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Charles E. Rice
Notre Dame Law School, charles.e.rice.1@nd.edu

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ISSUES RAISED BY THE ABORTION RESCUE MOVEMENT

Charles E. Rice*

The civil rights protests of the fifties and sixties taught the nation about the relation of the enacted law to the higher law of justice. Though less favorably publicized, the abortion rescue movement provides another such teaching moment today. As with the civil rights protests, the abortion rescue movement involves ordinary people putting their bodies on the line—and in jail—to vindicate their conception of justice. The rescue movement raises issues that transcend the question of whether one approves or disapproves of abortion. This paper examines what society might learn from the Operation Rescue movement about the weaknesses of our law.

A Newsweek commentary entitled *Operation Rescue* captured the movement's essence:

> Abortion is the most painfully divisive issue in American public life, and after years of relative dormancy, it shows signs of erupting again. The pro-life movement has discovered and adopted a key tactic of the civil-rights movement of the '60s: nonviolent disobedience of the law. Spearheaded by evangelical preachers like Jerry Falwell in tactical alliance with militant Roman Catholics, the right-to-lifers aim at a national movement in the next few years, dramatic and disruptive enough to force the adoption of a right-to-life amendment to the Constitution. Whatever the outcome, the nation seems headed for a wrenching new confrontation over the old questions: When does life begin, and how sacred is it? What are a woman's rights to what is in her womb?[1]

Operation Rescue has dramatized the abortion issue as previous efforts have not.[2] The movement's grass roots nature provides one explanation.

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* Professor of Law, Notre Dame Law School. This article is based on the Twenty-Sixth Donahue Lecture delivered at Suffolk University Law School on November 3, 1988.

1. Martz, *The New Pro-Life Offensive*, NEWSWEEK, Sept. 12, 1988, at 25.

2. *See id.* The Newsweek article describes the movement's national sweep as follows:

> The new tactics have been tested in a rash of abortion protests in recent months, from Cherry Hill, N.J., and the New York City area to Pittsburgh, Chicago and Tallahassee, Fla. But the most dramatic actions have come in Atlanta, where a protest organized for the Democratic National Convention in July turned into a semipermanent demonstration to make Atlanta "the Selma of the pro-life movement." In dozens of "rescue actions" at abortion clinics, protesters from as far away as Anchorage have blocked access to the facilities, harassed doctors and nurses and tried to persuade pregnant women that "Abortion is murder . . . Don't kill your baby." So far, 754 people have been arrested. Many refused to give police their names, thus making it legally impossible to set bail, and some have spent as long as 40 days in jail.
>
> Falwell came late to the movement but brought his usual zeal, putting up a $10,000 Moral Majority check for bail money and predicting a wave of 'massive nonviolent civil

Its originator was not an existing pressure group, but rather a twenty-nine-year-old activist, Randall Terry, from Binghamton, New York, whose motives are religious and whose organizational skills are considerable. Operation Rescue owes part of its appeal to the notable persons at its forefront.[3] The sizeable number of arrests throughout the country has also added to the movement's notoriety.[4]

Operation Rescue is not the first manifestation of onsite, obstructive interference with abortion. A few years ago, a wave of bombings and arsons at abortuaries attracted society's attention.[5] Less well publicized sit-ins and other nonviolent interferences have occurred in various communities for over a decade.[6] Abortion opponents have caused frustration and loss of business to abortion proprietors through lawful picketing of abortion facilities and abortionists' residences, and through lawful sidewalk counseling.[7]

The Operation Rescue proponents cite the common-law and statutory doctrines of necessity and justification as the foundation for their actions.[8] Courts at common law recognized necessity as a complete de-

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disobedience' in 1989. 'We have got a lot of teaching and instructing to do across the country,' he said, 'but then several million militants with the commitment and tactics of the civil-rights movement would create an irresistible momentum.'

Id.

3. In addition to Jerry Falwell, Roman Catholic Bishop Austin Vaughan of the Archdiocese of New York has also been actively involved. *See* The Life Advocate, Aug./Sept. 1988, at 10. On July 29th, Bishop Vaughan was arrested for the fourth time, along with 213 other people at a New York rescue operation. *Id.* at 10. Addressing a meeting on the eve of that rescue, Bishop Vaughan apologized "because I feel I have done nothing for 15 years" about abortion. *Id.*

4. *See id.* at Insert 1, col. 1, (listing Operation Rescue arrests). By the end of August, Operation Rescue listed 4,256 arrests among its members. *Id.* By the end of October, more than 7,000 persons had been arrested in rescues throughout the country. *See* Washington Times, Oct. 31, 1988, at A3, col. 4.

5. *See Whose Life Is It?*, Pensacola News-Journal (Fla.), Mar. 10, 1985 (Special News Project), at 3-4 & 8-9 (discussing abortion rescue tactics); Carlson, *A Holy War in Pensacola*, PEOPLE, Jan. 21, 1985, at 20 (discussing activist's bombing of abortion facilities).

6. *See Abortion: The New Militancy*, Gannett News Service Special Report, Dec. 1985, at 10; *cf.* Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1150-51 (E.D. Pa. 1987) (abortion clinic sued to enjoin abortion protestors from interfering with business).

7. *See* Frisby v. Schultz, 108 S. Ct. 2495, 2497 (1988).

8. While it is doubtful that necessity would justify the infliction of death in a situation not covered by the privilege of self-defense against an aggressor, the necessity of saving human life has long been recognized as a justification at least for the destruction of property and the infliction of personal injury. "The sailors took fright, . . . and to lighten the ship they threw the cargo overboard." *Jonah* 1:5. The Laws of Alfred even provided that a homicide "of necessity . . . as God may have sent him into his hands, and for whom he has not lain in wait [shall] be worthy of his life." I. THORPE, ANCIENT LAWS AND INSTITUTES OF ENGLAND § 13, at 47-49 (1840); *see also* Queen v. Dudley, 14 Q.B.D. 273 (1884); United States v. Holmes, 26 F. Cas. 360, 366 (C.C.E.D. Pa. 1842) (No. 15,383) (discussing law of necessity). Bracton lists necessity as a defense, provided that the harm was not avoidable. 2 DE LEGIBUS

fense in criminal prosecutions and in tort actions.[9] The Model Penal Code's codification of the justification defense sanctions the infliction of death if caused in an attempt to preserve the life of the actor or a third party.[10] The defense would likewise sanction the destruction of property to preserve life.

The justification, or necessity, principle applies to actions taken to save the lives of third persons as well as the lives of the actors.[11] "[T]he penal laws of most states would probably now recognize the privilege of the defendant to defend a third person against any kind of invasion against which the third person would have the privilege of self-defense, so long

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277, fig. 121 at 277 (Twiss ed. 1879); *see also* HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 415 (2d ed. 1960).

> The principle of justification by necessity, if applicable, involves a determination that "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged." . . . The compulsion from the harm or evil which the actor seeks to avoid, should be present and impending.

People v. Richards, 269 Cal. App. 2d 768, 777-78, 75 Cal. Rptr. 597, 604 (1969).

9. *See* United States v. Ashton, 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470); The William Gray, 29 F. Cas. 1300 (C.C.D.N.Y. 1810) (No. 17,694).

10. *See* MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962); *see also* MODEL PENAL CODE § 3.02, commentary at 7-8 (Tent. Draft No. 8 1958); N.Y. PENAL LAW §§ 140.10, .15, .17 (McKinney 1988).

The two principal American formulations of the necessity defense are those of the Model Penal Code and the New York Penal Law. "The Model Penal Code privileges an otherwise criminal act when 'the harm or evil sought to be avoided by [the actor's] conduct is greater than that sought to be prevented by the law defining the offense charged." Greenawalt, *Natural Law and Political Choice: The General Justification Defense—Criteria for Political Action and the Duty to Obey the Law*, 36 CATH. U.L. REV. 1, 4 (1986). Under the New York provision, "the desirability and urgency of avoiding such injury [to the actor or third person must] clearly outweigh the desirability of avoiding the injury sought to be prevented." *Id.* The requirements for the justification defense were spelled out by section 3.02 of the Model Penal Code:

> Justification Generally: Choice of Evils:
>
> (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962).

11. MODEL PENAL CODE § 3.05 (Proposed Official Draft 1962).

> (1) Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when: (a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and (b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and (c) the actor believes that his intervention is necessary for the protection of such other person.

Id.

as the intervention appeared to be reasonably necessary."[12] Many federal courts have also recognized justification as a defense in criminal prosecutions. "Actions taken in self-defense, in defense of property or other persons, or to avert a public disaster or a crime may be held non-criminal under this 'justification' doctrine."[13] The federal courts have further justified the use of force when, whether actually necessary or not, the actors reasonably believed that force was necessary to protect themselves or others from imminent harm.[14]

Protestors at nuclear and other defense facilities have raised the necessity or justification defense frequently in recent years. When nuclear plant protestors have violated the law, the courts have routinely denied their necessity defense arguments.[15] The Pennsylvania Supreme Court in *Commonwealth v. Berrigan*[16] denied the protestors' necessity argument and differentiated action undertaken to prevent a public disaster from action undertaken merely to raise the public conscience.[17] The court noted that the protestors trespassed onto a plant that manufactured bombshell casings.[18] The court held that, while the demonstrators protested the *use* of nuclear weapons, the trespass onto a plant that produced the shell casings could not be justified on the grounds of imminent

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12. *See* W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS § 20 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 76 (1965).

13. United States v. Simpson, 460 F.2d 515, 517 (9th Cir. 1972).

14. *See id.* at 517 n.4. The rationale and requirements for the defense of justification, or necessity, were spelled out in *United States v. Seward*:

> The "necessity defense" exonerates persons who commit a crime under the pressure of circumstances if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant's breach of the law.
>
> Successful use of the "necessity defense" requires (a) that there is no third and legal alternative available, (b) that the harm to be prevented be imminent, and (c) that a direct, causal relationship be reasonably anticipated to exist between defendant's action and the avoidance of harm.

687 F.2d 1270, 1275 (10th Cir. 1982) (citing State v. Marley, 54 Haw. 450, 509 P.2d 1095 (1973)), *cert. denied*, 459 U.S. 1147 (1983); *see also* MODEL PENAL CODE § 3.04 (Tent. Draft No. 8 1958); RESTATEMENT (SECOND) OF TORTS § 76 (1965).

15. *See* United States v. Kabat, 797 F.2d 580 (8th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987); United States v. Montgomery, 772 F.2d 733 (11th Cir. 1985); United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985); United States v. Seward, 687 F.2d 1270 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); Shiel v. United States, 515 A.2d 405 (D.C. 1986), *cert. denied*, 108 S. Ct. 1477 (1988); Linnehan v. State, 454 So. 2d 625 (Fla. App. 1984); State v. Marley, 54 Haw. 450, 509 P.2d 1095 (1973); Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188 (1983); Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982); Commonwealth v. Averill, 12 Mass. App. Ct. 260, 423 N.E.2d 6 (1981); People v. Hubbard, 115 Mich. App. 73, 320 N.W.2d 294 (1982); State v. Higgins, 376 N.W.2d 747 (Minn. 1985); State v. Hunt, 630 S.W.2d 211 (Mont. 1982); Commonwealth v. Berrigan, 509 Pa. 118, 501 A.2d 226 (1985).

16. 509 Pa. 118, 501 A.2d 226 (1985).

17. *Id.* at 124-25, 501 A.2d at 230.

18. *Id.*

danger.[19] The lack of imminence of the harm that the protestors seek to prevent, i.e., war, and the lack of causation between their illegal activities and the prevention of war weakens the protestors' necessity arguments. Such military demonstrators are protestors rather than rescuers.

Since Operation Rescue participants save lives faced with imminent destruction, courts should accept their necessity arguments more readily than those of the nuclear demonstrators. Alameda County Deputy District Attorney Joseph R. Hurley, who opposed the use of the necessity defense by protesters who intentionally blocked the road at the Lawrence Livermore National Laboratory in California, said, "[i]t seems to me that 'right-to-lifers' blocking an abortion clinic have a better case. If they stop one person from going in to get an abortion, they have effectively prevented an immediate act that they think is wrong."[20] Each year, abortion kills more than 1.5 million unborn children in the United States.[21] The courts, however, have denied the necessity defense in abortion cases.[22]

Some courts, relying explicitly on *Roe v. Wade*,[23] have denied the necessity defense in abortion trespass cases. In *Erlandson v. Texas*,[24] the Texas Court of Appeals held that the statute allowing the defense of third persons did not apply to the prosecution for trespass at an abortion clinic.[25] The court based its reasoning upon the propositions that abortion is not unlawful force and the unborn child is not a person.[26] Other

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19. *Id.*

20. Leland, *Necessity Defense Comes of Age*, CAL. LAW. 20, 21 (1984). Mr. Hurley, however, did not advocate use of the necessity defense in the abortion situation. *Id.*

21. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 70-71 (1989).

22. *See* Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147 (E.D. Pa. 1987); Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981); People v. Smith, 161 Ill. App. 3d 213, 514 N.E.2d 211 (1987), *appeal denied*, 118 Ill. 2d 550, 520 N.E.2d 391 (1988); City of St. Louis v. Klocker, 637 S.W.2d 174 (Mo. Ct. App. 1982); Commonwealth v. Wall, 372 Pa. Super. 534, 539 A.2d 1325 (1988), *appeal denied*, 555 A.2d 114 (1988); Erlandson v. Texas, 763 S.W.2d 845 (Tex. Ct. App. 1988); Hoppart v. State, 686 S.W.2d 259 (Tex. Ct. App. 1985), *cert. denied*, 479 U.S. 824, *reh'g denied*, 479 U.S. 977 (1986); *see also* Griffin v. United States, 447 A.2d 776 (D.C. 1982) (necessity defense not available to protestors who entered churches and opened them to the homeless).

In the 1985 trial of four persons who bombed three abortuaries in Pensacola, Florida, the trial court instructed the jury as follows:

> To justify a wrongful act there must be no legal alternatives available, the harm to be prevented must be imminent, and a direct, causal relationship must be reasonably anticipated to exist between the person's wrongful act and the avoidance of harm. Otherwise, no criminal act intentionally committed is justified by the law.

United States v. Goldsby, No. 85-00403 (N.D. Fla. 1985) (quoting reporter's transcript of proceedings). Despite this permissive instruction, the jury convicted the defendants. *Id.*

23. 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).

24. 763 S.W.2d 845 (Tex. Ct. App. 1988) (citing *Roe v. Wade*).

25. *Id.* at 852.

26. *Id.* The statutory necessity defense did not apply because the defendants had not

courts have likewise rejected the abortion opponents' necessity argument, holding that the societal and legislative acceptance of a woman's right to an abortion precludes the defense.[27]

The participants in Operation Rescue are now facing "the morning after." Prosecutors, proprietors of abortion facilities, and pregnant women are pressing for criminal prosecutions, individual and class actions in tort, and civil suits under RICO.[28] It is likely that the Operation Rescue leaders, and probably many of the movement's minor participants, will be forced out of circulation or financially overcome by litigation. While the Operation Rescue phenomenon may dissipate unless an unlikely continuing supply of volunteers replenishes its ranks, it nevertheless has significance as an important symptom of an underlying disorder in our law.

The Operation Rescue movement's existence requires society to re-examine the law's treatment of innocent life, not only in the abortion context, but in related areas. That re-examination must begin, of course, with *Roe v. Wade*. The Supreme Court in *Roe v. Wade* held unconstitutional the Texas and Georgia laws that, with some exceptions, forbade abortion.[29] The Court held that abortion prohibitions unconstitutionally infringe upon the mother's right to privacy, which includes her right to choose whether to continue her pregnancy or to terminate it by abortion.[30] While the Court in *Roe* found that the right to privacy is not absolute, it interpreted that right as protecting the mother's right to elec-

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shown that the "harm" to the clinic's patients or their unborn child clearly outweighed the harm their trespass caused. *Id.* The court also held that the defendants failed to show that the "harm" they sought to prevent was imminent. *Id.*

27. *See* People v. Smith, 161 Ill. App. 3d 213, 215, 514 N.E.2d 211, 212-13 (1987), *appeal denied*, 118 Ill. 2d 550, 520 N.E.2d 391 (1988); Commonwealth v. Wall, 372 Pa. Super. 534, 542-43, 539 A.2d 1325, 1329, *appeal denied*, 555 A.2d 114 (1988). In *People v. Smith*, the Illinois Appeals Court held that necessity was not a defense to a charge of trespass at an abortion clinic. 161 Ill. App. 3d at 214, 514 N.E.2d at 212. The *Smith* court reasoned:

> By statute, the defense is available only where "the accused was without blame in occasioning or developing the situation and reasonably believed [her] conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from [her] own conduct." . . . The doctrine [of necessity] was developed to deal with unusual circumstances—ones never contemplated by the criminal or civil law. Abortions are not rare occurrences. They are sanctioned by the Constitution and by a substantial portion of society.

Id.

In *Commonwealth v. Wall*, the Pennsylvania Superior Court said: "Because the Legislature has not enacted legislation prohibiting a woman from obtaining an abortion prior to viability, (and, indeed, cannot constitutionally enact such legislation . . .) we conclude that it has effectively precluded the justification defense with regard to protests at abortion facilities." 372 Pa. Super. at 543, 539 A.2d at 1329, *appeal denied*, 55 A.2d 114 (1988).

28. *See* 18 U.S.C. § 1962(c)-(d) (1982) (establishing RICO provisions).

29. Roe v. Wade, 410 U.S. 113, 166, *reh'g denied*, 410 U.S. 959 (1973).

30. *Id.* at 153.

tive abortion until the fetus reaches viability.[31] Even after viability, the Court held that the state may not prohibit abortion "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[32]

In the companion case of *Doe v. Bolton*,[33] the Court defined maternal health to include "psychological as well as physical well-being" and held that "the medical judgment may be exercised in the light of all the factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[34] This extremely flexible criterion effectively condones elective abortion at every stage of pregnancy.

The key element in *Roe v. Wade*, however, is the holding that the unborn child is not a person for purposes of the fourteenth amendment.[35] The *Roe* Court weighed the mother's right to privacy and the fourteenth amendment right to life asserted on behalf of the unborn child.[36] The Court conceded that if the fourteenth amendment treats the unborn child as a person, the mother's case "collapses."[37] In a footnote, the Court indicated that if the unborn child is a person, the state could not allow abortion even to save the life of the mother.[38] The Court ruled, however, that whether or not the unborn child is a human being, "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[39] The practical outcome of *Roe v. Wade* is that approximately 1.5 million unborn children are legally killed each year by abortion.[40]

If the Supreme Court reversed *Roe v. Wade* by holding that the unborn child is a person, the child's life would be protected and abortion would not be permissible. A holding of personhood would preclude a states' rights approach to abortion in which the state would have the option, but not the duty, to protect unborn life. While learned speculation continues

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31. *Id.* The Court defined viability as the period when the fetus is able to survive outside of the womb. *Id.* at 160, 163, 164-65.

32. *Id.* at 165.

33. 410 U.S. 179 (1973).

34. *Id.* at 191-92.

35. *Roe v. Wade*, 410 U.S. 113, 158 *reh'g denied*, 410 U.S. 959 (1973).

36. *Id.* at 152-59.

37. *Id.* at 156-57.

38. *Id.* at 157 n.54.

39. *Roe v. Wade*, 410 U.S. 158. Justice Stevens stated,

> Unless the religious view that a fetus is a "person" is adopted . . . there is a fundamental and well-recognized difference between a fetus and a human-being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures.

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 779 (1986) (Stevens, J., concurring).

40. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 70-71 (1989).

as to the future of *Roe v. Wade*, the abortion rescue phenomenon calls us to examine the legal status of the right to life on a deeper level. The increased speculation as to whether the Court will overturn *Roe v. Wade*, and the rise of the Operation Rescue movement, suggest that our basic law is radically wrong.[41] Since the *Roe* decision, the Supreme Court's membership has changed, and subsequent decisions have disclosed opposition to the *Roe* Court's reasoning. Chief Justice Burger, who voted with the majority in *Roe*, dissented in *Thornburgh v. American College of Obstetricians and Gynecologists*.[42] Since Chief Justice Burger's retirement, Justice Antonin Scalia has joined the Court. If Justice Scalia votes against *Roe*, the opponents of *Roe* will remain one vote short of reversal. The vote of Justice Kennedy could tip the balance against *Roe* because Kennedy replaced Justice Powell, who voted with the majority in *Thornburgh*.

Justice O'Connor's dissent in *Akron v. Akron Center for Reproduction Health*[43] criticized the *Roe* Court's trimester approach.[44] Justice O'Connor argued that the trimester approach fails to "accommodat[e] the woman's right and the State's interests. The decision of the Court today graphically illustrates why the trimester approach is a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context."[45] Justice O'Connor reasoned that, as medical technology increases, the fetus will become viable at earlier and earlier stages of the pregnancy.[46] She illustrates that, as the period of viability increases, the

41. Washington Times, Sept. 14, 1988, at A7, col. 2. "Will *Roe v. Wade* go down the drain?" When a law student at the University of Arkansas at Little Rock put this question to Justice Harry Blackmun, the judge who wrote *Roe*'s majority opinion said, "I think there's a very distinct possibility that it will—this term. You can count the votes." *Id.* Justice Blackmun's concern may be traced to the 5-4 vote by which the Court, in *Thornburgh v. American College of Obstetricians and Gynecologists*, held unconstitutional a Pennsylvania statute that placed restrictions on abortion. 476 U.S. at 779. Further, in light of Justice Anthony Kennedy's appointment to the Supreme Court and the view of Justice Kennedy as the possible "swing vote," Justice Blackmun said, "One never knows what a new justice's attitude towards stare decisis is. It's now 15 years old." Washington Times, Sept. 14, 1988, at A7, col. 2.

One difficulty with this speculation as to the future of *Roe v. Wade* is that both supporters and opponents of *Roe* may be overreacting to the prospect that *Roe* will "go down the drain." Although the Supreme Court will likely qualify *Roe* before too long, there is no reason to expect that the Supreme Court will reverse *Roe* or its basic holding that the unborn child is not a person. *See* USA Today, Sept. 14, 1988, at 1, col. 7.

42. 476 U.S. at 779. But none of the justices in *Thornburgh* voted in favor of overturning *Roe*'s personhood dicta. As Justice Stevens noted, "[n]o member of this Court has ever suggested that a fetus is a 'person' within the meaning of the Fourteenth Amendment." *Id.* at 779 n.8.

43. 462 U.S. 416 (1983).

44. *Id.* at 453-54.

45. *Id.*

46. *Id.* at 458.

states' compelling interest in the well-being of the fetus also increases.[47]

While Justice O'Connor's dissent soundly challenges the internal logic of the *Roe* trimester analysis, it misses the real deficiency of the *Roe* decision, namely, that the *Roe* majority's nonpersonhood premise clashes with a foundational principle of the civil order. In a civilized order in which the status of personhood guarantees certain rights, an inseparable connection between humanity and personhood exists. The *Roe* Court has broken the connection between humanity and personhood in order to serve claims made pursuant to a right of reproductive privacy which the Supreme Court itself discovered only by peering into the "penumbras, formed by emanations from" the Bill of Rights.[48]

When the Court in *Roe v. Wade* declined to decide when human life begins, yet based its holding upon the assumption that the unborn child is a nonperson, it endorsed the age-old principle that has allowed one class of human beings to treat another class of human beings as nonpersons. The nonpersonhood element of *Roe* embodies the same principle as the *Dred Scott* case, in which the Court held that freed slaves could not be citizens and said that slaves were property rather than persons.[49] Furthermore, the *Roe* decision follows the principle that underlay the Nazi extermination of the Jews: that a "higher" class of citizens could define other innocent human beings as nonpersons and subject the nonpersons to death.[50]

The *Roe* Court's distinction between humanity and personhood has created ironic contrasts in the law. Some employers exclude pregnant women, or sometimes all women of child-bearing years, from jobs that may pose health hazards to unborn children.[51] While the pregnant employee may protect her unborn child as well as herself from harmful radiation, she has the right to kill that child by abortion.

After their births, children may recover damages for personal injuries wrongfully inflicted on them while in the womb.[52] Some states allow recovery for wrongful death by the statutory representatives of an unborn child who died in the womb as a result of the defendant's fault or

47. 462 U.S. at 458.

48. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

49. Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856).

50. *See generally* W. BRENNAN, THE ABORTION HOLOCAUST (1983).

51. *See* International Union v. Johnson Controls, Inc., 680 F. Supp. 309, 317 (E.D. Wis. 1988) (employer's excluding women of child-bearing years from certain positions did not violate Title VII); Goldhaber, *The Risk of Miscarriage and Birth Defects Among Women Who Use Visual Display Terminals During Pregnancy*, 13 AM. J. OF INDUS. MED. 695 (1988); Pastides, *Spontaneous Abortion and General Illness Symptoms Among Semiconductor Manufacturers*, 30 J. OF OCCUPATIONAL MED. 543 (1988); L.A. Times, July 23, 1988, pt. 2, at 8, col. 4; L.A. Times, Jan. 19, 1987, pt. 1, at 3, col. 4.

52. *See* W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS § 55 (5th ed. 1984); Annotation, *Prenatal Injuries*, 62 AM. JUR. 2d, § 3 (1972).

negligence.[53] Thus, a pregnant woman who miscarries when a truck hits her while she is crossing the street toward the clinic to have an abortion may, in theory at least, sue as the statutory representative of her unborn child to recover for the child's death. If the case ever arose, however, the court would have difficulty deciding the life expectancy of the child.

In *In re A.C.*,[54] the District of Columbia Court of Appeals ordered physicians to perform a Caesarian section on a woman dying of cancer. The woman was twenty-six-weeks pregnant. The court entered the order to save the life of the unborn child, despite the objections of the mother and some of her physicians.[55] Both the mother and the child died shortly after the physicians performed the Caesarian section.[56] The court of appeals noted the trial court's determination that the fetus was viable and held that the interests of the state and the unborn child overrode the mother's right to bodily integrity.[57]

The court of appeals' opinion in *In re A.C.* illustrates the complications that the *Roe v. Wade* precedent creates. The court of appeals in *In re A.C.* emphasized that the case was not about abortion.[58] The *In re A.C.* court recognized a woman's right to bodily integrity, but also noted that, once a woman decides not to terminate her pregnancy, her obligations to the fetus change.[59] The court, however, found that once the fetus reached viability, the state had a compelling interest in protecting that life.[60] The court weighed the mother's limited remaining life against the fetus' chance of survival and affirmed the district court's order to perform the Caesarian.[61]

Even apart from *Roe v. Wade*, cases like *In re A.C.* require courts to strike a difficult balance between the interests of the unborn child and those of the mother. Some commentators argue that courts might use precedent that compels surgery or transfusions not to order mothers to undergo remedial treatment, but to order them to refrain from harmful conduct such as smoking, drinking, and using drugs.[62] Other courts have required women to undergo intrauterine treatment.[63] Yet, accord-

53. *See* W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS § 55 (5th ed. 1984); Note, *The Fetus as a Person in Wrongful Death Actions*, 57 COLO. L. REV. 895, 898 n.26 (1986).

54. 533 A.2d 611 (D.C. 1987), *vacated*, 539 A.2d 203 (D.C. 1988).

55. *Id.* at 612-13, 617.

56. *Id.* at 611; N.Y. Times, March 22, 1988, § A, at 17, col. 1.

57. *In re* A.C., 533 A.2d at 613, 617.

58. *Id.* at 614.

59. *Id.* at 614, 617.

60. *See id.* at 614.

61. *See* 533 A.2d at 617.

62. *See* Note, *Maternal Rights & Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994 (1988).

63. *See* Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 423-24, 201

ing to *Roe v. Wade*, the mother has the right to obtain an abortion until the child's birth, subject only to the requirement that in the third trimester she justify the abortion as necessary for her health, mental or physical. If she decides not to have an abortion, *Roe v. Wade* would apparently guarantee her right to change her mind. How then, if she still has the right to decide to kill that child, can the courts require her to undergo treatment for the sake of her unborn child?[64]

The abortion rescue movement, however, should extend consideration beyond mere examination of such anomalies as have developed in the law in the aftermath of *Roe v. Wade*. The movement impels the re-examination of the personhood issue involved in the basic holding of *Roe*. The common-law and statutory defenses of necessity or justification, discussed above, provide a useful framework for that re-examination.[65] If you were walking down the street and noticed, through a picture window, a man strangling a three-year-old child in his living room, both the law and morality would entitle you to break down his front door to prevent the killing. The law of necessity would even provide a defense if you injured or killed the man. Since abortion, in the objective, moral sense, constitutes murder, the common-law and statutory defenses of necessity and justification should apply to the abortion rescue participants.

Although the Supreme Court in *Roe* defined the unborn child as a nonperson, and thereby precluded the argument that abortion is homicide, subsequent medical testimony has substantiated the immediate human development of the child. As explained by Dr. Jerome Lejeune before a Senate subcommittee, every abortion undoubtedly kills a human being:

> Life has a very, very long history but each individual has a very neat beginning, the moment of its conception. . . . All these facts were known long ago and everybody was agreeing that test-tube babies, if produced, would demonstrate the autonomy of the conceptus . . . . Test tube babies now do exist. . . .
>
> All this explains why Drs. Edwards and Steptoe could witness in vitro the fertilization of a ripe ovum from Mrs. Brown by a spermatozoa from Mr. Brown. The tiny conceptus they were implanting days later in the womb of Mrs. Brown could not be a tumor or an animal. It was in fact the incredibly young Louise Brown. . . .

A.2d 537, 538 (over mother's objection, court appointed guardian to consent to blood transfusion to save unborn child), *cert. denied*, 377 U.S. 985 (1964).

64. Nor is it a satisfactory answer to say, as the court of appeals did in *In re A.C.*, that, "as a matter of law, the right of a woman to an abortion is different and distinct from her obligations to the fetus once she has decided not to timely terminate her pregnancy." *In re* A.C. 533 A.2d 611, 614 (D.C. 1987), *vacated*, 539 A.2d 203 (D.C. 1988).

65. *See supra* notes 8-14 and accompanying text (discussing the justification and necessity defenses).

> At 2 months of age, the human being is less than one thumb's length from the head to the rump. He would fit at ease in a nutshell, but everything is there—hands, feet, head, organs, brain—all are in place. His heart has been beating for a month already. Looking closely, you would see the palm creases, and a fortune teller would read the good adventure of that tiny person. With a good magnifier, the fingerprints could be detected. Every document is available for a national identity card. . . .
>
> 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. The human nature of the human being from conception to old age is not a metaphysical contention, it is plain experimental evidence.[66]

Recent studies have confirmed that a baby's learning process begins in utero.[67] When Louise Brown was born in 1978, the first child born as a result of in vitro fertilization and embryo transfer, the whole world knew that her life began at conception.[68] Each abortion, at whatever stage of pregnancy, is in fact the killing of a human being.

Legalized abortion, moreover, symptomizes the general acceptance of a relativist and utilitarian ethic. As long ago as 1970, *California Medicine*, the California Medical Association Journal, described "A New Ethic for Medicine and Society":

> It will become necessary and acceptable to place relative rather than absolute values on such things as human lives, the use of scarce resources and the various elements which are to make up the quality of life or of living which is to be sought. This is quite distinctly at variance with the Judeo-Christian ethic and carries serious philosophical, social, economic and political implications for Western society and perhaps for world society.
>
> The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long-held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws and public policy rather than the reverse. Since the old ethic has not yet been fully displaced it

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66. *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 8, 9, 10 (1981) [hereinafter *Hearings*] (testimony of Dr. Jerome Lejeune, Professor of Fundamental Genetics, University of Rene Descartes, Paris).

67. *See id.*; *see also* Kolata, *Studying Learning in the Womb*, 225 SCIENCE 302, 303 (July 20, 1984).

68. *See Hearings*, supra note 66, at 12-13 (testimony of Dr. Hymie Gordon, Professor, Medical Genetics); *see also* Biggers, *In Vitro Fertilization and Embryo Transfer in Human Beings*, 304 NEW ENG. J. OF MED. 336 (1981).

> 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 extrauterine 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.[69]

The Supreme Court's refusal in *Roe v. Wade* to decide the question of whether the unborn child is a human being provides an example of the "schizophrenic sort of subterfuge" described in the *California Medicine* editorial.

Notwithstanding the Supreme Court's definition of the unborn child as a nonperson, the necessity defense justifies the Operation Rescue participants' conduct because the defense contemplates the actors' intervention for the protection of all *life*.[70] Since the defense applies to the protection of property and animals,[71] it would be strange indeed if it did not apply to the protection of members of the human species simply because they lacked "personhood." One could then act to save unborn cattle, but not unborn children.

The Supreme Court's denial of personhood for purposes of the fourteenth amendment (and the fifth amendment, by extension of *Roe v. Wade* to the United States government) does not preclude the treatment of the unborn as human life which may properly be the object of life-saving efforts.[72] Since *Roe v. Wade*, the law has continued to recognize the rights of the unborn child.[73] Tort law recognizes the unborn child's rights from the moment of conception:

> So far as duty is concerned, if existence at the time of the tortious act is necessary, medical authority has long recognized that an unborn child

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69. Editorial, *A New Ethic for Medicine and Society*, 113 CAL. MED. 67 (1970).

70. *See* Waldrop v. Nashville & St. Louis Ry., 183 Ala. 226, 235, 62 So. 769, 771 (1913) (preservation of human *life* special force behind doctrine of necessity) (emphasis added); *see also* Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349 (1971).

71. *See* MODEL PENAL CODE § 3.06(1) (Proposed Official Draft 1962).

72. *See* Harris v. McRae, 448 U.S. 297 (1980).

73. *See supra* notes 51-52 and accompanying text (discussing prenatal rights). Indeed, from the adoption of the fourteenth amendment in 1868 until 1973, state and lower federal courts had increasingly recognized the personhood rights of the unborn child, especially the rights of children born alive to recover for prenatal injuries and wrongful death, to inherit property, and to get court orders to compel their mothers to get a blood transfusion to save their lives. *See In re* A.C., 533 A.2d 611, 614-17 (D.C. 1987), *vacated*, 539 A.2d 203 (D.C. 1988).

> is in existence from the moment of conception, and for many purposes its existence is recognized by the law. It has been accorded legal status for various purposes in equity, criminal law, property law, and tort law.[74]

The Operation Rescue participants believe and have argued that their conduct meets the justification defense's requirements.[75] Their acts prevent the killing of human life and, therefore, prevent a greater harm than damage to the abortionist's property. A further consideration is that the Operation Rescue technique ordinarily does not involve even the destruction of property; rather, it has usually employed the obstruction of entrances to close the facilities, which is a type of interference with property rights. They have acted to save human life which they reasonably believed was imminently threatened with extinction by abortion. The rescuers were not protesting abortion in general, nor engaging in symbolic acts that they hoped would lead the public to sympathize with the pro-life cause. Rather, they directly intervened to protect particular lives threatened with imminent destruction. They can show imminent harm by proving that the picketed abortion establishments had scheduled abortions on the targeted days on which the rescuers disrupted their business. The disruption prevented at least some of those children from being killed.

The courts have required that the rescuers prove that alternative means of saving the unborn were unavailable.[76] The rescuers could not appeal to the public authorities to protect the children in question because the public authorities would follow the legal precedent permitting abortion. If the rescuers chose merely to demonstrate or to otherwise influence the public towards the prohibition of abortion, such efforts might ultimately have led to the eventual outlawing of abortion and, thus, to the saving of other children who otherwise would be in peril at some time in the future. The children threatened with death on the days of the rescues, however, would not have been helped. The rescuers believed in good faith not that they had *broken* the law, but that their conduct was *permitted* by the law. The necessity defense implicitly sanctioned their trespass and property damage since the Operation Rescue participants intended to, and by their actions succeeded in, saving life.

Exceptions within the Model Penal Code's necessity defense provide

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74. W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS § 55 (5th ed. 1984); *see also* Doudera, *Fetal Rights? It Depends*, TRIAL 38 (1982).

75. *See* Commonwealth v. Wall, 372 Pa. Super. 534, 542-44, 539 A.2d 1325, 1329-30, *appeal denied*, 555 A.2d 114 (1988).

76. *See* United States v. Bailey, 444 U.S. 394, 410-11 (1980) (necessity defense requires there be no legal alternative).

some difficulty for the abortion rescuers' justification. The Model Penal Code would apply the necessity defense only when the law does not provide an exception or when "a legislative purpose to exclude the justification claimed does not otherwise appear."[77] Although the trespass statutes that protect abortion facilities do not contain specific exclusions of the ordinarily applicable necessity defense,[78] *Roe v. Wade* and subsequent judicial decisions, as well as legislative enactments, arguably intended to exclude the defense. The *Roe* court, however, based its abortion rulings upon the issue of personhood and did not alter the common-law principle that the destruction of, or entry upon, property may be justified in order to save human life.

To conclude that *Roe* excludes the necessity defense ignores several essential questions. Is there not a natural right to rescue human beings in danger? Is the nonviolent abortion rescue movement a reasonable exercise of that natural right? Is not the exercise of that right, therefore, beyond the power of the Court or even the legislature to forbid?

The rescuers did not create the anomalous conflict between the mother's right to kill the child and the rescuer's duty to save him or her. Rather, the conflict proceeds from the Supreme Court's fragile distinction between the unborn child's personhood and his or her humanity.[79] Since the Supreme Court could not justifiably decide that a fetus is *not* a human being, it glossed over the issue.[80] This open door allows the Operation Rescue participants to use the justification defense. While the courts have legally sanctioned the abortion procedure, the Supreme Court's word splitting and semantics over "person" versus "human being" authorizes reliance upon an asserted right to rescue endangered human life.

If we analogize Operation Rescue to the abolitionist movement before the Civil War, we ought not to be surprised that, despite the courts' rejection of the necessity defense, some abortion opponents still try to stop the killing by direct action in violation of trespass and other laws that protect the abortionists from interference. Both movements have sought to protect the rights of human life. Yet, by denying the humanity of unborn children, the *Roe* Court's decision to legalize abortion inflicts on the unborn child a status worse than that of the American chattel slave.[81]

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77. MODEL PENAL CODE § 3.02(1)(b)-(c) (Proposed Official Draft 1962).

78. *See, e.g.*, CAL. PENAL CODE § 602 (West 1988 & Supp. 1989); IND. CODE ANN. § 35-43-2-2 (West 1986); N.Y. PENAL LAW § 140.10 (McKinney 1988).

79. *See* Roe v. Wade, 410 U.S. 113, 158, 159, *reh'g denied*, 410 U.S. 959 (1973).

80. *See id.* at 159. The Court justified its position that it could not decide the human being issue by emphasizing the medical profession's lack of agreement. *Id.*

81. *See* M. MELTZER, SLAVERY I: FROM THE RISE OF WESTERN CIVILIZATION TO THE RENAISSANCE 176-77 (1971).

The slave had no rights respected by the law of the Roman Republic. The slave was

A fair reading of both the thirteenth and fourteenth amendments supports the conclusion that Congress intended to protect *human* life, including the unborn child:

> The precise purpose of Congress in submitting the Thirteenth and Fourteenth Amendments was to establish that the concept of "human being" and "person" were one and the same concept rather than different concepts, as they had in practice been treated by many states, the federal courts, and even at times by the federal legislature and executive, as well as to insure constitutional protection for all human beings, of whatever age and of whatever condition, from the time of their creation and endowment with human nature at conception by God, with respect to their right to life and all other fundamental human rights. It was the view of their framers that the concept of "person" had been misconstrued and misapplied between the time of the adoption of the Constitution and their submission of these amendments for adoption. It was their purpose to establish a new definition of person consonant with biological reality and common sense so as to comprehend all human beings.[82]

This view parallels Justice Harlan's dissenting opinion in the *Civil Rights* cases:

> If the constitutional amendments [thirteenth and fourteenth] be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this Republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant.[83]

The framers of the thirteenth and fourteenth amendments, as well as legislators at the state and territorial level, knew well that the existence of the unborn child was a biological reality.[84]

The abortion rescuers are reminiscent of the abolitionists who maintained the Underground Railroad in violation of the Fugitive Slave Act of 1793 and the fugitive slave provisions of the Compromise of 1850.[85]

> property, not person . . . . The owner of a slave was free to ship him, jail him, or kill him, with or without reason. He could send his slave to death against beasts or against men in the arena or put them out to die for starvation.

Id. Unlike the unborn child, some early courts convicted whites of murder for killing slaves. *See* M. MELTZER, SLAVERY II: FROM THE RENAISSANCE TO TODAY 202 (1972). Before the Civil War, the law considered the slaves as chattels. "The slave, therefore, had no political or civil rights: . . . If he was killed by a white, the white would probably not be tried for murder." *Id.; see also supra* notes 51-52 and accompanying text (discussing rights of unborn).

82. *See* Witherspoon, *Impact of the Abortion Decisions upon the Father's Role*, 35 THE JURIST 32, 42 (1975).

83. Civil Rights Cases, 109 U.S. 3, 62 (1883) (Harlan, J., dissenting).

84. *See* Witherspoon, *supra* note 82, at 42.

85. *See* A. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 533-39 (1935); *see also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (holding state law requiring

The fugitive slave provisions established federal enforcement machinery and forbade testimony by a fugitive slave in hearings before federal commissioners.[86] It also made refusal to aid in the capture of a fugitive slave a criminal offense.[87] Reaction against these provisions was so strong that President Millard Fillmore issued a presidential proclamation calling upon citizens and officials to obey the law.[88] No federal judge ever refused to enforce the fugitive slave law on the grounds of its injustice. Interestingly, the defendants' arguments in the fugitive slave cases foreshadowed the arguments advanced by the abortion rescuers today.[89] In 1860, the United States District Court in Chicago convicted John Hossack of aiding a fugitive slave's escape.[90] The court fined him $100 and imprisoned him for ten days.[91] In his speech before sentencing, Hossack said:

> This law . . . is so obviously at variance with the law of that God . . . that the path of duty is plain to me. This law so plainly tramples upon the divine law, that it cannot be binding upon any human being under any circumstances to obey it. . . . This law is just as binding on me as was the law of Egypt to slaughter Hebrew children . . . .
>
> I am ready to die, if need be, for the oppressed of my race. But slavery must die; and when my country shall have passed through the terrible conflict which the destruction of slavery must cost, and when the history of the great struggle shall be candidly written, the rescuers of Jim Gray will be considered as having done honor to God, to humanity, and to themselves.[92]

In terms of positivist jurisprudence, courts will understandably reject the necessity defense as well as the higher-law arguments, and uphold the trespass laws against abortion rescuers as they upheld the fugitive slave laws against the abolitionists. The fact that a human law legalizes abortion cannot overcome the inherent injustice and horror of abortion. As Saint Thomas Aquinas put it, an unjust law "is no longer law but a perversion of law."[93] Pope John Paul II declared at the Capitol Mall in

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slave owners to present evidence before removing a fugitive slave from state unconstitutional). *See generally* W.H. SIEBERT, THE UNDERGROUND RAILROAD (1968).

86. *See* A. MCLAUGHLIN, *supra* note 85, at 533-39.

87. *See* A. MCLAUGHLIN, *supra* note 85, at 536.

88. G. RICHARDSON, MESSAGES & PAPERS OF THE PRESIDENTS 2637-42, 2645-46 (1897); *see* FREEDOM TO THE FREE: A REPORT TO THE PRESIDENT BY THE U.S. COMMISSION ON CIVIL RIGHTS 18-19 (1963).

89. *See* Speech of John Hossack Before the U.S. District Court for the Northern District of Illinois (1860), *reprinted in* 4 SLAVERY, RACE AND THE AMERICAN LEGAL SYSTEM 1700-1872, at 433, 440 (P. Finkelman ed. 1988).

90. *Id.* at 435.

91. *Id.*

92. *Id.* at 442-44.

93. T. AQUINAS, TREATISE ON LAW 78, Q. 95, art. 2 (Gateway ed. 1969).

Washington, D.C. in 1979 that "no one ever has authority to destroy unborn life."[94] There persist uncomfortably close parallels between the positions of the slave rescuers and the Operation Rescue participants.

The general condemnation of even nonviolent disruption of abortion facilities is ironic in light of the certainty that society would have heralded young persons who destroyed Auschwitz, especially if they had done so without hurting anybody. They would probably be regarded today as heroes throughout the civilized world. Even if they unintentionally killed or injured some people in the process of destroying the death camps, the world would not have viewed their acts as inherently wrong. Note, however, that Operation Rescue rejects violent tactics in favor of nonviolent disruption.

Not surprisingly, pro-choice supporters, while complaining that their opponents impose their morality on others, consistently impose their morality on the pro-life demonstrators. It would at least be consistent to hear someone on the pro-choice side say, "I am personally opposed to the disruption of abortion facilities, but I will not impose my morality on those who disagree." Instead, the stridency of the denunciations of the rescuers may be due to the fact that rescuers do prevent abortions and thereby decrease "business."

These considerations do not require an endorsement of Operation Rescue as a prudent tactic. Those who disrupt abortuaries can point to women scheduled for abortion who changed their minds on account of the rescuers. Lawful sidewalk counselors, however, can claim similar successes. While the rescuers waste weeks and months on their own criminal and civil legal defenses, the sidewalk counselors can hold their positions without diversion from legal battles. If the objective is to save lives at the abortuary not only on the day of the rescue, it should be concluded that the abortion rescue is a less profitable expenditure of time and resources than the lawful alternative of the prayer vigil and sidewalk counseling.

The Operation Rescue tactics, though nonviolent, have not received uniform acclaim among abortion opponents. For example, Rev. Charles Stanley, pastor of the First Baptist Church in Atlanta, denounced abortion as "an abomination before God," but opposed the disobedience tactics.[95] He advocated "all lawful means of protesting abortion," but said of Operation Rescue, "Where does it stop? . . . If blocking an entrance is permitted, then why not physical restraint . . . or even destruction of those who are performing the procedure . . . ? Anarchy and chaos will

94. Homily by Pope John Paul II, Capitol Mall, Washington, D.C. (Oct. 7, 1979), *reprinted in* 9 ORIGINS 1, 280 (1979).

95. N.Y. Times, Aug. 31, 1988, at 8, col. 1.

ultimately result."[96] Reverend Stanley's points have merit. But even if the abortion opponents reject the tactic of disobedience, Operation Rescue remains a symptom of an inherent wrong.

As noted above, the justification for Operation Rescue cannot be based upon a "body count" of "babies saved today." If that is the criterion, the lawful prayer vigil with sidewalk counseling is more effective. Operation Rescue, however, draws public attention to the abortion problem and thereby promotes a solution through creative tension on the streets and in the courts. Such a justification for Operation Rescue is similar to that advanced by Padraic H. Pearse for the 1916 Easter Uprising, which he led in Dublin against the British.[97] While Pearse and his men expected defeat before they started, they offered themselves as a "blood sacrifice" to alert the Irish people to the injustice of continued British rule.[98] Operation Rescue can be best understood as a sacrificial effort to awaken the nation to a re-examination of legalized abortion so as to achieve the wholesale elimination of abortion. The technological developments that will make abortion-by-pill truly a private choice for women intensify the need to re-examine the abortion issue. The director of the human reproduction research program of the World Health Organization, Dr. Jose Barzelatto, noted the probability that the new drugs that induce miscarriages may eventually abolish the need for abortion operations.[99] The replacement of surgical abortions by chemical abortifacients, such as RU-486, will make the abortion decision a truly private matter. To the extent that abortifacients supplant surgical abortion, pro-life proponents will have to shift their protests towards pharmaceutical companies rather than against abortuaries. The lack of immediacy of the threat to innocent life will convert the missions into protests rather than rescues and could deprive the protestors of the necessity defense.

The basic reality, however, will be unchanged. Abortion in the moral sense is murder, even if the victim is only a few hours old. Abortifacients, such as RU-486, terminate a pregnancy after it has begun; that is, they terminate an existing human life. It is unlikely that chemical abortifacients will wholly replace surgical abortions, but their expanded use will diminish the occasions for "rescue" operations. To the extent that surgical abortions continue, however, "rescue" operations may persist. Furthermore, it is likely that abortion opponents will direct substantial protest and even disruptive efforts at manufacturers and distributors of abortifacients. In sum, the development of early abortifacient technology cannot be counted upon wholly to dissipate the tensions of which

96. Martz, *The New Pro-Life Offensive*, NEWSWEEK, Sept. 12, 1988, at 25.
97. R. KEE, THE GREEN FLAG 531, 578 (1972).
98. *Id.* at 531.
99. N.Y. Times, Feb. 16, 1988, at C3, col. 3.

Operation Rescue is a symptom. Legal restrictions upon the use of abortifacients would be limited to the prohibition of their manufacture and distribution, or to the licensing of those drugs which have uses in addition to the abortifacient. Unlike the victim of a surgical abortion, it is difficult to visualize the victim of an abortifacient. To generate support for restrictions and prohibitions of abortifacients, therefore, will require an increased public awareness that, as a matter of principle, all human beings, from the first moment of their existence, are persons entitled to the right to life.

The well-established extension of condoned killing beyond the unborn to deformed infants and to some adult patients underscores the enduring need to reconsider the basic personhood ruling of *Roe v. Wade*. In the 1982 Bloomington *Infant Doe* case, the court authorized the parents of a Down's Syndrome infant to starve and dehydrate the infant to death.[100] At the same time, prosecutors in Indiana and elsewhere convicted parents of reckless homicide who withheld medical treatment from their children on the basis of their religious beliefs.[101] Thus, the law has protected healthy children even when their parents' nontreatment decisions arose from religious convictions. In contrast, the system places a different value on defective infants' lives. This dichotomy implicitly involves a functional valuation of personhood; the law will treat infants as "persons" only to the extent that the children are normal and healthy.

The recent judicial and medical treatment of incompetent patients provides another clear example of this implicit depersonalization. The American Medical Association, through its Council on Ethical and Judicial Affairs, has declared:

> Even if death is not imminent but a patient's coma is beyond doubt irreversible and there are adequate safeguards to confirm the accuracy of the diagnosis and with the concurrence of those who have responsibility for the care of the patient, it is not unethical to discontinue all means of life-prolonging medical treatment.
>
> Life-prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition, or hydration. In treating a terminally ill or irreversibly comatose patient, the physician should determine whether the benefits of treatment outweigh its burdens. At all times, the dignity of the patient should be maintained.[102]

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100. *In re* Treatment & Care of Infant Doe, No. GU 8204-004 (Cir. Ct., Monroe Co., Ind. 1982) (order granting declaratory judgment); *see also* Chicago Tribune, May 2, 1982, § 1, at 6, col. 1.

101. The News-Sentinel (Fort Wayne, Ind.), Aug. 29, 1984, at 1, col. 2.

102. American Med. News, March 28, 1986, at 1; *see also* Chicago Tribune, March 15, 1986, § 1, at 15, col. 1.

In *In re Conroy*,[103] the New Jersey Supreme Court held that a nursing home could withhold an eighty-four-year-old patient's nutrition and hydration when the court found that the patient would have personally refused the treatment under the limited circumstances involved.[104] The court held that the caretakers could withhold patients' treatment, even if the patients had never indicated their feelings about life-sustaining treatment, if one of two "best interest" tests—a limited-objective or a pure-objective test—was satisfied.[105]

Under either test, the courts must weigh the burdens of the patients' treatment-filled life with the benefits of life in general. The *Conroy* court held that the burdens must clearly outweigh the benefits.[106] The limited-objective test further considers trustworthy evidence that the patient would have refused the medical treatment.[107]

The court emphasized the inappropriateness of authorizing anybody to decide "that someone else's life is not worth living simply because . . . the patient's 'quality of life' or value to society seems negligible."[108] Nevertheless, the court used a "net burdens" and "benefits" approach and authorized the removal of the life-sustaining apparatus.[109]

In *Conroy*, the patient had a life expectancy of one year or less.[110] In the subsequent *In re Peter* case,[111] the physicians did not expect the patient to die within a year. The New Jersey Supreme Court, however, limited the tests set forth in *Conroy* to " 'elderly, formerly competent patients' like Claire Conroy 'who, *unlike Karen Quinlan*, are awake and conscious and can interact with their environment to a limited extent.' "[112] The *Peter* court relied on the 1975 case of *In re Quinlan* in which the New Jersey Supreme Court authorized the withdrawal of medical treatment, but not feeding, from a comatose patient.[113] The *Peter*

103. 98 N.J. 321, 486 A.2d 1209 (1985).

104. *Id.* at 365-68, 486 A.2d at 1232-33.

105. *Id.* at 361-74, 486 A.2d at 1229-37.

106. *See id.* at 386-87, 486 A.2d at 1243.

107. *In re* Conroy, 98 N.J. 321, 365-66, 486 A.2d 1209, 1232-33 (1985). "The primary focus should be the patient's desires and experiences of pain and enjoyment." *Id.* at 369, 486 A.2d at 1233. The *Conroy* court said, "the line between active and passive conduct in the context of medical decisions is far too nebulous to constitute a principled basis for decision-making." *Id.* at 370, 486 A.2d at 1234. The court also confirmed the definition of starvation as a form of medical nontreatment when it rejected the distinction between the termination of artificial feedings and the termination of other forms of life-sustaining medical treatment. *Id.* at 369-70, 486 A.2d at 1234.

108. *Id.* at 367, 486 A.2d at 1233.

109. *Id.* at 386-88, 486 A.2d at 1243-44.

110. *Id.* at 363, 486 A.2d at 1231.

111. 108 N.J. 365, 529 A.2d 419 (1987).

112. *Id.* at 374, 529 A.2d at 424 (emphasis included).

113. *See id.*; *see also In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

court stated:

> Under *Quinlan*, the life-expectancy of a patient in a persistent vegetative state is not an important criterion in determining whether life-sustaining treatment may be withdrawn. For this kind of patient, our 'focal point . . . should be the prognosis as to the reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of . . . biological vegetative existence.'[114]

The *Peter* court, following *Quinlan*, gave the family and guardian the authority to refuse to continue the comatose patient's life support system. The court eliminated the burden of proving the presumed intent of the patient and held that the family "need only 'render their best judgment' as to what medical decision the patient would want them to make."[115] In *Peter*, the court concluded that the patient would have wanted the nutrition and hydration stopped.

In the companion case of *In re Jobes*,[116] the court, finding no sufficient proof from Mrs. Jobes' prior statements that she would want her feeding tube withdrawn, nonetheless followed the *Peter* and *Quinlan* decisions and allowed the patient's family to substitute their own judgment on the patient's behalf.[117] The court authorized removal of the feeding tube and held that the nursing home had no right to "refuse to participate in the withdrawal" of the tube.[118]

Thus, our courts have authorized the family and guardians of comatose patients to starve and dehydrate the patients to death when, regardless of the patient's life expectancy, the medical evidence suggests no reasonable prognosis for the patient's recovery.[119] The patient need not even be terminally ill, let alone in the process of dying. Patients who, like Claire Conroy, are awake and conscious may be starved to death if they meet the subjective or objective criteria spelled out in that case.

Conroy, Peter and *Jobes* appear to represent the emerging, dominant view of the courts.[120] In *Brophy v. New England Sinai Hospital*,[121] the

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114. *In re* Peter, 108 N.J. at 374, 529 A.2d at 424.

115. *Id.* at 377, 529 A.2d at 425.

116. 108 N.J. 394, 529 A.2d 434 (1987).

117. *Id.* at 411-16, 529 A.2d at 443-45. Nancy Ellen Jobes, age thirty-one, resided in a nursing home in a comatose state since 1980. *Id.* at 401-02, 529 A.2d at 437-38. The experts agreed that she was brain-damaged, but disagreed about whether she was in a "persistent vegetative state." *Id.* at 404-05, 529 A.2d at 438-39. The court, however, found that she was in "an irreversible vegetative state." *Id.* at 409, 529 A.2d at 441.

118. *Id.* at 424-25, 529 A.2d at 449-50. The nursing home did not give the family notice of its policy against such withdrawals. *Id.* at 425, 529 A.2d at 450.

119. *See supra* notes 103-18 and accompanying text (discussing cases which allowed for removal of life-sustaining treatment).

120. *See generally* Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988) (first case to establish federal civil right of patient to starve and dehydrate to death).

121. 398 Mass. 417, 497 N.E.2d 626 (1986).

court approved the request of Brophy's family to withdraw the feeding tube that was keeping Mr. Brophy alive because, in the court's opinion, the patient would have wanted to die had he been able to choose.[122] In the *Brophy* case, Justice Lynch, in dissent, said:

> the withdrawal of the provision of food and water is a particularly difficult, painful and gruesome death; the cause of death would not be some underlying physical disability like kidney failure or the withdrawal of some highly invasive medical treatment, but the unnatural cessation of feeding and hydration which, like breathing, is part of the responsibilities we assume toward our bodies routinely. Such a process would not be very far from euthanasia, and the natural question is: Why not use more humane methods of euthanasia if that is what we endorse?[123]

The most important point, however, is that the law here authorizes intentional killing. These cases do not involve the withdrawal of ineffective or excessively painful medical treatment, but rather, the deprivation of food and water with the intent to end the patient's life. The *Peter* court held:

> Hilda Peter will not die from the withdrawal of the nasogastric tube, but because of her underlying medical problem, i.e., an inability to swallow. Withdrawal of the nasogastric tube, like discontinuance of other kinds of artificial treatment, merely acquiesces in the natural cessation of a critical bodily function. The cessation is the cause of death, not the acquiescence.[124]

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122. *Id.* at 433, 497 N.E.2d at 635. Paul Brophy, a forty-eight-year-old nonterminal, comatose patient, lived in a persistent vegetative state, but suffered no discomfort. *Id.* at 422, 497 N.E.2d at 628.

123. *Id.* at 444, 497 N.E.2d at 641. In a note to his opinion, Justice Lynch recounted the physical hardship that the evidence in the case showed to be normally associated with starvation and dehydration:

> Removal of the G. tube would likely create various effects from the lack of hydration and nutrition, leading ultimately to death. Brophy's mouth would dry out and become caked or coated with thick material. His lips would become parched and cracked. His eyes would recede back into their orbits and his nose might crack and his cheeks would become hollow. The lining of his nose might crack and cause his nose to bleed. His skin would hang loose on his body and become dry and scaly. His urine would become highly concentrated, leading to burning of the bladder. The lining of his stomach would dry out and he would experience dry heaves and vomiting. His body temperature would become very high. His brain cells would dry out, causing convulsions. His respiratory tract would dry out, and the thick secretions that would result could plug his lungs and cause death. At some point within five days to three weeks his major organs, including his lungs, heart, and brain, would give out and he would die.

Id. at 444 n.2, 497 N.E.2d at 641 n.2.

Paul Brophy died eight days after the hospital removed his feeding apparatus. "His death was extremely peaceful," said Frank Reardon, Mrs. Brophy's lawyer. N.Y. Times, Oct. 24, 1986, at B9, col. 4. According to the attending physician, Mr. Brophy received practically no nutrition during the final eight days, and only as much water as was needed to administer anticonvulsant medication to prevent seizures. *Id.*

124. *In re* Peter, 108 N.J. 365, 383, 529 A.2d 419, 428 (1987).

What must be remembered, though, is that Hilda Peter was not dying when the tube was withdrawn. She was stable, in no significant distress, and her inability to swallow was compensated for by the feeding apparatus. The intent involved in removing that apparatus was not to relieve pain or to terminate an ineffective treatment. The intent was precisely to allow Hilda Peter to starve and dehydrate to death.

In his seminal 1949 analysis of the involvement of the German medical profession in the Nazi euthanasia program, Dr. Leo Alexander wrote:

> Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the nonrehabilitable sick.[125]

Dr. Alexander noted that physicians made distinctions between patients capable of rehabilitation and those incapable of recovery. Society consistently treated the latter with contempt. Dr. Alexander theorizes that this attitude results in decisions not to attempt therapeutic procedures.[126] The doctor argues that the field of medicine must discard its practical realism and focus on the emotional foundation of healing and care.[127] In 1984, Dr. Alexander, shortly before his death, commented that the American situation "is much like Germany in the twenties and thirties—the barriers against killing are being removed."[128]

Dr. Alexander's remarks are quite poignant when one compares the Operation Rescue movement to the nonviolent student resistance movement in Nazi Germany called The White Rose. The White Rose challenged the Nazi regime on the basis of the higher law of God. The fourth Leaflet of the White Rose emphasized the necessity to struggle against the demons which lead man to separate himself separated from the higher order and yield to forces of evil.[129] The leaflet stated: "Man is free, to be sure, but without the true God he is defenseless against the

125. Alexander, *Medical Science Under Dictatorship*, 241 NEW ENG. J. OF MED. 39, 44 (1949).

126. *See id.* at 45.

127. *See id.* at 46.

128. *See* Stanton, *The New Untermenschen*, HUMAN LIFE REVIEW Fall 1985, at 77, 82.

129. *See* I. SCHOLL, THE WHITE ROSE 86 (1983).

principle of evil. He is like a rudderless ship, at the mercy of the storm, an infant without his mother, a cloud dissolving into thin air."[130]

The Nazi People's Court convicted the White Rose leaders, Hans Scholl and his sister Sophie, ages twenty-five and twenty-two, of treason and ordered both beheaded. The Nazi regime executed or imprisoned other activists. Hans Scholl was affected by "the sermons of Count Galen, Bishop of Munster" which "radiated an astonishing aura of courage and integrity."[131] Bishop Galen had said:

> For some months now we have been hearing that mental patients who have been ill for a long time and are apparently incurable have been removed from the hospitals by force, on orders from Berlin. Regularly the relatives are informed after a short while that the patient has died, the body has been cremated, and the ashes may be called for. There is widespread suspicion, verging on certainty, that the many unexpected deaths among mental patients have not been due to natural causes but have been deliberately arranged and that the officials follow the precept that it is permissible to destroy 'life which does not deserve to live'—to kill innocent persons, if it is decided that such lives are no longer of value to the *Volk* and the state. It is a terrible doctrine, which excuses the murder of innocent people, which gives express license to kill unemployable invalids, cripples, incurables, and the senile and those who suffer from incurable disease![132]

Operation Rescue, like the White Rose, cannot be dismissed as a merely sectarian response to the problem of the legalized killing of the innocent. Instead, that problem ultimately raises the essential issue of whether the right to life is an "inalienable" right. If life is not seen as God's gift, there would seem to be no enduring obstacle to its disposition according to the decree of the state. Aleksandr Solzhenitsyn made this point with respect to the human toll exacted by Soviet Communism:

> Over half a century ago, while I was still a child, I recall hearing a number of older people offer the following explanation for the great disasters that had befallen Russia: 'Men have forgotten God; that's why all this has happened.'. . .
>
> And if I were called upon to identify the principal trait of the entire twentieth century, here too, I would be unable to find anything more

130. *Id.*

131. "Hans was deeply agitated. 'Finally a man has had the courage to speak out.' " *Id.*

132. *Id.* at 19-20. During her trial, Sophie Scholl said, "what we said and wrote is what many people are thinking. Only they don't dare to say it." *Id.* at 59. Hans Scholl said to the court, "You can execute me, but the day will come when you will be judged. The people, our German homeland will judge you!" *Id.* at 155. And when the death sentences were pronounced against Hans and Sophie Scholl, their father cried out in the courtroom, "There is a higher court before which we all must stand." *Id.* at 59.

precise and pith than to repeat once again: *Men have forgotten God*.[133]

Solzhenitsyn criticized the Western legal philosophy of legal realism, arguing that law must embody our moral principles.[134] He further stated:

> While law is our human attempt to embody in rules a part of that moral sphere which is above us. We try to understand this morality, bring it down to earth and present it in a form of laws. Sometimes we are more successful, sometimes less. Sometimes you actually have a caricature of morality, but morality is always higher than law. This view must never be abandoned.[135]

CONCLUSION

The proper response to Operation Rescue is not to continue the status quo, i.e., sanctioning the execution of millions of unborn children and locking up an increasing number of rescuers who, by their actions, show that they have a better understanding of the issues involved than do the judges. The proper response to Operation Rescue is to re-examine *Roe v. Wade*, to re-establish the necessary correspondence between humanity and personhood, and to return to the affirmation of the higher law which was recognized, at least in aspiration, in the Declaration of Independence. What is at stake is not a sectarian principle, although Pope John Paul II put it as well as anybody in his October 7, 1979, homily at the Capitol Mall in Washington, D.C.:

> Let me repeat what I told the people during my recent pilgrimage to my homeland: "If a person's right to life is violated at the moment in which he is first conceived in his mother's womb, an indirect blow is struck also at the whole of the moral order, which serves to ensure the inviolable goods of man. Among those goods, life occupies the first place. The Church defends the right to life, not only in regard to the majesty of the Creator, who is the First Giver of this life, but also in respect of the essential good for the human person."[136]

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133. Address by Aleksandr Solzhenitzyn at Templeton University (May 10, 1983), *reprinted in* IMMACULATA, Sept. 1983, at 6 (emphasis in original).

134. Address by Aleksandr Solzhenitsyn to AFL-CIO (June 30, 1975), *reprinted in* IMPRIMIS, Sept. 1975, at 7-8.

135. *Id.*

136. Homily by Pope John Paul II, Capital Mall, Washington, D.C. (Oct. 7, 1979), *reprinted in* 9 ORIGINS 279 (1979).