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RELIGION, MORALITY, AND ABORTION: A CONSTITUTIONAL APPRAISAL

by Mr. Justice Tom C. Clark*

*Thought without action is an abortion;
action without thought is folly.¹*

Our society is currently in the midst of a sexual revolution which has cast the problem of abortion into the forefront of religious, medical, and legal thought. In my day at the bar all discussion of abortion was taboo. For more than sixty years the American Medical Association had a negative policy respecting abortion. The A.M.A. often sought the prosecution of any doctor who engaged in the practice of abortion, regardless of the merits of the individual situation. Society's general attitude toward abortion was such that the patient was ostracised and the doctor was disgraced. As in so many other facets of its moral code, however, society was hypocritical in its behavior. Despite the public pronouncements against its practice, abortions increased, especially among married women, and judicial action against the participants decreased in proportion.²

Some social commentators argue that Freud prepared the way for the Kinsey Report, which in turn set the stage for the sexual permissiveness that Reinhold Niebuhr called "moral anarchism."³ This permeating permissiveness engendered a need for more efficient birth control methods, such as "the pill," and precipitated the doom of the old hypocrisy.

The law, lagging behind as usual, began to emerge from its quagmire and rid itself of the archaic restraints on abortion. In 1962 the American Law Institute proposed an affirmative policy declaring that the termination of pregnancy is justified whenever (1) its continuance would gravely impair the physical or mental health of the mother, (2) the child would be born with grave physical or mental defects, or

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¹ *The Wisdom of Nehru*, 34 WISDOM 62 (The Wisdom of India ed. 1960).

² R. THOMLINSON, POPULATION DYNAMICS 198-99 (1965).

³ Niebuhr, *Kinsey and the Moral Problem of Man's Sexual Life*, in AN ANALYSIS OF THE KINSEY REPORTS ON SEXUAL BEHAVIOR IN THE HUMAN MALE AND FEMALE 62 (D. Geddes ed. 1954).

(3) the pregnancy was the result of rape, incest, or other felonious intercourse.⁴

Within five years of this proposal, the A.M.A. reversed its negative policy and adopted the A.L.I. proposal with only a few nuances.⁵ During the next two years, five states liberalized their abortion laws and adopted the A.L.I. proposal.⁶

A further liberalization occurred in Great Britain with the adoption of the 1967 Abortion Act, which permits doctors to consider the mother's "actual or foreseeable environment" in deciding whether an abortion is necessary.⁷ The American College of Obstetricians and Gynecologists (A.C.O.G.) recently advocated enactment of similar legislation in this country.⁸ While the permissiveness of the legislation would contradict existing laws in all states, the A.C.O.G. made it clear that it does not counsel disobedience to the law. It merely recommended liberalization and repeal of inconsistent laws. It did not, however, advocate the legalization of abortion for any unwanted pregnancy or as a population control device.

Various religious, medical, psychological, and legal organizations have been striving to reach some level of accord on the issues involved in promulgating a realistic and acceptable policy toward abortion. Emphasis on this topic is the result of many factors, including the chaotic state of thinking that prevails among the professions and the public, and the medical, emotional, and legal consequences which aborticide has on today's society.

The Christian Medical Society's symposium on controlling human reproduction provides a recent illustration of the disagreement that exists among professionals concerning abortion. Distinguished clerics, psychologists, doctors, and lawyers sought to determine what course of action should be followed. They were unable to answer many important questions, such as: Is the control of human reproduction against the will and spirit of God? At what stage of the gestation period does the fetus acquire human status? What are the constitutional limitations upon the State in prohibiting or limiting the control of

⁴ MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962).

⁵ Committee on Human Reproduction, *AMA Policy on Therapeutic Abortion*, 201 J.A.M.A. 544 (Aug., 1967).

⁶ CAL. HEALTH & SAFETY CODE §§ 25950-54 (West Supp. 1967); COLO. REV. STATS. 40-2-50 (Perm. Cumm. Supp. 1968); GA. CODE ANN. § 26-1202 (effective July 1, 1969); LAWS OF MD. ch. 470 (Supp. 1968); N.C. GEN. STAT. § 14-45.1 (Supp. 1967).

⁷ Abortion Act 1967, c. 87, at 2033.

⁸ *Just How Great Are the Risks of The Pill?*, MEDICAL WORLD NEWS, May 24, 1968, at 23.

reproduction? I ask myself, "Heaven knows; who can tell? Who shall decide when experts disagree?" These and many other questions must be answered if we are to attain our goal of an aborticide policy that is responsive to modern society's needs and desires.⁹

In a recent conference the Association for the Study of Abortion experienced far greater success in agreeing on an aborticide policy. Dr. Robert Hall, President of the Association, said that the conference was designed to "relate what we know about abortion, and to determine what, if any, extent our attitude toward abortion should change with changing times. . . ."¹⁰ The conference reviewed numerous reports dealing with present abortion laws. One of these reports concerned the effect of California's recently liberalized abortion law. It was noted that while the number of therapeutic abortions performed in California hospitals this year will rise from six hundred to about four thousand, there will continue to be some one hundred thousand illegal abortions performed in that state, because doctors are concerned about risking a prison sentence for an incorrect interpretation of ambiguous provisions of the liberalized law.¹¹ The conference was also informed that psychiatrists and physicians in various states were referring patients to doctors in states which have more liberal abortion laws. This practice renders the availability of legal abortion dependent upon the woman's ability to reach such states.¹² Many doctors admitted privately that they and most of their non-Catholic colleagues perform several illegal abortions each month. Kenneth R. Whittemere reported that his recent interviews revealed that in one small Southern city, women had a choice between "a chiropractor, an antique dealer, a mid-wife, a mechanic and a doctor dissatisfied with his profession to perform the operation."¹³

The Association reached an almost unanimous conclusion that all abortion laws should be abolished and that the right of childbirth should

⁹ The theological and medical scholars did agree on *A Protestant Affirmation*. It did not undertake to answer any of the questions posed in the text. In substance, the consensus concluded that as to abortion "each case should be considered individually, taking into account the various factors involved and using Christian principles of ethics." It suggested that suitable cases for abortion would fall within the scope of the A.C.O.G. statement, but not including abortion for convenience only or on demand. See CHRISTIAN MED. SOC'Y J. (Nov.-Dec., 1968).

¹⁰ Meeting of the Ass'n for the Study of Abortion, Hot Springs, Va., Nov. 18, 1968, reported in N.Y. Times, Nov. 24, 1968, at 77, col. 1.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

be left to each woman acting on the advice of her doctor. This would have the effect of removing the issue from the hands of the legislatures and the courts, which are virtually helpless to decide an ethical question as controversial and far-reaching as abortion.¹⁴ Whether or not we agree with the Association's recommendations, it is readily apparent at this point that a uniform scheme concerning abortion is highly desirous.

Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of "ensoulment" or "personhood," *i.e.*, the time at which the fetus becomes a human organism. The Reverend Joseph F. Donseel of Fordham University admitted that no one can determine with certainty the exact moment at which "ensoulment" occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place.¹⁵ Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, *i.e.*, able to support itself outside the womb. In balancing the evils, the latter conclude that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth.¹⁶

Most civilizations of antiquity prohibited the practice of abortion. Ancient Judaism prohibited birth control except in times of famine.¹⁷ Assyrian law imposed the death penalty upon any person participating in an abortion, including the procurer.¹⁸ Even pagan writers described abortion as an evil act prohibited by law.¹⁹

The New Testament is devoid of pronouncements bearing directly on the issue of birth control or abortion. The Old Testament, however, does not condemn abortion as a capital offense since the fetus was not regarded as possessing a soul within the Sixth Commandment

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ For studies in this area see L. EPSTEIN, *MARRIAGE LAWS IN THE BIBLE AND THE TALMUD* (1942); L. EPSTEIN, *SEX LAWS AND CUSTOMS IN JUDAISM* (1948).

¹⁸ H. SAGGS, *THE GREATNESS THAT WAS BABYLON* 215 (1962).

¹⁹ PAULY'S *REAL-ENCYCLOPÄDIE DER CLASSISCHEN ALTERTUMSWISSENSCHAFT* (Wissowa ed. 1962).

proscription.²⁰ It does declare, however, that conception is a gift of God which can be withdrawn at His will.²¹ Many theologians today argue that man must not destroy what God has created and that aborting a pregnancy destroys the gift of human life.²²

The medical profession is far from agreeing on the time at which the fetus becomes a human life. Some physicians argue that abortion should be permitted with impunity at any time up to the sixth month of pregnancy since prior to that time the fetus is no more than a growing plant.²³ On the other hand, many eminent physicians believe that the fertilized ovum has human life from the time of conception.²⁴ In support of this argument they refer to the International Code of Medical Ethics, which states that a physician will maintain the utmost respect for human life, from the time of its conception. A third view is that the decision to terminate a pregnancy must be made according to the circumstances of the particular case. Among the factors to be considered are the duration of the pregnancy, the physical and mental health of the mother, and the risk of serious fetal abnormality. This places the burden of decision upon the doctor and renders the selection of the physician a governing factor in securing permission to perform a therapeutic abortion.²⁵

Sociologists have found themselves in a similar quandary over the issue. Some of these social philosophers argue that man is not merely a chemical machine and that he possesses a soul from the earliest stages of fetal development. Therefore the fetus cannot be destroyed with impunity. The control of human reproduction, according to this view, should concentrate on the prevention of conception rather than on abortion.²⁶ Other sociologists believe that there is no conclusive evidence or persuasive argument that the fetus is human.²⁷ Indeed,

²⁰ *Exodus* 3:21.

²¹ *Genesis* 1:28, 4:1, 11:30; *Ruth* 4:13.

²² Montgomery, *How to Decide the Birth Control Question*, CHRISTIANITY TODAY, March 4, 1966, at 10.

²³ Stein, *The Issue of Legalized Abortion*, 88 CAN. MED. ASS'N J. 899 (1963); J. FLETCHER, MORALS AND MEDICINE 152 (1967); address by E. Bidinton, Symposium of Christian Medical Society, Aug., 1968.

²⁴ See generally PHILOSOPHY AND ETHICS IN MEDICINE (M. Gelfand ed. 1968).

²⁵ See *Therapeutic Abortion*, 98 CAN. MED. ASS'N J. 512 (1968).

²⁶ R. ETTINGER, THE PROSPECT OF IMMORALITY 132 (1962). But see Hudeczek, *De Tempore Animatianis Foetus Humanis Secundum Embryologiam Hodiernam*, in XXIX ANGELICUM 162-81 (1952). See also *Cyronics and Orthodoxy*, XII CHRISTIANITY TODAY 816 (1968).

²⁷ Address by John Scanzoni, Ph.D., Assoc. Prof. of Sociology, Indiana Univ., Nat'l Convention of Christian Medical Society, Aug., 1968.

it cannot interact with other human beings. Therefore, there is no proof of life in the sense that the law contemplates proof of fact.

The moving spirit of the times also raises moral issues that divide the disciplines within themselves. A group of one hundred psychiatrists were questioned on the morality of abortion.²⁸ Twenty-four agreed that abortion should be available upon demand at an appropriate stage of pregnancy. Fifty-six, however, would require consideration of all of the medical and social factors involved in each case before deciding whether to terminate the pregnancy. Sixteen of those questioned would abort only when actual or threatened maternal disaster was present. Only four expressed other views. While this indicates a vast departure from the Christian concept, it does reveal residuals of morality affecting the opinions of over two-thirds of the group. In other words, over two-thirds of the group would not abort a pregnancy solely on demand.

Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that "moral predilections must not be allowed to influence our minds in settling legal distinctions."²⁹ This is illustrated by the fact that the present change in attitude toward abortion has developed while the need for abortion has diminished as a technique to save the life or health of the mother or to prevent fetal deformities. Despite the medical developments, the demand for abortions has increased astronomically.³⁰ This indicates a definite change in social mores, which is undoubtedly the result of increased knowledge and use of abortion. This attitude of permissiveness is replacing the hypocrisy that prevailed in the last generation.

A major contributing factor to this change in attitude has been the growing antagonism toward the double standard which permits those with social status and financial ability to obtain abortions, while those in the lower social and economic classes are denied this opportunity. We are in the midst of a worldwide movement to make "the pill" and abortion available in the slums as well as on Fifth Avenue. The statistics illustrate the disparity between the affluent and the nonaffluent. Three counties surrounding San Francisco are relatively affluent. These counties account for sixteen per cent of the live births and fifty

²⁸ Howells, *Legalizing Abortion*, 1 LANCET 728 (1967).

²⁹ O. W. HOLMES, *THE COMMON LAW* (1881).

³⁰ *The Cost of Life*, 60 PROCEEDINGS OF ROYAL SOC'Y OF MEDICINE 1235 (1962); Cogan, *A Medical Social Worker Looks at the New Abortion Law*, 2 BRITISH MED. J. 235 (1968).

per cent of the abortions in California. The less affluent Los Angeles County with its widespread slum areas accounts for sixty per cent of the live births and twenty-three per cent of the abortions in California.³¹ These facts demonstrate quite clearly that the affluent areas account for a number of abortions disproportionate to their population density.

The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute. It appears that doctors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability. Very few states, if any, will repeal all abortion laws as the Association for the Study of Abortion has recommended. Some states, however, may liberalize their laws in accordance with the A.L.I. suggestion, but we have already seen that in states such as California this is an inadequate remedy in many respects. If the medical profession is to be accorded complete protection, it will have to come through the judicial system.

The Supreme Court of the United States has gone far—some critics contend too far—in permitting individual action in the areas of the Bill of Rights. It has not, however, dealt directly with the problem under discussion, nor do the decided cases cast much light on its solution. The best that we can do is examine related areas and draw some analogies.

In 1922 the Court held that the right “to marry, establish a home and bring up children” was an essential liberty within the guarantees of the Fourteenth Amendment.³² In 1925 a public school statute requiring attendance exclusively at state schools was declared unconstitutional on the ground that it unreasonably interfered “with the liberty of parents and guardians to direct the upbringing and education of children under their control.”³³ This concept was later extended to include “the private realm of family life which the state cannot enter.”³⁴ And in 1960 the Court declared, in very broad language, that where State action significantly encroached upon personal liberty, its action would be invalid unless the State had a compelling subordinating interest in the particular activity.³⁵ Finally, in *Griswold v. Connecticut*³⁶ the Court struck down the state’s statute prohibiting the use of con-

³¹ N.Y. Times, Nov. 24, 1968, at 77, col. 1.

³² *Meyer v. Nebraska*, 262 U.S. 390 (1923).

³³ *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

³⁴ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

³⁵ *Bates v. Little Rock*, 361 U.S. 516, 524 (1960).

³⁶ 381 U.S. 479 (1965).

traceptives. The statute was found to operate upon "an intimate relation of husband and wife" which came within the zone of privacy created by several fundamental constitutional guarantees, the penumbras of which gave protection to the sanctity of a man's home and the privacies of his life. The Court determined that the statute was aimed at use rather than regulation and therefore violated the principle that legislation must not be unnecessarily broad. This does not mean that judges are given a free rein to strike down state regulatory statutes. They must look to the collective conscience of our society in determining which rights are fundamental and therefore protected by the Constitution.

The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution. No one will deny that a State has a valid interest in regulating the well-being of its inhabitants, especially when it is dealing with children, who are more susceptible to undesirable influences. We have also seen that a State may not unreasonably interfere with the intimate relations of its inhabitants. When deciding on the constitutional restraints imposed on a State's interference with individual rights, the vital question becomes one of balancing. It must be determined at what point the State is interfering with individuals and at what point it is exercising valid authority by regulating the well-being of children.

In his concurrence in *Griswold*, my brother Goldberg asked whether a decree requiring all husbands and wives to be sterilized after the birth of ten children would be valid. He answered the question in the negative.⁸⁷ But suppose that the husband and wife voluntarily submitted to sterilization. Would it then violate the Constitution? I think not. Does it therefore follow that voluntary destruction of the fetus is also protected from interference by the State? Perhaps—unless life is present so that the State's compelling subordinating interest in the life of one of its people predominates. However, I submit that until the time that life is present, the State could not interfere with the interruption of pregnancy through abortion performed in a hospital or under appropriate clinical conditions. I say this because State interfer-

⁸⁷ *Id.* at 482.

ence is permissible only if reasonably necessary to the effectuation of a legitimate and compelling State interest.³⁸ Prior to the time that life is present in the fetus, what interest does the State have? Procreation is certainly no longer a legitimate or compelling State interest in these days of burgeoning populations. Moreover, abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?

The common law courts uniformly held that an infant could not be the subject of a homicide until its complete expulsion from the body of the mother and the establishment of an independent existence.³⁹ The distinction between fetal life and independent life is that the latter has an independent circulatory system.⁴⁰ Hence, where the evidence showed that an infant was killed before its birth was complete or was killed by means used to assist in its delivery, it was not deemed a homicide.⁴¹ Therefore, under the common law, abortion could not be murder. These concepts and distinctions have been somewhat eroded in recent years. At present the courts do not agree on the time when life begins. The courts, however, have held an *accoucheur* responsible for prenatal brain damage to an infant in a viable state.⁴² In this line of cases, the courts have found that the unborn infant was a separate biological entity and hence a legal one in contemplation of law, indicating a departure from the requirement of an independent existence. From this reasoning the courts may well take the unborn child into their protective custody. Indications of such a trend are illustrated by the abolition of the viability rule in some jurisdictions⁴³ and the repudiation of the "live birth" doctrine by fourteen states.⁴⁴

To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm

³⁸ *Id.* at 503 (concurring opinion).

³⁹ *Morgan v. State*, 148 Tenn. 417, 256 S.W. 433 (1923).

⁴⁰ *State v. Prude*, 76 Miss. 543, 24 So. 871 (1899).

⁴¹ *Evans v. State*, 48 Tex. Cr. App. 589, 89 S.W. 974 (1905).

⁴² *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

⁴³ See PROSSER ON TORTS (3d. ed. 1964).

⁴⁴ Del Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death*, 15 RUTGERS L. REV. 61 (1960).

meets egg life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs.⁴⁵ No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life.

It has been urged that the courts are the proper forum to determine when life begins. I submit, however, that the professionals are better able to determine when life begins than are the courts. Tort cases might cast some light on the issue,⁴⁶ but I would prefer that the courts yield to the expert testimony of doctors. This testimony would vary greatly, but that is nothing new to our judicial system.

This is not a question that will be easily resolved. Few questions that reach the Supreme Court are. As was stated at the Christian Medical Society's Symposium, "professionals . . . do not wish to play God with human lives, whether in being or inchoate with life. But we can inform our judgment . . . by the widest interchange, airing and consensus. Humility is a large part of every professional's code."⁴⁷ It must be remembered that many imponderables are a part of Supreme Court adjudications.

Accommodation of conflicting doctrine is more difficult to achieve in the judicial than in the legislative process. Courts cannot reach out to reform our society. A problem comes to the Court in the form of a justiciable issue and is narrowly drawn, rendering the Court's ruling contracted and finespun. Legislatures, on the other hand, have such facilities for investigation as hearings and may address themselves to the necessities of broad social needs and the correction of evils, both probable and existing. As Mr. Justice Cardozo said, "Legislation can eradicate a cancer, right some hoary wrong, correct some definitely established evil, which defies the feebler remedies, the distinctions and the fictions familiar to the judicial process."⁴⁸

⁴⁵ Schwartz, *Abortion and 19th Century Laws*, TRIAL June-July, 1967, at 41.

⁴⁶ *Kwaterski v. State Farm Mut. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966). *Contra*, *Norman v. Murphy*, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); *Marko v. Philadelphia Transp. Co.*, 420 Pa. 124, 216 A.2d 502 (1966).

⁴⁷ Prof. Thomas Lambert, Jr., Editor-in-Chief, American Trial Lawyers Ass'n, former Prof. of Law, Boston Univ.

⁴⁸ B. CARDOZO, *GROWTH OF THE LAW* 134 (1924).

The courts work on a case-by-case system which deals with the past rather than the future. Society would not have the benefit of the sweeping effect of a statute, nor would the doctor have the protection that he is entitled to receive. The case method would be slow, expensive, and possibly disastrous. It is for the legislature to determine the proper balance, *i.e.*, that point between prevention of conception and viability of the fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights.

The present climate seems favorable for immediate legislative action. Five states have already led the way.⁴⁹ With appropriate action, many more will follow suit in liberalizing their abortion laws. But this process will take less talk and more action. As Nehru once said:

I am tired of people who merely talk about things. However wise you may be, you can never enter into the spirit of a thing if you only talk about it and do nothing. Even scientists have a tendency to let a wonderful experiment remain an experiment once it has been performed. The next stage somehow does not come. They may well say that the next stage is somebody else's job, but I think if the scientist had a sense of practical application, he would either try to do it himself, or get somebody else to do it. This association of thought with action is, I think, of utmost importance. Thought without action is an abortion; action without thought is folly.⁵⁰

⁴⁹ Georgia, Maryland, North Carolina, California, and Colorado.

⁵⁰ WISDOM, *supra* note 1.