe v. Wade*, but at the expense of the babies who made the statistic possible. Could we talk about solving any other social pathology in this manner? Would we crow about a 50% reduction in babies born to welfare mothers if it came at the price of forced sterilizations? Regrettably, some would say yes. Perhaps a stronger example is necessary, one that equates lost life with lost life. Would we be proud of a 72% reduction in homelessness if it had been achieved by gently euthanizing homeless men and women? Bioethicist Scott Rae drives the point home with perfect clarity when he writes:

> It is one thing to decrease the incidence of these genetic diseases, but quite another to do so by eliminating the person who has the disease. The incidence of every disease would decrease dramatically if medical

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[80] Natalie Angier, *Scientists Find Long-Sought Gene that Causes Lou Gerhig's Disease,* N.Y. TIMES, Mar. 4, 1993, at A1, *quoted in* Martha A. Field, *Killing "The Handicapped" – Before and After Birth*, 16 HARV. WOMEN'S L.J. 79, 90 (1993).

[81] Robert Cooke, *Experts Debating Gene Therapy*, NEWSDAY, May 21, 1991, *quoted in* Field, *supra* note 80.

[82] Field, *supra* note 80.

[83] Tucker Carlson, *Eugenics, American Style*; *The Abortion of Down Syndrome Babies*, WKLY. STANDARD, Dec. 2, 1996, at 20.

[84] *Id.*

[85] CHARLES COLSON & NANCY PEARCEY, HOW NOW SHALL WE LIVE? 121 (Judith Markham & Lynn Vanderzalm eds., 1999).

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> practitioners had the liberty to do away with afflicted patients. There is a difference between finding a solution to a problem and eliminating the problem.[86]

The sentiment expressed by Elders is strikingly similar to the ideas of the eugenics movement that was so popular in this country and Europe in the first half of the twentieth century. To state it concisely, the better society is one that is not hampered by a community of walking wounded (the disabled) who are unable to contribute to the productive output of a community and consume a disproportionately large share of its resources. Those in favor of abortion as a public health measure would immediately respond that the modern notion of eugenics is entirely different from the old government sponsored efforts at forced sterilization of the unfit or feeble minded, because legal abortion simply gives parents the option of weeding out substandard children. It is true that legal abortion and prenatal testing are not mandated by the government but, rather, are made available to the parents through the governmental mechanism of legalization, yet that does not answer the question of whether eugenic abortion itself is morally wrong and a violation of the anti-discrimination principle that American society has so carefully developed over the last half century. That the government gives parents a license to kill handicapped children rather than mandating the practice does little to distinguish our choices from the Third Reich's practice of euthanizing the mentally retarded. The only real difference is that the mentally retarded in Germany were killed after birth, while ours are killed before birth. This article has already done much to show that the birth wall is not the great divide that excuses all sins against a child. By making reproductive freedom one of the most protected rights in constitutional law, the Supreme Court has created the opportunity for mass discrimination and prejudicial treatment.

The entire logic of genetically based abortion is polluted with the thought that the disabled life is not worth living. Rae notes that this type of thinking represents "a value judgment, not a medical fact, and no one should have the right to impose that kind of value judgment upon another person, especially when doing so results in his or her death."[87] He further considers whether parents who choose eugenic abortion are thinking about the difficulty of life for the child or, rather, about the difficulty they would encounter in raising such a child.[88]

Who can say that life for the retarded or crippled person is not worth living? In the instance of Down's Syndrome, the result is often

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[86] SCOTT B. RAE, BRAVE NEW FAMILIES: BIBLICAL ETHICS AND REPRODUCTIVE TECHNOLOGIES 198 (1996).

[87] *Id.* at 200.

[88] *Id.*

moderate retardation. Adults with Down's frequently go on to hold jobs and live independently. If the birth parents are unwilling to bear the burden of a Down's child, there is a waiting list of parents hoping to adopt such children. The lives of the handicapped are changing. They are increasingly enabled by technology and laws, such as the Americans with Disabilities Act, to enjoy public life. To see them aborted, simply because one can see them coming, is contradictory to America's policies of encouragement and protection.

But if it can be done, it will be done. The Baby Doe case proved that there is substantial tolerance for allowing a newborn infant to die simply because it was retarded. In 1982, Baby Doe was born with a deformed esophagus that could easily be corrected with a simple operation.[89] However, the baby's parents refused to consent to the operation even though it meant the child would starve to death.[90] Their singular reason for refusing to save the child was the fact that he had Down's Syndrome.[91] If the child had been normal, the parents would have done anything to save it, but not a child who would probably be moderately retarded. The Indiana courts refused to intervene, allowing the baby to painfully starve to death over six days.[92] Can that possibly be right? Can it possibly be right for one person to decide that another person's life is not worth living and deny even simple treatment to sustain it? Baby Doe's situation is played out relentlessly in the politics of the womb, where parents who discover that their child has Down's Syndrome or some other disorder decide that the child's life is not worth living. It is a decision from which there is no appeal because the power to abort has no limitations based on the motive of the parents. The tragedy of eugenic abortion goes beyond the lost life of the child. Reflecting on the losses incurred by eugenic abortion, Chuck Colson quoted his daughter's thoughts on her autistic son, Max:

> "When Max enters a room full of people, it's like dropping a spoon into a blender – everyone stops and reacts. Just when people's lives are running along smoothly, everything blending as it should, in comes Max, this sweet, energetic, beautiful child who doesn't fit into their recipe. Everyone reacts in some way, good or bad. But eventually they become aware of their own actions and feelings, and this profoundly affects them. It is a wonderful experience for me to see someone who has not felt comfortable with Max take the chance and reach out to him."[93]

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[89] COLSON & PEARCEY, *supra* note 85, at 120-21.

[90] *Id.* at 121.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 143 (quoting Colson's daughter, Emily).

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Colson adds to his daughter's remarks, "Yet Max is exactly the kind of child that the modern eugenics crowd would snuff out in the womb – or, if his 'defect' couldn't be detected there, then on the delivery table."[94] Not only do the unborn children lose their lives when their parents choose to abort them or let them die when born, but we as a society lose the opportunity to discover the best in ourselves. Just as Colson's daughter, Emily, talked about the ways in which people are affected by her autistic son, we learn to be more merciful, helpful, and creative people when we interact with those who need a little more understanding to make their way through the world. Finally, there is a strong argument to be made for self-determination in the face of defects that may have no effect in childhood. Huntington's disease and Lou Gehrig's disease, for example, are both disorders that do not manifest themselves until adulthood. In that situation, the parent would be choosing to abort the child for something that would not affect the child until well after the time she reached the legal age of consent. Is it the parent's right to make that decision for the child? If the answer is yes, then why not allow the parent to make that decision at any point during childhood, or certainly during the period before which the child learns to speak and express preferences? As a fundamental moral question, the decision of whether to face a devastating disease after thirty years or more of *normal* life would have to belong to the person who would in fact be facing it. Genetic indications of Alzheimer's disease pose an even more extreme question. Parents who would *mercifully* abort a child that would someday have Alzheimer's exercise their autonomy over an individual who will not face the consequences of the disease until middle age or later.

As a thought experiment, imagine that parents could look into a crystal ball and see the lives of their children before they occurred. If a pregnant mother saw that her boy would live life as a quadriplegic after a terrible car accident at age thirty-four, would it make sense for her to decide that his life would not be worth living in total and therefore to abort? In substance, genetic screening poses almost exactly the same question to parents with a genetically defective child *in utero*.

It is fair to say that the traditional story about abortion never contemplated such extensive control over a child's destiny. Here we have parents who would have borne the child under any other set of circumstances. They are not too poor. They do not risk the ostracism of the community for having sex out of wedlock. They just think Junior will not be able to handle his disease as an adult. That is an awful lot of leeway for one person to impose their values on another person who actually has much more at stake. Perhaps a modification of a favorite bit

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[94] *Id.*

of verse is appropriate, "Tis better to have lived and lost, than never to have lived at all."

2. On the Subject of Those Who Yet Live . . .

Leaving behind the matter of the morality of terminating the disabled before they are born, what about the secondary effects of that practice on the disabled population that yet lives, or on their loved ones? How do you suppose the parents of Down's Syndrome children felt when Joycelyn Elders proclaimed that legal abortion's reduction in the number of living children with Down's represented a positive public health outcome? For that matter, how did people living with Down's view her remark? Many of them are capable of understanding what she meant.

There is a clear tension between the interests of genetic abortion and those of the disabled population who suffer from the maladies genetic abortion means to prevent. Many disabled persons and their advocates fear that encouraging the elimination of others like them prenatally will result in the community's apathy toward their lives.[95] In fact, it has been noted that "[a]s prenatal testing for a particular condition becomes widespread, less is spent on cure, treatment and social services for existing persons with that condition."[96]

Although slippery-slope arguments can be made about the disabled community's fears of someday being subject to euthanization because of society's efforts to dispense with them in the womb, perhaps a more compelling argument can be made that their lives are negatively impacted now. Beyond concerns about loss of funding in the wake of genetic screening and abortion, there is an emotional impact on both the genetically disabled and society at large. For instance, observe the horror generally expressed when people talk about abortions for sex-selection in cultures where boys are much more highly valued than girls. No similar disturbance has been expressed when it comes to the abortion of a child who might have genetic defects.[97] And why should there be, when the public was ambivalent at best over the starvation of Baby Doe, born alive with Down's Syndrome? Had the child been left to starve because it was female and the parents wanted a male, no court in America would have tolerated it. Yet, for some reason, we as a society seem to have come to a point where we believe that a genetically imperfect life is not worth preserving, not worth living. Given the disparity of attitudes of the public regarding abortion for sex-selection versus abortion for genetic

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[95] Field, *supra* note 80, at 117-18 (construing R.B. Zachary, *Life With Spina Bifida*, 2 BRIT. MED. J. 1460, 1462 (1977)).

[96] *Id.* at 117.

[97] RAE, *supra* note 86, at 208.

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defect, the genetically disabled can fairly infer that their lives are much less respected than the lives of *normal* people.

Harvard law professor Martha Field noted examples of the emotional impact of genetic abortion on the disabled.[98] For instance, one disabled woman described her pain when she discovered that her aunt had aborted a child that would have been similarly handicapped, saying, "With great sadness, I realized that I lost to abortion the only cousin I would have had who was similar to me."[99] This woman identifies a cognizable harm she experienced due to genetic abortion. She has been deprived of the opportunity to have a relative who could identify with her struggles in life. Now, instead of having two disabled relatives who could emotionally support one another, genetic abortion took life from one and companionship from the other.

Another case involved Bree Walker-Lampley, a successful television newswoman who suffers from a genetic condition that fuses fingers and toes together. Bree expressed a great deal of hurt when a talk show host dedicated a program to discussion of whether it was fair for her to get pregnant and risk passing on her disfiguring disease.[100] She reacted by calling the show "a harassment of her unborn child and a sweeping blow to a disabled community struggling for social acceptance and civil rights."[101]

Ultimately, the emotional effect on the genetically disabled community can be summed up very simply: aborting a child who would be born with a similar condition tells the disabled that their lives would have been better aborted in the womb, while consequently depriving them of a peer, a relative, a friend. The genetically disabled stand as interested observers to the ongoing development of eugenic abortion. While they watch, they remember Matthew 25:45: "[W]hatever you did not do for one of the least of these, you did not do for me."[102]

3. Imagine the Possibilities: Abortion and Genetic Behavioral Traits

One of the great questions that genetic research has yet to answer is whether homosexuality is a genetic trait and, therefore, a basis for protection from discrimination just as race or gender. Other behaviors

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[98] Field, *supra* note 80, at 120.

[99] Lillibeth Navarro, *People Don't Want a Child Like Me*, L.A. TIMES, Sept. 4, 1991, at B7, *quoted in* Field, *supra* note 80, at 120.

[100] Jay Matthews, *The Debate Over Her Baby*, WASH. POST, Oct. 20, 1991, at F1, *noted in* Field, *supra* note 80, at 120.

[101] Daniel Cerone, *Bree Walker Blasts KFI's Baby Talk,* LA. TIMES, Aug. 17, 1991, at F1, *quoted in* Field, *supra* note 80, at 120.

[102] *Matthew* 25:45 (New International).

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may have genetic links as well. Alcoholism, for instance, is commonly believed to be a hereditary trait.

Imagine that a genetic link to homosexuality is found and can be detected via genetic screening. Imagine further that some subset of parents would abort a child on that basis because they hoped for a child who would not someday bring home a same-sex partner to holiday celebrations. What would be the reaction of the gay community to such a practice? Certainly the practice would not be mandated by the government, but gays would rightly be outraged to know that a combination of technology and permissive law provided the means to an unborn child's death on the sole basis of his sexual orientation. As with the genetically disabled, the possibility of abortion based on sexual orientation poses a direct threat to the carefully cultured American principle of non-discrimination.

C. What Rights Do Parents Have With Regard to Their Children's Genetic Make-up?

Pro-choice feminist Naomi Wolf perfectly characterized the problem of a designer attitude toward the unborn, wherein parents determine the attributes of the child before embracing it as their own:

> The pro-life warning about the potential of widespread abortion to degrade reverence for life does have a nugget of truth: a free-market rhetoric about abortion can, indeed, contribute to the eerie situation we are know facing, wherein the culture seems increasingly to see babies not as creatures to whom parents devote their lives but as accoutrements to enhance parental quality of life. Day by day, babies seem to have less value in themselves . . . than they do as products with a value dictated by a market economy.[103]

In fact, Wolf's point serves as an excellent bridge to George Grant's earlier remarks about the Romans' attitude toward the birth of a child. The Roman parent did not *have* a child, but rather *took* a child if it measured up to his standards and he wanted it.[104] In the last thirty years, we have become a people who take a child at our discretion rather than unconditionally having the children who come to us through the miracles of conception and childbirth. Our treatment of the unborn reveals certain things about ourselves should we ask, as the New American Compact asked, "What kind of a people are we? What kind of a people will we be?"[105]

The notion that parents can choose whether to allow their child to be born based on their satisfaction with his or her genetic characteristics

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[103] Wolf, *supra* note 39, at 29.

[104] GRANT, *supra* note 22, at 20.

[105] Casey et al., *supra* note 44, at 45.

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again raises the spectre of the unborn child as property. Whether the genetically disabled unborn child receives prenatal surgery to facilitate treatment of spina bifida or is instead aborted, rests entirely in the parents' discretion. That is quite a neat trick, is it not? When the parents want the unborn child with spina bifida and arrange a helpful operation, then the child is the surgeon's patient. But when the parents do not want their children and arrange for abortions, the children go from being patients to being "products of conception." The fact that the child's entire destiny as property or a person depends only on the parents' sole discretion is shocking and outrageous. Surely it is difficult to find another subject where reality is made to depend so completely on one's wishes and whims.

D. Abortion and the Problem of Cognitive Dissonance

Cognitive dissonance is defined as "psychological conflict resulting from incongruous beliefs and attitudes held simultaneously."[106] If the talk about abortion as a procedure that merely dispenses with "products of conception" or "a mass of cells" has worn thin as knowledge of the unborn child's life within the womb has increased, then we find ourselves in a state of cognitive dissonance to the extent that we continue to permit abortion.

Abortion rights advocates who see the writing on the wall, as does Naomi Wolf, find themselves in the awkward position of admitting that abortion represents the taking of a life while favoring the right of a woman to terminate the pregnancy. Wolf believes that by acknowledging the reality that abortion takes life, the abortion rights movement can preserve the support of the American people in spite of the increasing awareness that the unborn child is alive.[107]

Wolf's position represents an astounding move forward in the debate over abortion. Her concessions severely undercut much of the abortion rights movement's traditional rhetoric. Of particular interest is her acknowledgement that denying the reality of fetal life has more consequences than simply the loss of political support:

> But we are also in danger of losing something more important than votes; we stand in jeopardy of losing what can only be called our souls. Clinging to a rhetoric about abortion in which there is no life and no death, we entangle our beliefs in a series of self-delusions, fibs and evasions. And we risk becoming precisely what our critics charge us with being: callous, selfish and casually destructive men and women who share a cheapened view of human life.[108]

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[106] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 257 (1984).

[107] Wolf, *supra* note 39.

[108] *Id.*

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Wolf later lists the three destructive consequences of the traditional pro-choice rhetoric as "hardness of heart, lying and political failure."[109] She further refers to language developed to defeat the notion that the fetus is a person as a "lexicon of dehumanization."[110]

So this is where we find ourselves at long last. The strategy of denial has become increasingly difficult to support, particularly in the face of ultrasound technology. With denial slipping out the back door of the debate, there is a clear choice to be made.

First, we have Wolf's position that although abortion takes the life of a child, the woman must have the power to make the decision of whether to complete her pregnancy. As she puts it from her own experience, "there were two columns in my mind – 'Me' and 'Baby' – and the first won out."[111] Hers is a sincere position based on personal autonomy, a powerful value.

Second, we have the position of this article. Abortion takes a human life, a fact about which there is no dispute. Personhood analysis that removes even the most basic civil rights from unborn children is morally bankrupt and results in a de facto regime of the fetus as mere property. Ultrasound has shown that the fetus is actually living in the womb, not merely curled up inanimate until quickening. The ability to perform genetic screening on the fetus puts incredible power in the hands of parents to decide if someone else's life is worth living and leads to a view of human life as disposable. In short, if the fetus is a human being, then nothing short of a threat to its mother's life can justify denying it the most basic civil right of protection for its life.

The difference between the two positions is cognitive dissonance. The first view holds that the fetus is a human baby. However, it also maintains the belief that the mother should have the right to undergo a procedure to end the baby's life before it can emerge from her body. Cognitive dissonance comes in because there is incredible conflict between believing the fetus is a human life and simultaneously believing that the innocent life may be taken by the mother for any reason except to preserve her own survival. The proof of the dissonance in those beliefs is easily demonstrated by the felt need of the abortion rights movement to engage in semantic gymnastics to define the fetus as uterine material, a mass of cells, useless tissue, anything but a human life.

When their denial is displaced by reality, as is increasingly the case, there will be psychological and spiritual damage done to mothers, abortion providers, and society. Richard Ganz did a good job of setting up the inquiry into the potential for damage when he wrote:

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[109] *Id.* at 28.

[110] *Id.*

[111] *Id.* at 32.

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> For example, a woman's response to the question, "How do you feel about the recent therapeutic removal of the protoplasmic mass from your uterus?" would be different from her response to the question, "How do you feel about the recent murder of your unborn child?" *Which question is objective depends upon which one is true to the facts.* If abortion is indeed the killing of human beings, then to phrase the question any differently . . . would be dissembling.[112]

Ganz then reports on the results of a psychiatric study entitled "Abortions and Acute Identity Crisis in Nurses," which dealt with the problems suffered by nurses in response to their abortion work.[113] The study noted that:

> All suffered from strong emotional reactions to their abortion work . . . In varying degrees they all showed symptoms of anxiety and depression. They complained about being tired and being unhappy about their work; they cried too easily and got angry too quickly; they had difficulty sleeping and had bad dreams; during the day they found themselves preoccupied with disturbing thoughts about their abortion work; and they were overly sensitive when their friends teased them about working in a "slaughter house" . . . They were confused and uncertain about their role and function as nurses and no longer felt proud of their hospital and their work.[114]

But the psychiatrists in the study treated those feelings as a pathology, even though many of the nurses had been pro-abortion prior to working in the field.[115] They saw the nurses as having overidentified with the aborted fetus.[116] Note the investigators' report:

> A most disturbing experience to the nurses was to hold a well-formed aborted fetus with movement and with its eyes "still alive" . . . Some of the nurses overreacted when they *allegedly saw formed fetal parts* such as hair and bits of limbs being sucked out or scraped out. The nurses who overidentified with the fetus projected into the *protoplasmic masses* real, live, grown-up individuals.[117]

Ganz observed the investigators' denial of the reality of abortion, noting their characterization of the nurses' reaction as having "allegedly" seen formed fetal parts and having projected live individuals into "protoplasmic masses."[118] He reports that the psychiatrists successfully

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112 Richard L. Ganz, *Psychology and Abortion: The Deception Exposed, in* THOU SHALT NOT KILL 26, 27 (Richard L. Ganz ed., 1978).

113 Walter F. Char, M.D. & John F. McDermott, Jr., M.D., *Abortions and Acute Identity Crisis in Nurses,* 128 AM. J. PSYCHIATRY 952 (1972), *cited in* Ganz, *supra* note 112, at 27.

114 Char & McDermott, *supra* note 113, at 953, *quoted in* Ganz, *supra* note 112, at 27 (ellipses as added by Ganz).

115 Ganz, *supra* note 112, at 27.

116 *Id.* at 28.

117 Char & McDermott, *supra* note 113, at 953, *quoted in* Ganz, *supra* note 112, at 28 (emphasis added) (ellipses as added by Ganz).

118 Ganz, *supra* note 112, at 28.

intervened and helped the nurses regain their objectivity.[119] The authors of the study stated the nurses became able to see again "that what is aborted is a protoplasmic mass and not a real, live . . . individual."[120]

The intervention that worked with the nurses doing abortion work depended entirely on what we now know to be an utter denial of reality. But we've come too far for denial to continue to be an effective treatment. Naomi Wolf admits it. Other abortion rights advocates have admitted as much long ago. Back in 1970, Dr. Malcolm Watts of the California Medical Association reasoned that a new ethic that would honestly permit abortion had not yet destroyed the old Western ethic that every life is precious.[121] Therefore:

> [I]t has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.[122]

The question we are left with is whether we as a society are willing to support the taking of a human life without either the comforting security blanket of denial or the bromides about protoplasmic masses and uterine material. At long last, the question can be clearly presented: are we a society that can tolerate the abortion of a human being living inside the womb? If we can tolerate it, should we? Is it acceptable to give parents complete control over the life or death of a child in the womb for any reason they might propose? And consider the issues raised by genetic screening. Does permissive abortion law simply create a new opportunity for private discrimination on a mass scale? No more quibbling about when life begins. No more euphemisms. Will we or will we not continue on our current path now that more and more facts pile up before us? Would Roe have turned out differently if the judges had several nice ultrasound movies to view in their chambers?

V. CONCLUSION

Think again about the exchange between Dostoevsky's Karamazov brothers. Ask these questions of yourself and of our nation:

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[119] *Id.* at 29.

[120] Char & McDermott, *supra* note 113, at 956, *quoted in* Ganz, *supra* note 112, at 29.

[121] *A New Ethic for Medicine and Society*, CAL. MED., Sept. 1970, at 67, 67-68.

[122] *Id.* at 68.

> "Tell me yourself – I challenge you: let's assume that you were called upon to build the edifice of human destiny so that men would finally be happy and would find peace and tranquility. If you knew that, in order to attain this, you would have to torture just one single creature . . . and that on her unavenged tears you could build that edifice, would you agree to do it? Tell me and don't lie!"
>
> "No, I would not," Alyosha said softly.
>
> "And do you find acceptable the idea that those for whom you are building that edifice should gratefully receive a happiness that rests on the blood of a tortured child and, having received it, should continue to enjoy it eternally?"
>
> "No, I do not find that acceptable," Alyosha said . . . .[123]

Once we know the truth, our answers must be the same as Alyosha Karamazov. Although we have permitted the building of such an edifice, we must not find the continued enjoyment of that edifice to be acceptable.

Personal autonomy is not the cynosure of our existence; not personal autonomy to kill, nor personal autonomy to discriminate based on disability or sex. There is only one line that can safely be drawn. That line is life. Let us end with more words from the signers of the New American Compact:

> Abortion is a question of choice. The "choice," though, is not one faced by isolated women exercising private rights. It is a choice faced by all the citizens of this free society. And the choice we make, deliberatively and democratically, will do much to answer two questions: What kind of a people are we? What kind of a people will we be?

If we abandon the principle of respect for human life by making the value of a life depend on whether someone else thinks that life is worthy or wanted, we will become one sort of people.

But there is a better way.

We can choose to reaffirm our respect for human life. We can choose to provide effective care of mothers and children. And we can choose to extend once again the mantle of protection to all members of the human family, including the unborn.

And if we make those choices, America will experience a new birth of freedom, bringing with it a renewed spirit of community, compassion, and caring.[124]

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[123] DOSTOEVSKY, *supra* note 1, at 296.

[124] Casey et al., *supra* note 44, at 45.

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