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The Inviolability of the Right to Be Born

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If one accepts the premise that a human fetus is, in effect, a human being, or is at least treated as such for legal purposes, then it follows that the fetus has the rights of a human being. That the most inviolable right of a human being is that of life has long been imbedded in Anglo-American law, which in turn stems from the Judeo-Christian religious tradition. Dean Drinan discusses the rights that have been conferred upon the human fetus by Anglo-American law, pointing out that the fetus has many legal rights akin to those of a human being. He concludes that the fetus is a human being and that any laws designed to permit unrestrained abortion would necessitate a change in basic Anglo-American law which, at present, precludes the destruction of an innocent human being by other human beings to serve their own ends.

EVERY DISCUSSION of abortion must, in the final analysis, begin and end with a definition of what one thinks of a human embryo or fetus. If one has, by the application of several principles, come to the conviction that a fetus, viable or not, can be extinguished for the benefit of its mother or its own welfare, rational debate on changing or "liberalizing" existing laws forbidding abortion is not really possible or necessary. For if a person argues from the premise that a human fetus may have its existence terminated for any valid reason, then the only point about which to argue is the validity of the reasons asserted to be sufficient to justify the voluntary extinction of a human fetus. These reasons can have only three sources: (1) the welfare of the fetus; (2) the health or happiness of the mother; or (3) the overall future of the family.

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It is unfortunate that debates and discussions over the advisability of changing the anti-abortion laws which now exist in every state have not infrequently tended to polarize the disputants into those who desire to make America's abortion laws more "humane" on the one side and Roman Catholics on the other. Such a distortion of the real issues involved in this matter comes about, in part, because Catholic moral theology and philosophy have retained, more

than the teaching of most other religious denominations, the traditional, and until recently, unchallenged view that an abortion is the taking of the life of an unborn but, nevertheless, a real human being.

When a Catholic jurist defends the moral viewpoint of his church, he almost inevitably deepens the distortion that anti-abortion laws in America would be easily modified or repealed but for the existing or expected opposition of Catholics, acting individually and collectively. The impression may also be given that the Catholic jurist is seeking simply to translate the views of his religion into the civil law and, as is sometimes alleged, to impose them on others.

The facts and the real issues are a good deal different from the supposed or the asserted posture of the abortion question as it is being debated, on the one hand, by "liberals" who seek a more "humane" law and, on the other hand, by Catholic spokesmen. This is illustrated by a discussion of the following topics: (1) the several issues which are *not* disputed by any of the parties in the discussion about abortion laws; (2) the areas of agreement between all parties regarding the nature of the fetus; and (3) the arguments on why Anglo-American law should continue its basic public policy of discouraging abortion by making it illegal, either by criminal or civil sanctions.

I. THE NON-ISSUES

A. Peril to the Mother's Life

Every state in the union permits an abortion by authorized persons when such action is required to save the life of the mother.[1] Although the morality of such laws is open to question, participants in the current controversy over the advisability of easing the nation's laws proscribing abortion cannot cite as relevant the contention that laws in America forbid physicians from performing an abortion when, otherwise, the life of the mother would be endangered. Furthermore, it is well known that by the employment of generally available medical techniques by competent obstetricians, the dilemma of saving the life of the mother *or* the child will seldom if ever arise.[2]

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[1] See George, *Current Abortion Law: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371 (1965).

[2] See, *e.g.*, Heffernan & Lynch, *What is the Status of Therapeutic Abortion in Modern Obstetrics?*, 66 AMERICAN J. OBSTETRICS & GYNECOLOGY 335-45 (1953).

B. *Abortion Not a Substitute for Birth Control*

It is further agreed among all persons concerned with a just and fair law regulating abortion that if abortion is to be allowed by society, it is understood to be a remedy which should be available only in unusual cases and not as a substitute for the ordinary methods of birth control. Those who favor a relaxation of the law regarding abortion would, in other words, presumably endorse a program of private and public birth control clinics designed to assist women to take measures which would make an abortion unnecessary.

It should be noted in this connection that the available statistics on the financial and marital status of the women who seek an abortion in the United States are not at all satisfactory. It is simply not reliably known how many or what percentage of those seeking an abortion are unwed, poor, married, or financially secure. Consequently, it is not known to what extent the greater availability of contraceptive information and devices would diminish the need for abortion.

C. *Abortion of a Non-Viable Fetus Only*

It is also beyond contention that the advocates of a liberalized abortion law would in general permit an abortion only of a non-viable fetus. This is the position of the Model Penal Code of the American Law Institute (ALI) where it is proposed that the life of a fetus not older than twenty-six weeks may be terminated if such action can be justified because of the physical or mental health of the mother.[3] This proposed law, which is the most carefully drawn of all the proposals in this area, would not, furthermore, justify the abortion of a non-viable embryo because of pre-natal injuries to the fetus unless such injuries could be deemed to be detrimental to the mental or physical health of the *mother*.[4]

Glanville Williams, who is surely one of the most vigorous advocates of the abolition of all legal penalties for abortion, appears to feel that, since virtually no abortions are sought after a fetus is viable, a repeal of the sanctions for abortions of non-viable fetuses would almost solve the entire problem.[5]

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[3] MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962).

[4] See note 3 *supra*. For a discussion of some of the implications of the ALI proposals see Quay, *Justifiable Abortion — Medical and Legal Foundations*, 49 GEO. L.J. 173-256, 395-538 (1961).

[5] WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 146-247, at 157-59 (1957).

D. *Abortion in Rape Cases*

The frequently-cited, emotion-laden example of the need for an abortion by a woman who has been raped is also really not relevant to the discussion regarding the liberalization of America's abortion laws. No law in the United States prohibits a doctor from taking appropriate medical measures following a rape to prevent the possibility of a pregnancy. The canon law of the Catholic Church permits such measures on the ground that the rapist is an unjust aggressor and allows that the victim of such aggression may prevent the conception which might result from such conduct. This act of prevention is not abortion but rather the elimination of the possibility of conception.[6]

II. Areas of Agreement Regarding Abortion and the Nature of the Fetus

Both in public opinion and in the law of America, there is a profoundly based consensus that an embryo or a fetus has at least *some* rights. Sharp differences arise not over the nature and extent of the rights of the fetus but rather over the question of whether these rights may be totally subordinated to the rights of the mother whose body contains the fetus.

A. *Right to Inherit*

One right of the fetus that is clearly guaranteed by the law is its right to inherit *en ventre sa mere.*[7] The exercise of this right obviously depends on the live birth of the fetus; therefore, it is uncertain how much about the law's attitude toward the inviolability of the right of the fetus to survive is actually proven by the recognition, by Anglo-American law, of the right to inherit *en ventre sa mere.*

B. *Right to Compensation for Pre-Natal Injuries*

The fact that ever more frequently both statutory and decisional law recognize pre-natal injuries[8] as the basis for compensation also has dubious probative value regarding the underlying convictions of the law with respect to the right of the fetus to survive. The

[6] Most manuals on Catholic moral theology touch on this subject. See *e.g.*, McHugh, Callan & Wagner, Moral Theology (1930).

[7] See Atkinson, Wills 75 (2d ed. 1953).

[8] See Prosser, Law of Torts 354-57 (3d ed. 1964).

development of the right of an infant to compensation for pre-natal injuries does, however, at least prove that the law assumes that this right becomes inchoate or vested in a fetus even if the fetus had hardly been conceived when the injury occurred; every fetus is, therefore, *sui juris* or capable of possessing rights.

C. *Right to be Born*

Even among the most vigorous proponents of the repeal of laws forbidding abortion, there appears to be consensus that a fetus has a right to be born[9] unless its extinction can be justified by at least one of the following reasons: its birth would be detrimental to itself, to its mother, or to the family into which it would be born. The fetus, in other words, cannot arbitrarily or capriciously be deprived of its right to be born.

D. *Right to Self-Abort*

Another area of agreement in the controversy over the fairness of America's abortion laws seems to exist by virtue of the fact that the advocates of the repeal of these laws apparently would not subscribe to an arrangement by which the woman desiring an abortion could unilaterally and without the advice and consent of any other person terminate her pregnancy. The American Law Institute's proposal, for example, requires the consent of two physicians.[10] Similarly, some proponents of liberalized abortion laws recommend the arrangement operating in Sweden by which a medical-lay commission makes the decision concerning the advisability of an abortion. This same feature appeared in a recent proposal[11] made to the House of Delegates of the American Medical Association (AMA); under a plan urged upon the governing board of the AMA, a physician would be permitted to terminate a pregnancy only if two licensed physicians, neither of whom would be performing the operation, have certified in writing the circumstances that justified the abortion.[12]

There has been little, if any, speculation by the proponents of liberalized abortion laws on the question of what the law should

[9] See Leavy and Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 So. CAL. L. REV. 136-38 (1962).

[10] MODEL PENAL CODE § 230.3(3) (Proposed Official Draft, 1962).

[11] Committee on Human Reproduction, American Medical Ass'n, A.P. Dispatch, N.Y. Times, Dec. 1, 1965, p. 1, col. 2.

[12] See N. Y. Times, Nov. 29, 1965, p. 44, col. 6. See also N. Y. Times, Dec. 2, 1965, p. 24, col. 4, for an account of the vote by the AMA to defer action on a report of its Committee on Human Reproduction.

be when medical science discovers a drug which may be safely and effectively self-administered by a woman desiring to procure an abortion. All discussion on the advisability of more liberal abortion laws has, up to the present, assumed that a woman is not able, or should not be permitted, to be the exclusive decision-maker in the process of securing an abortion; an outside agency has been recommended, presumably because the state owes some duty to the unborn fetus or at least some duty to protect a pregnant woman against the consequences of her own unilateral decision — a judgment which may be made in excessive haste or fear. If any of the advocates of eased abortion laws would categorically recommend the free availability of abortifacient drugs (when they will have become safe for self-administration) the underlying position of these proponents of easier abortion laws will become much clearer. If they see no problem in permitting a pregnant woman to abort herself without the advice or consent of any other human being, then the fetus is, in this view of things, simply a quantum of protoplasm with no rights or interests, which the mother may destroy for any reason deemed valid by herself alone. Absent such a position, however, those who would defend existing legal penalties against abortion must argue against adversaries who presumably think that an unborn fetus has *some* rights which the state should protect and preserve. Furthermore, the absence of individuals or legal groups that would advocate that a pregnant woman has the complete and exclusive right to determine whether to have an abortion indicates that those who are dissatisfied with existing legislation forbidding abortion in certain circumstances have not really thought through the central problem — the nature of the non-viable fetus.

E. Additional Points of Agreement

Other areas of agreement, or partial agreement, exist between those with opposing positions with regard to legislation regulating the availability of abortion. Unfortunately these areas have not emerged in public discussions of this question. The polarization of the contending parties on the basic moral issue probably has been the major reason why little if any consensus has developed on certain legal-moral aspects of the abortion question. One of those aspects, for example, is the question of whether a married woman should have the right to secure an abortion of a non-viable fetus without the advice and consent of her husband. One could devise persuasive arguments on either side of this issue; it must be ad-

mitted, however, that if the law is to continue to promote family solidarity, it is questionable whether the law should permit a wife to dispose of an unborn child of a marriage without the knowledge, advice, or consent of her husband — the father of the child unwanted by its mother.

III. Why the Law Should Have Sanctions Against the Abortion of A Non-Viable Fetus

When one has conceded the principle that the life and rights of a non-viable fetus may be subordinated to the desires or rights of its mother or parents, one must then justify this hierarchy of rights by recourse to one or more of three reasons: (1) the welfare of the fetus; (2) the health or happiness of the mother; or (3) the over-all future of the family into which the unwanted child would be born. It may be helpful therefore to analyze each of these three reasons in the light of the justification for abortion drawn from these sources.

A. Future Welfare of the Fetus

One of the reasons regularly advanced to justify abortion is the damage or disability suffered by a fetus because of the sickness of the mother or because of some pre-natal disease contracted by the fetus itself. The assumption is, of course, that it is better to terminate the life of a future person if it is certain (or highly probable?) that he will be seriously deformed, physically or mentally. The proponents of this position do not seem to limit their advocacy of this measure to only those infants who would be forever pitiable, "sub-human" creatures incapable in any way of developing into a fully human person. The thrust of the argument of those who recommend the elimination of defective embryos reaches all future children whose development may have been harmed by the mother taking a drug like thalidomide, contracting German measles, or suffering any other of the known medical conditions which can adversely affect a fetus.[13]

No one can deny the laudable humanitarian intentions of those who seek, by the elimination of anti-abortion legislation, to prevent the birth of those persons who, because of serious pre-natal injuries, cannot enjoy a normal life. At the same time, however, to concede that the life of the fetus, disabled through no fault of its

[13] See St. John-Stevas, The Right to Life (1964).

own or of its mother, may be extinguished because it might not attain complete physical or intellectual development is to concede either (1) that the non-viable fetus is really *not* the repository of any inviolable rights or (2) that the strong and dominant members of society may extinguish or terminate the life of those individuals whose physical or mental development may, in the judgment of society, be so substantially arrested that they cannot attain a life worth living.

Clearly no advocate of easier abortion laws will concede the second of these alternatives. He will resist and reject any imputation that by permitting abortion he is by implication permitting infanticide, euthanasia, "mercy-murder," or anything else in the "parade of the horribles" not unknown in the rhetoric of the defenders of existing laws forbidding abortion. But can one logically and realistically claim that a defective non-viable fetus may be destroyed without also conceding the validity of the principle that, at least in some extreme cases, the taking of a life by society may be justified by the convenience or greater over-all happiness of the society which takes the life of an innocent but unwanted and troublesome person?

It is submitted that it is illogical and intellectually dishonest for anyone to advocate as morally permissible the destruction of a defective, non-viable fetus, but to deny that this concession is not a fundamental compromise with what is surely one of the moral-legal absolutes of Anglo-American law — the principle that the life of an innocent human being may not be taken away simply because, in the judgment of society, non-life for this particular individual would be better than life.

It is intellectually dishonest to maintain that a defective, non-viable fetus may be destroyed unless one is also prepared to admit that society has the right to decide that for certain individuals, who have contracted physical and/or mental disabilities, non-existence is better than existence. The advocate of abortion who bases his position on the ground that this is best for the fetus would no doubt shrink from this extension of the principle by which he justifies abortion; he would retreat to the familiar ground that the non-viable fetus is not even *medically* a person and, hence, does not possess the same right to survive enjoyed by a human being who has lived outside the body of its mother. But does this distinction really make a difference? Is there any real moral or ethical difference between prenatal and post-natal life? And is it not possible that medical discoveries will show more and more that fetal life is different from

post-natal life only in degree and not in kind? Furthermore, if medical science makes it possible for a fetus to be viable at a time much earlier than the present moment of viability, will the advocates of the abortion of the defective fetus eliminate the distinction that only the non-viable fetus may be aborted?

Abortion performed for the asserted future welfare and happiness of a defective fetus cannot be justified morally or ethically except by the use of a principle which, however attenuated, leads logically to the validation of the termination by society of the life of an innocent but unwanted person. If one does not shrink from that consequence, the discussion has to be extended to a much broader base. But, it is submitted, it is intellectual dishonesty for anyone to advocate the destruction of a defective non-viable fetus without being prepared to accept the far-reaching consequences of the principle which justifies the termination of pre-natal life.

B. Health or Happiness of the Mother

(1) A Mother's Health and Abortion.—As previously noted,[14] all states permit a therapeutic abortion in order to save the life of the mother. Although there is no meaningful decisional law on this matter, it is clear that this policy allows a physician to make the indisputably moral judgment that the life of the mother is to be preferred over the life of her unborn child. It could be argued that, since the law permits physicians to act upon their own moral judgments when a mother's life is at stake, the law should logically permit physicians to make similar moral judgments when the mother's future health, rather than her survival, is in question. If this line of reasoning is correct, it may be that those who oppose the legalization of abortion must urge that the right of physicians to perform an abortion to save the life of a mother be either abrogated or logically extended to a granting of permission to perform an abortion in order to save the health of the mother. On the assumption which permeates the case of those seeking the legalization of abortion — that society should concentrate on the quality, rather than the quantity, of life it preserves — there would seem to be no reason why a doctor should *not* be allowed to preserve the health of the mother by performing an abortion.

The medical hypothesis running through this line of argumentation is, of course, open to question. Assuming reasonably mod-

[14] See note 1 *supra* and accompanying text.

ern medical techniques, in how many instances is it likely that the birth of a child will permanently impair the *physical* health of a mother?

Some cases, of course, do exist where the continuation of a pregnancy may bring about a substantial risk, not to the mother's life, but rather, to her future physical health. If there is an inherent right in basic justice for a mother in this situation to request an abortion — and this case is probably the most appealing and compelling reason for a justifiable abortion — how should the law regulate the exercise of this right? The various proposals for changes in America's law regulating abortions silently suggest that the mother's right not to have her health impaired is paramount in this instance and that the state has no duty to speak for, or to protect, the fetus. However appealing such a solution may appear, its implications and consequences need examination.

Every married couple possesses a moral and a legal right to privacy from any undue interference from the state. This right, emphasized by the United States Supreme Court in *Griswold v. Connecticut*,[15] involving the Connecticut birth control statute, should be as broad and as inclusive as is consistent with the good of society. The right to have, or not to have, children and to determine the number of such children are matters in which the state, by general agreement, should not interfere. The welfare of children born to any marriage, however, is, by equally general agreement, a matter of grave concern for the state. Recent controversies over the advisability of statutes designed to curb the physical abuse or the battering of children by mentally upset or emotionally disturbed parents indicate that society feels a deep responsibility to protect children even at the expense of restricting the right to privacy enjoyed by married couples.

For at least a century and a half, this same concern of society and the law for children too young to speak for themselves has been extended to the unborn child by Anglo-American law. The law has taken the position that a married couple may refrain from having children or may restrict the number of their children[16] but that a child, once conceived, has rights which its parents may not extinguish, even if the parents seek only to prevent a permanent impairment of the physical health of the mother.[17]

[15] 381 U.S. 479 (1965).

[16] Only Massachusetts bans the use of contraceptives. See MASS. GEN. LAWS ANN. ch. 272, §§ 20, 21 (1956).

[17] See note 1 *supra*.

Once again, the advocates of the right of a mother to an abortion, when confronted with the interest of the state in the child, born or unborn, will take refuge in the medically questionable and logically indefensible position that the unborn child is so different from a child after birth that the state has no right to interfere with a mother's desire to extinguish the life of her unborn child. It appears, however, that if Anglo-American law is to retreat from its present position of extending some, not total, protection to the fetus, it must logically say that the right to marital privacy precludes state interference with an abortion or that the non-viable fetus is not yet sufficiently a human being to merit the protection of the law.

The advocates of the abolition of anti-abortion laws will no doubt urge, as one of the principal arguments, the right to marital privacy as that right is explained in the *Griswold* decision. It is submitted, however, that even the broadest dicta in *Griswold*, and even the most sweeping language in other judicial decisions on the right to marital privacy, do not justify the exclusion of the interest of the state *after* a child has been conceived but not yet delivered. It may be, of course, that courts in the future will extend the right of marital privacy to exclude state interference with an abortion decided upon by a couple. But such a decision would be entirely different from existing decisional law and would, at least logically, have to reject the underlying assumption of present laws forbidding abortion which is, of course, that a non-viable fetus has an inherent and inviolable right to be born even if it is physically or mentally defective and even if its birth results in the impairment of the physical health of its mother.

(2) A Mother's Mental Health or Happiness and Abortion.— The various proposals designed to liberalize America's abortion laws, including that of the American Law Institute (ALI),[18] do not attempt to restrict the right to have an abortion to women who might otherwise have an impairment of their *physical* health. Those who would ease existing abortion laws recognize the fact that physical and mental health are so interdependent that it would be unrealistic to state that an abortion is allowable only for threatened damage to *either* the physical *or* mental health of the mother.

In evaluating the meaning and scope of mental health, however, many problems arise. The legislative history of the section

[18] See note 3 *supra.*

on abortion of the Model Penal Code of the ALI[19] suggests that the term "mental health" is not meant to be used in the proposed law in a narrow or technical sense but rather in a comprehensive way which would permit two physicians to authorize an abortion if in their judgment an operation of this nature would be best for the long-range happiness of the mother. Hence, the term "mental health" of the mother is not intended to be restricted to cases where there is a diagnosis that severe mental depression or some similar psychiatric phenomenon will follow childbirth.

Therefore, in view of the broad authorization which would result if the mental health of the mother became a norm for judging the advisability of abortions, it may be that the married and unmarried mother should be treated differently.[20]

(3) Mental Health of Unwed Mothers.—There is not much scientifically compiled information available on the number and nature of unwed mothers in America. Even less is known about those unwed mothers who terminate their pregnancy by an abortion.[21] As a result, any writer moves into a sea of ambiguities when he attempts to analyze the factors involved in reaching a prudential judgment on the question of whether more relaxed abortion laws would promote the mental health of unwed mothers. Among the many factors which should be weighed in coming to a decision regarding the basic legal-moral policy which America should adopt with respect to the availability of abortion for unwed mothers are the following.

(a) Promiscuity Among Single Persons.—To what extent would more relaxed abortion laws promote promiscuity among single persons?

(b) Adoption of Children of Unwed Mothers.—Should law and society give greater consideration to childless couples (one out of ten) who seek an adoptable child? If so, should the nation's public policy tend to encourage unwed mothers *not* to destroy their unborn child but to arrange that the child be born and placed for adoption?

(c) Guilt Feelings of the Unwed Mother.—Who is to assess

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[19] MODEL PENAL CODE § 207.11, comment 3 (Tent. Draft No. 9, 1959).

[20] For a discussion of the mental health of married mothers see text accompanying note 22 *infra.*

[21] See GEBHARD, POMEROY, MARTIN & CHRISTENSON, PREGNANCY, BIRTH AND ABORTION (1958).

the nature and the consequences of the guilt which, according to reliable and virtually universal reports, comes to an unwed mother who resolves her problem by abortion? If accurate psychiatric testimony showed that the vast majority of unwed mothers who abort their child experience guilt that may have adverse consequences in their lives and their future marriages, would society be morally obliged to counsel unwed mothers about the likelihood of guilt before an easy method of abortion were made available to them? If, in other words, the mental health of the mother is to be the norm by which the advisability of an abortion is to be judged, then the assessment of an unwed mother's prospective mental health following an abortion must include the most careful and comprehensive evaluation of the impact which a feeling of guilt may have on her life.

(d) "Happiness" of the Unwed Mother.—Since the term "mental health" in the Model Penal Code of the American Law Institute[22] actually translates into "happiness," how and by whom is this broad norm to be interpreted and applied, not merely to the present predicament of the unwed mother but, more importantly, to her entire future life?

Some may object to the relevance of some or all of these factors and urge that the desire of the unwed mother for an abortion should be controlling. As much as one must be sympathetic to this apparently simple solution to a most difficult problem, it should never be forgotten that in modern society the unwed mother is in a position of shame, humiliation, and anguish which is possibly worse than any other human predicament. One may feel that society's attitude of disdain towards the unwed mother is one of hypocrisy, but the fact remains that the pressures and problems confronted by an unwed mother are such that it is not likely that she will be in a position to make rational decisions substantially uninfluenced by fear or panic. Society, therefore, has a very special and unique duty to furnish the most careful counselling to unwed mothers before it allows them to employ a legally approved method of abortion.

The various proposals to modify or repeal anti-abortion laws in America do not distinguish between married and unmarried mothers with respect to the reasons and the procedures by which an abortion would be sanctioned. In view of the very different problems faced by unwed mothers, it is submitted that any new law regulating abortion should take these factors into consideration.

[22] See note 19 *supra* and accompanying text.

IV. The Welfare of Families and Abortion

One of the recurring ideas in the literature recommending a liberalization of abortion laws is the concept that the coming of an unwanted child into a family may tend to disrupt the relationship of the husband and wife and destroy the unity and solidarity of the family. A persuasive article by an anonymous mother who secured the abortion of an unwanted child, published in the *Atlantic Monthly*,[23] sets forth in a dramatic manner the argument that parents have a right and duty to plan their families, even to the extent of terminating an unplanned pregnancy.

There exists a growing consensus in America that couples should be assisted by private and public agencies in the planning of their families. Differences over the morality of various methods of birth control center on means, rather than on ends.

There is a serious question, however, whether there exists a consensus which would support a public policy permitting a married mother to secure an abortion for an unplanned and unwanted pregnancy. Even to discuss such a question requires that one delve into the question of the origins or sources of public policy in America. Who or what groups, and for what reasons, should supply the guidelines for the shaping of the fundamental legal-moral policies underlying American law?

V. Conclusion

It is submitted that no logically defensible or rational change of a substantial nature can take place in America's abortion laws unless the proponents of less strict sanctions against abortion confront and resolve the issue underlying all the other issues: what or whose moral values should the law endorse and enforce?

America's laws against abortion derive in large part from the concept of the sacredness and the inviolability of every human being. This concept of the non-violability of the human person clearly has many of its most profound roots in the Judeo-Christian religious tradition. That tradition, in fact, is probably the principal source of Anglo-American criminal law. Not all of the elements of that religious tradition are, of course, incorporated or embodied in the criminal laws of England and America; but the essence or the most fundamental principles of that tradition *are* an inherent part of Anglo-American criminal law. And any change of a sub-

[23] Atlantic Monthly, Aug. 1965, pp. 66-68.

stantial kind in America's abortion laws would be a notable departure from that body of Anglo-American law which regulates conduct deemed to constitute a crime against society.

No one can reasonably insist that *all* of the actions now penalized by law should remain as they are. On the other hand, no one, presumably, desires to scuttle the entire fabric of Anglo-American criminal law. But, it is submitted, no one can take a position (allegedly between these two extremes) which advocates abortion without inevitably sanctioning a basic compromise of principle — a compromise which could undermine the very foundations of Anglo-American criminal jurisprudence.

The integrity, the untouchableness, the inviolability of every human life by any other human being has been the cardinal principle and the centerpiece of the legal institutions of the English-speaking world and, to a large extent, of every system of law devised by man. However convenient, convincing, or compelling the arguments in favor of abortion may be, the fact remains that the taking of a life, even though it is unborn, cuts out the very heart of the principle that *no one's* life, however unwanted and useless it may be, may be terminated in order to promote the health or happiness of another human being. If the advocates of legalized abortion desire to have an intellectually honest debate about the fundamental change they seek in the moral and legal standards of American life, they should not fall back on the error of fact that a fetus is not a human being. They should, rather, face the fact that they are stating that the rights of one or more human beings to health or happiness may in some circumstances become so important that they take precedence over the very right to exist of another human being.

The inescapable moral issues in the emerging struggle over the wisdom and fairness of America's abortion laws deserve to be discussed and dissected and eventually resolved. It will be a tragedy beyond description for America if the question of legislation on abortion is resolved on sentiment, utilitarianism, or expediency rather than on the basic ethical issue involved — the immorality of the destruction of any innocent human being carried out by other human beings for their own benefit.