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# ABORTION, EUTHANASIA, AND THE NEED TO BUILD A NEW 'CULTURE OF LIFE'

CHARLES E. RICE\*

A quarter-century after *Roe v. Wade*,<sup>1</sup> the body count shows at least thirty-seven million innocent human beings killed in this country by surgical abortions, with an uncountably larger number killed by intrauterine devices and chemical and other abortifacients.

It may be helpful in this essay to touch upon six aspects of this phenomenon:

1. The constitutional status of legalized abortion;
2. The constitutional status of legalized euthanasia;
3. The reality that abortion and euthanasia, largely as a result of technological developments, are moving beyond the reach of the law;
4. The effect of the misguided effort of the establishment pro-life movement to regulate abortion through an incremental approach;
5. The decisive impact of the contraceptive ethic; and
6. What, if anything, can be done at this time to restore the right to life?

## I. THE CONSTITUTIONAL STATUS OF LEGALIZED ABORTION

The constitutional issue in *Roe v. Wade* is as fundamental as one can be: In a legal system where personhood is the condition of possessing rights, including the right to live, is every human being intrinsically entitled to be regarded as a person? In *Roe*, the Court held that "the word 'person' as used in the Fourteenth Amendment, does not include the unborn."<sup>2</sup> The Court declined to decide whether the unborn child is a human being. Whether he is or is not a human being, concluded the Court, he is not a person. The decision, therefore, is effectively the same as a decision that an acknowledged human being is not a person and therefore has no constitutional right to live. The basic principle of *Roe* is the principle of the Holocaust, that innocent human beings can be defined as nonpersons and subjected to

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1. 410 U.S. 113 (1973).

2. *Id.* at 158.

death at the discretion of others.<sup>3</sup> It is the principle of the 1857 Dred Scott case, where the Court held that blacks could not be citizens and said that slaves were property rather than persons.<sup>4</sup>

The Court in *Roe* held that abortion prohibitions unconstitutionally infringed upon the mother's right to privacy which the Court interpreted, in effect, to protect her right to elective abortion at every stage of pregnancy. Even after viability, the Court said, 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."<sup>5</sup> In the companion case of *Doe v. Bolton*,<sup>6</sup> the Court defined maternal health to include psychological as well as physical well-being; the Court said that "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."<sup>7</sup> This flexible criterion is a practical sanction for abortion on request at every stage until delivery.

Since 1973, the Court has upheld marginal restrictions on abortion, such as a requirement that abortions be performed by physicians.<sup>8</sup> In *Planned Parenthood v. Casey*,<sup>9</sup> the Court upheld Pennsylvania requirements that the woman be given certain information about abortion twenty-four hours before the abortion; that a minor must have the consent of at least one of her parents, or the approval of a judge, before she can have an abortion; and that abortion facilities must comply with record keeping and reporting requirements. But the Court struck down a requirement that the woman notify her spouse before the abortion. The Court in *Casey* described the woman's right to an abortion as a "liberty" interest protected under the Due Process Clause of the Fourteenth Amendment rather than simply as an exercise of the right to privacy.<sup>10</sup> In the 1997 "right to die" case, the Court described its *Casey* ruling as follows:

There, the Court's opinion concluded that 'the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.' We held, first, that a woman has a right, before her fetus is viable, to an abortion 'without undue interference from the State'; second, that States may restrict post-viability abortions,

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3. See Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 551-55 (1989).

4. See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407-10 (1857).

5. *Roe*, 410 U.S. at 165.

6. 410 U.S. 179 (1973).

7. *Id.* at 192.

8. See *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam).

9. 505 U.S. 833 (1992).

10. See *id.* at 846-53.

so long as exceptions are made to protect a woman's life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child.<sup>11</sup>

Despite the Court's allowance of marginal restrictions on abortion, the Court will not allow the states to enact any effective prohibition of abortion at any stage of pregnancy. The Court has also imposed severe restrictions on pro-life activities at abortion sites.<sup>12</sup>

The ultimate legal remedy for the Supreme Court abortion rulings is a constitutional amendment, expressly establishing in our basic law that all human beings are entitled to the constitutional right to life. It is doubtful, at best, that the Court would uphold a statute enacted by Congress to enforce the Fourteenth Amendment by defining all human beings as persons.<sup>13</sup> Although there is no realistic possibility of enacting such a constitutional amendment or statute in the foreseeable future, personhood remains the decisive constitutional issue:

[W]hoever is not a person lacks not only the privileges of citizenship, but even the barest minimum of human rights. A person need not have every right—prisoners, minors, and aliens, for example, do not possess the full panoply of rights and privileges afforded under the Constitution—but a non-person has no rights whatsoever. A non-person is no better off than property, entirely subject to the whim of the owner and whatever permissible regulation the government may deign to impose.

The constitutional protection for "persons" simply cannot function if each individual or class of human beings must prove explicit inclusion in some unwritten catalogue of "persons." Does the term "person" include mentally disabled individuals? There is not likely much, if any, explicit support for that particular proposition in the text, history, or early application of the fifth and fourteenth amend-

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11. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2270 (1997) (quoting *Casey*, 505 U.S. at 846).

12. *See Schenck v. Pro-Choice Network*, 117 S. Ct. 855 (1997) (invalidating a "floating buffer zone" of 15 feet between protesters and persons entering or leaving an abortion clinic, but upholding a fixed buffer zone between protesters and an abortion clinic); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding a 36-foot buffer zone on a public street in an area immediately adjacent to an abortion clinic).

13. *See, e.g., City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (invalidating the Religious Freedom Restoration Act, a statute that provided greater constitutional protection for religious conduct than prior Supreme Court decisions).

ments. Yet these are certainly persons. Does "person" include citizens of hostile nations? Children under the age of eighteen? Convicted misdemeanants or felons? Comatose individuals? Each of these classes of human beings lacks either the legal or physical ability to exercise certain rights, yet each is unquestionably a class of persons. This is so, not because members of each class can *prove* their particular inclusion under the fifth and fourteenth amendments, but because they are included *by virtue of their humanity*. "They are humans, live, and have their being." Therefore, "[t]hey are clearly 'persons'" within the meaning of the Constitution.<sup>14</sup>

Human offspring conceived but not yet born are likewise "humans, live, and have their being." They are "a form of human life," as are infants, toddlers, teens, adults, and the elderly. As human beings, prenatal children do not need to overcome any additional hurdles in order to establish their right to inclusion within the term "person" as used in the Constitution. Nor does any justification exist for the arbitrary exclusions of such children from the protection of basic human rights under the Constitution.<sup>15</sup>

In *Roe v. Wade*, the Supreme Court held that, if the personhood of the unborn child is established, the pro-abortion case "collapses, for the fetus' right to life would then be guaranteed by the (Fourteenth) Amendment."<sup>16</sup> As the Supreme Court itself noted in *Roe v. Wade*:

When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other state are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for the abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is

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14. Brief of Catholics United for Life et al. at 46, *Casey* (No. 91-744) (quoting *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (discussing statutory classifications for illegitimate children)); (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (holding that discrimination against mentally retarded persons triggers equal protection scrutiny)).

15. *Id.* (quoting *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989)).

16. *Roe v. Wade*, 410 U.S. 113, 156-57 (1973).

the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?<sup>17</sup>

Those statements of the Court indicate that a restoration of personhood to the unborn child, without exceptions, would prevent the states from legalizing any abortions, even those claimed to be necessary to save the life of the mother. That result is consistent with the common law principle of necessity, which does not justify anyone taking the life of an innocent non-aggressor even to save his own life.<sup>18</sup> A constitutional restoration of personhood would not prevent state legislatures and the Supreme Court from applying, incorrectly, the law of necessity so as to permit abortion to save the life of the mother. But no constitutional amendment on any subject can be immune to misconstruction. The object of the restoration of personhood is simply to restore to the unborn child the same right to live which is enjoyed by his older brother and his grandmother. Despite the practical impossibility of its achievement in the foreseeable future, the restoration of that right ought to remain the central legal and political objective of the pro-life movement.

However, as far as the Supreme Court is concerned, including the "pro-life" dissenting Justices, the personhood issue has been definitively settled against personhood. Every member of the Court accepts the holding of *Roe* that the unborn child is a non-person. As Justice Stevens noted in *Webster*:

No Member of this Court has ever questioned the holding in *Roe*, . . . that a fetus is not a "person" within the meaning of the Fourteenth Amendment. Even the dissenters in *Roe* implicitly endorsed that holding by arguing that state legislatures should decide whether to prohibit or to authorize abortions. . . . By characterizing [in *Webster*] the basic question as 'a political issue,' . . . Justice Scalia likewise implicitly accepts this holding.<sup>19</sup>

When Justice Scalia and the other Justices talk about overruling *Roe*, they evidently mean allowing the states to decide whether to allow or prohibit abortion rather than overruling *Roe* on its essential holding that the unborn child is a non-person. But that states' rights solution is based on the premise that the unborn child is a non-person. The status of personhood carries with it a right to the protection of the law, especially with respect

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17. *Id.* at 157 n.54.

18. See, e.g., *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383); *Regina v. Dudley & Stevens*, 14 Q.B.D. 273 (1884).

19. *Webster*, 492 U.S. at 568 n.13 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

to the right to life. As Justice Stevens said in the 1986 *Thornburgh* case, "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."<sup>20</sup>

In his *Casey* opinion, Justice John Paul Stevens explained the personhood holding of *Roe*:

The Court in *Roe* carefully considered, and rejected, the State's argument "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment." . . . After analyzing the usage of 'person' in the Constitution, the Court concluded that the word 'has applicability only postnatally.' . . . Accordingly, an abortion is not 'the termination of life entitled to Fourteenth Amendment protection.' . . . From this holding, there was no dissent, . . . , indeed, no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have what is sometimes described as a 'right to life.' This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.<sup>21</sup>

The dissenting Justices in *Casey* said, in Chief Justice Rehnquist's words, "that *Roe* was wrongly decided, and that it can and should be overruled."<sup>22</sup> However, they would "overrule" *Roe* by allowing the states to decide whether to allow or prohibit abortion. Chief Justice Rehnquist said that "[a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest."<sup>23</sup> Justice Scalia said:

The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another

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

21. *Planned Parenthood v. Casey*, 505 U.S. 833, 913-14 (1992) (Stevens, J., concurring in part and dissenting in part) (citations omitted).

22. *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

23. *Id.* at 966.

and then voting. As the Court acknowledges, 'where reasonable people disagree the government can adopt one position or the other.'<sup>24</sup>

In any free and just society, there is an indispensable connection between humanity and personhood. The denial of personhood was the legal technique by which the Nazis set the Jews on the road to the gas chambers. If an innocent human being is subject to execution at the discretion of another, he is, in that most important respect, a non-person. And if he can be defined as a non-person in the womb so as to be subjected to execution at the discretion of others, the same thing can be done to his elder retarded brother or his grandmother. The personhood issue, it would seem, has been definitively and unanimously decided by the Supreme Court against the claim of the unborn human being to be regarded as a person. That personhood could be definitively restored by a constitutional amendment affirming the personhood of all human beings with respect to the right to life. See, for example, the Paramount Human Life Amendment,<sup>25</sup> which provides, "[t]he paramount right to life is vested in each human being from the moment of fertilization without regard to age, health or condition of dependency."<sup>26</sup>

## II. THE CONSTITUTIONAL STATUS OF LEGALIZED EUTHANASIA

While opponents of abortion have been derided for claiming that legalized abortion would put the nation on a slippery slope to euthanasia, events have proven them correct. Abortion is merely prenatal euthanasia, as euthanasia is postnatal abortion.

In *Washington v. Glucksberg*,<sup>27</sup> the Court held that there is no constitutional "right to die" that would require the states to allow assisted suicide. The Washington statute punishing one who "knowingly causes or aids another person to attempt suicide" was therefore upheld as "rationally related to legitimate government interests."<sup>28</sup> The Court, however, did not say whether it would defer to the legislative judgment so as to uphold a state law allowing assisted suicide. In 1994, Oregon adopted by a referendum margin of 51 percent to 49 percent a "Death With Dignity Act", which legalized assisted suicide for competent, terminally ill

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24. *Id.* at 979 (Scalia, J., concurring in the judgment in part and dissenting in part) (citations omitted).

25. S.J. Res. 12, 96th Cong., 1st Sess. (1980); H.J. Res. 300, 96th Cong., 1st Sess. (1980).

26. *Id.*

27. 117 S. Ct. 2258 (1997).

28. *Id.* at 2271.



adults. In 1997, Oregon voters rejected, by a 60 percent to 40 percent margin, a proposal to repeal the 1994 Act.<sup>29</sup> If the Supreme Court upholds the Oregon law, it will mean that the guarantees in the Constitution of the right to life and the equal protection of the laws do not prevent the states from allowing the intentional killing of the persons described in the Act.

In *Vacco v. Quill*,<sup>30</sup> the Supreme Court upheld the New York law which forbids assisted suicide. The Court of Appeals had held that New York's prohibition of assisted suicide violated the constitutional guarantee of equal protection because:

those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs.<sup>31</sup>

The Supreme Court, however, upheld the New York statute on the ground that "the distinction between assisting suicide and withdrawing life-sustaining treatment . . . is certainly rational."<sup>32</sup> The Court went on to note that "a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not."<sup>33</sup> Similarly:

a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and 'to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them.' The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain.<sup>34</sup>

The Supreme Court in *Vacco* relied on its 1990 decision in *Cruzan v. Director, Missouri Department of Health*,<sup>35</sup> for the state-

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29. See generally the discussion in NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *LIFE AT RISK: A CLOSER LOOK AT ASSISTED SUICIDE* (1997).

30. 117 S. Ct. 2293 (1997).

31. *Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir. 1996).

32. *Vacco*, 117 S. Ct. at 2298.

33. *Id.* at 2299.

34. *Id.* at 2298-99 (quoting *Assisted Suicide in the United States: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. 368 (1996) (testimony of Leon R. Kass, medical doctor)).

35. 497 U.S. 261 (1990).

ment that "[t]his Court has also recognized, at least implicitly, the distinction between letting a patient die and making that patient die."<sup>36</sup> In *Cruzan* the Court held that Missouri could require "clear and convincing" evidence of Nancy Cruzan's intent not to be sustained on a feeding tube before it would permit removal of that tube. On rehearing after the Supreme Court decision, such "clear and convincing" evidence was found, the tube was withdrawn and Nancy died.<sup>37</sup> But *Cruzan* does not forbid the states to allow withdrawal of food and water on a lesser showing of the patient's intent or on the basis that withdrawal is in the incompetent's best interest in the absence of a showing of intent. It can be difficult to distinguish legitimate withholding or withdrawal of medical treatment, including termination of the administration of food and water that no longer sustains the life of a patient near death, from actions which are homicidal in intent. Nevertheless, the rulings in *Cruzan* and, by implication, *Vacco*, can fairly be read as the conferral of constitutional permission on the states to allow the intentional killing of at least some patients from whom "treatment" is withdrawn.

The law is a blunt instrument. It should not attempt to require that excessive treatment be given to impede the act of dying. There comes a time when a person has done all that is reasonably required of him to preserve his life, nature should be allowed to take its course, and the proper judgments of physicians and family should be respected. In this context, a person should be allowed to die a natural and dignified death. Four factors, however, distinguish the *Cruzan*-type case from the difficult cases of medical judgment from which the law should abstain:

1. The patient in the *Cruzan*-type case is *not dying or near death*. Nancy Cruzan had a life expectancy of thirty years. If she were near death, it still should be forbidden to kill her intentionally, as by shooting her, even with her consent. However, if she were in the final stages of dying, it would be extremely difficult to prove that the removal of a feeding tube was done with the intent to cause death rather than to accept the immediately inevitable outcome.
2. Cases of this type *do not involve the withdrawal of medical treatment, including food and water provided by tube, that is burdensome, dangerous, extraordinary, or disproportionate to*

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36. *Vacco*, 117 S. Ct. at 2301.

37. See Andrew H. Malcolm, *Nancy Cruzan: End to Long Goodbye*, N.Y. TIMES, Dec. 29, 1990, at 1.

*the expected outcome.* The administration of food and water by tube was effective in sustaining Nancy Cruzan's life. It was therefore not useless even though it obviously would not correct her underlying condition.

3. Contrary to the Supreme Court's statements in *Vacco*,<sup>38</sup> the removal of the feeding tube, in the usual case, causes death by starvation and dehydration and not by an "underlying fatal disease or pathology." The official cause of Nancy Cruzan's death was "shock due to dehydration due to traumatic brain injury."<sup>39</sup> Nancy Cruzan had no real prospect of recovery from her underlying condition. But she was not dying when her tube was withdrawn. She was stable, in no significant distress and the nourishment she received through the tube kept her alive. When that tube was withdrawn, she starved and dehydrated to death. Interestingly, the petitioners in *Vacco*, who were attacking the ban on assisted suicide, implicitly conceded this point:

Patient-plaintiff Jane Doe, like some other terminal patients in the final stages of their illness, thus had lawfully available to her one method of physician assistance in ending her suffering. Because she required a feeding tube for nutrition and had had one surgically inserted, she could have asked to have it removed without running afoul of New York's assisted suicide laws. But while this would have permitted Jane Doe to die with her physician's assistance before her cancer ravaged her further, she would have been subject to what for her would have been the degrading process of death by starvation. She (and her family) would have been relegated to watching—perhaps only in glimpses as she was roused from a stupor brought on by malnutrition or medication or both—the degeneration of her body unto death.<sup>40</sup>

This point is so obvious—that deprivation of food and water causes death by starvation—that it would not deserve mention were it not for the effort by the courts to obscure the reality that we have legalized the intentional killing of innocent persons.

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38. See *Vacco*, 117 S. Ct. at 2298.

39. NEWS LEADER (Springfield, Mo.), Dec. 26, 1990, at 1.

40. Respondent's Brief at 16, *Vacco* (No. 95-1858).

4. In *Cruzan*, as in the typical such case,<sup>41</sup> *food and water are withdrawn with the specific intent to cause the death of the patient.* The removal of Nancy Cruzan's tube was not intended to relieve pain or to terminate an administration of food and water that was ineffective to sustain bodily life. The tube was supposed to sustain Nancy's biological life and it did that. The intent in removing her tube was precisely to allow Nancy to starve and dehydrate to death. When the tube was removed, she did exactly that. The motive or purpose of the removal may have been to relieve the patient of life considered burdensome or useless, but the clear and specific intent was to achieve that purpose by means of intentionally killing the patient. A permissible intention, on the other hand, would be to ease the excessive pain *caused by the medical treatment itself.* The removal of the feeding tube in the usual case is not justified by the principle of the double effect since the "good" objective, e.g., the relief of suffering or a burdensome life, is achieved by means of an intrinsically evil act, i.e., the intentional killing of the innocent.<sup>42</sup>

This analysis involves no reflection on the families, such as the Cruzan family, involved in these difficult situations. They evidently act in good faith in what they see as the best interest and intention of the patient. The fault is not with the families but rather with the Supreme Court. The Court has interpreted the Constitution to authorize the federal and state governments to permit the execution of the innocent, born as well as unborn.

With respect to the *Cruzan*-type case, the problem is one of equal protection of the laws. The Fourteenth Amendment provides: "No state shall . . . deny to *any person* the equal protection of the laws."<sup>43</sup> In "right to die" cases, the patients involved are all "persons" within the meaning of the Fourteenth Amendment. They are all innocent non-aggressors. The Fourteenth Amendment ought to mean that such persons cannot be excluded from the protection of state homicide laws by permitting them to be intentionally killed by others in any situation. When a state protects innocent, non-aggressor persons in general by forbidding them to be intentionally killed by another, it should be held to deny equal protection of the laws for the state to exclude from

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41. See, e.g., *Guardianship of Jane Doe*, 583 N.E.2d 1263 (Mass. 1992); *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626 (Mass. 1986); *In re Jobes*, 529 A.2d 434 (N.J. 1987); *In re Lawrence*, 579 N.E.2d 32 (Ind. 1991).

42. See Brief for the American Life League at 19-20, *Vacco* (No. 95-1858).

43. U.S. CONST. amend. XIV, § 1 (emphasis added).

that protection some such persons because they are terminally ill or because they have asked to be killed. Moreover, when an innocent human being is thus excluded from the protection of the homicide laws, he is treated by the law as a nonperson.

Regardless of whether the Supreme Court ultimately upholds a state law allowing active assisted suicide, the Supreme Court already interprets the Constitution to permit the states to allow the intentional killing of the innocent. In some cases, where a treatment or procedure is ineffective or where it is burdensome, dangerous or extraordinary or disproportionate to what it might achieve, the intent of the physician who removes or withholds that treatment or procedure might not be to kill the patient. However, in the ordinary case, such as *Cruzan*, the intent is precisely to end the patient's life, that is, to kill. In *Cruzan*, the Missouri Supreme Court accurately said:

This is also a case in which euphemisms readily find their way to the fore, perhaps to soften the reality of what is really at stake. But this is not a case in which we are asked to let someone die. Nancy is not dead. Nor is she terminally ill. This is a case in which we are asked to allow the medical profession to make Nancy die by starvation and dehydration. The debate here is thus not between life and death; it is between quality of life and death. We are asked to hold that the cost of maintaining Nancy's present life is too great when weighed against the benefit that life conveys both to Nancy and her loved ones and that she must die.<sup>44</sup>

Even if a state forbids assisted suicide, so that a physician may not legally prescribe for a consenting patient a drug that directly induces death, such a law will not prevent intentional killing by withdrawing medical treatment, including nutrition and hydration, by prescribing pain killers which have the effect of hastening death and by "terminal sedation." In *Vacco v. Quill*, the Supreme Court stated:

Respondents also argue that the State irrationally distinguishes between physician-assisted suicide and "terminal sedation," a process respondents characterize as "induc[ing] barbiturate coma and then starv[ing] the person to death." . . . Petitioners insist, however, that "[a]lthough proponents of physician-assisted suicide and euthanasia contend that terminal sedation is covert physician-assisted suicide or euthanasia, the concept of sedating

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44. *Cruzan v. Harmon*, 760 S.W.2d 408, 412 (Mo. 1988).

pharmacotherapy is based on informed consent and the principle of double effect." . . . Just as a State may prohibit assisting suicide while permitting patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have the foreseen but unintended "double effect" of hastening the patient's death. . . . ("It is widely recognized that the provision of pain medication is ethically and professionally acceptable even when the treatment may hasten the patient's death, if the medication is intended to alleviate pain and severe discomfort, not to cause death").<sup>45</sup>

The Supreme Court allows the states to decline even to try to distinguish between those who act with and without the intent to kill.

### III. THE REALITY THAT ABORTION AND EUTHANASIA, LARGELY AS A RESULT OF TECHNOLOGICAL DEVELOPMENTS, ARE MOVING BEYOND THE REACH OF THE LAW.

#### A. *Abortion*

In practical terms, abortion is moving beyond the reach of the law. The dominant abortion technique of the very near future will be by early abortifacient drugs and devices. Licensing and other restrictions will be only marginally effective, at best, in preventing the use of such abortifacients, especially with respect to those which also have non-abortive uses. Abortifacients can be prescribed by any physician, not just abortionists working in abortion clinics. So no one else will know when a woman is using an abortifacient. Abortion therefore will be a matter of private choice beyond the reach of the law. In *Roe*, the Supreme Court based the right to an abortion on the right to privacy which it had discovered lurking in the "penumbras, formed by emanations from"<sup>46</sup> the Bill of Rights.<sup>47</sup> In *Planned Parenthood v. Casey*,<sup>48</sup> the Court shifted the basis for the abortion right from privacy to a "liberty interest," just as technology was making abortion truly a matter of privacy.

While the attention of the pro-life movement was focused on the effort to ban partial-birth abortions, the Food and Drug Administration gave conditional approval to the Population

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45. *Vacca*, 117 S. Ct. at 2301-02 n.11.

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

47. *See Roe v. Wade*, 410 U.S. 113, 165 (1973).

48. 505 U.S. 833 (1992).

Council for the marketing of RU 486.<sup>49</sup> RU 486, or mifepristone, can be taken "virtually as soon as a woman knows she is pregnant." The Planned Parenthood Federation of America has obtained FDA approval for a nationwide clinical trial of an early abortion method using a combination of two drugs—methotrexate and misoprostil—that are now labeled for other purposes. It has been shown to be "highly effective" when used within the first nine weeks of pregnancy.<sup>50</sup>

"Planned Parenthood clinics in the Washington area are offering abortions to women as early as 14 to 21 days after conception. And a few clinics elsewhere in the country are using the same technique to perform abortions as early as eight to ten days after conception, before women have missed a period, said Rosann Wisman, executive director of the Planned Parenthood Federation of Metropolitan Washington."<sup>51</sup>

Early abortion drugs and devices have a practical immunity to prohibition because they are treated as contraceptives rather than abortifacients. In the mid-1960s the leading medical dictionaries, the American College of Obstetricians and Gynecologists (ACOG) and ultimately the relevant federal agencies, changed the definition of pregnancy so that it would be regarded as beginning, not at the fertilization of the ovum by the sperm, but at the implantation of the embryo in the womb, which occurs five to seven days after fertilization. Joseph R. Stanton, M.D., described this process:

Until 1964 there was no scientific disagreement whatsoever that human pregnancy began at fertilization. . . . Nor was there any dispute that conception occurred at the time of the fertilization of the human ovum by the human sperm. . . . Attempts to change the definition of the beginning of pregnancy from the time of fertilization to the more vague and unprecise time of implantation began seriously in 1964 at the Second International Conference on Intra-Uterine Contraception. . . . This was a careful and calculated effort to make induced abortion socially acceptable.<sup>52</sup>

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49. Gina Kolata, *Pill for Abortion Clears Big Hurdle to Its Sale in U.S.*, N.Y. TIMES, Sept. 19, 1996, at 1.

50. See Karen Freeman, *Planned Parenthood to Participate in Test of Abortion Drugs*, N.Y. TIMES, Sept. 12, 1996, at A10.

51. Joyce Howard Price, *Abortion Clinics in Area Provide Early Procedure*, WASH. TIMES, Dec. 22, 1997, at A3.

52. JOSEPH R. STANTON, M.D. & MARIANNE REA-LUTHIN, *WHY HUMAN LIFE SHOULD BE PROTECTED FROM FERTILIZATION, ONWARD 1* (1975); see generally

"Shortly thereafter, the American College of Obstetricians and Gynecologists (ACOG) appointed a committee on terminology which, in 1965, created new definitions of conception and of the beginning of pregnancy, relating them both to implantation rather than fertilization of the ovum."<sup>53</sup>

Fertilization is the union of spermatozoon and ovum.

Conception is the implantation of a fertilized ovum. "The definition has been selected deliberately because union of sperm and ovum cannot be detected clinically unless implantation occurs."

Pregnancy is the state from conception to expulsion of the products of that conception.<sup>54</sup>

"The impact of this change," noted Dr. Stanton, 'is seen in the following two facts: 1) *Stedman's Medical Dictionary* which . . . had defined conception as 'the act of conceiving or becoming pregnant . . .',<sup>55</sup> changed the definition of conception . . . to read 'the successful implantation of the blastocyst. . . .'<sup>56</sup> The Department of Health, Education and Welfare and the Centers for Disease Control currently accept the 1965 ACOG definition of human pregnancy.'<sup>57</sup>

Early abortifacients are widely promoted as contraceptives. The National Academy of Sciences described RU 486 itself as a contraceptive in a 1990 report.<sup>58</sup> Numerous other kinds of pills that have been approved for use in this country are inaccurately promoted as contraceptives although their effect is to prevent implantation of the embryo in the womb. And the intrauterine device apparently operates as an abortifacient by preventing implantation.<sup>59</sup> "In the latest of a series of new techniques that blur the line between contraception and abortion, a growing number of abortion clinics nationwide are offering abortions to

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GERMAIN GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 106-16 (1970).

53. *Id.*

54. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNCOLOGISTS, ACOG TERMINOLOGY BULLETIN 1-2 (1965).

55. STANTON & RAE-LUTHIN, *supra* note 52 (citing STEDMAN'S MEDICAL DICTIONARY (20th ed. 1961)).

56. *Id.* (citing STEDMAN'S MEDICAL DICTIONARY (22nd ed. 1972)).

57. *Id.* (citing letter from Gilbert L. Woodside, Acting Director, National Institute of Child Health and Human Development, U.S. Dep't of Health, Education and Welfare, to Joseph Stanton, M.D.); *see also* CHARLES E. RICE, NO EXCEPTION, A PRO-LIFE IMPERATIVE 59 (1990).

58. *See* Philip Hilts, *U.S. is Decades Behind Europe in Contraceptives*, N.Y. TIMES, Feb. 15, 1990, at 1.

59. *See* HUMAN LIFE INTERNATIONAL REPORT 5 (Apr. 1990) (containing list of abortifacient drugs and devices that is published by Pharmacists for Life).



women as early as 8 or 10 days after conception, before they have missed a menstrual period."<sup>60</sup>

At least two Justices on the Supreme Court appear to agree that abortifacients should be treated as contraceptives. The preamble to the Missouri statute in *Webster v. Reproductive Health Services*,<sup>61</sup> stated that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being."<sup>62</sup> Five Justices declined to decide the constitutionality of that preamble because it had no legal effect on abortions. Justice Stevens, however, argued that the preamble is unconstitutional. The statute defined "conception" as "the fertilization of the ovum of a female by a sperm of a male."<sup>63</sup> Justice Stevens stated that "standard medical texts equate 'conception' with implantation in the uterus, occurring about six days after fertilization. Missouri's declaration therefore implies regulation not only of previability abortions, but also of common forms of contraception such as the IUD, and the morning-after pill."<sup>64</sup> Justice Stevens noted that, "An intrauterine device, commonly called an IUD, 'works primarily by preventing a fertilized egg from implanting.' . . . Other contraceptive methods that may prevent implantation include 'morning-after pills,' high-dose estrogen pills taken after intercourse, particularly in cases of rape . . . and the French RU 486, a pill that works 'during the indeterminate period between contraception and abortion.' . . . Low-level estrogen 'combined' pills—a version of the ordinary, daily ingested birth control pill—also may prevent the fertilized egg from reaching the uterine wall and implanting. . . ."<sup>65</sup> Justice O'Connor appeared to agree with Justice Stevens [when she described] early abortifacients as "post fertilization contraceptive devices."<sup>66</sup>

### B. *Euthanasia*

With respect to euthanasia, it will be very difficult for the law to distinguish among cases of sedation or removal of treatment so as to determine whether the physician acted with the intent to relieve pain or the intent to cause death.

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60. Tamar Lewin, *A New Technique Makes Abortions Possible Earlier*, N.Y. TIMES, Dec. 21, 1997, at A1.

61. 492 U.S. 490 (1989).

62. *Id.* at 504.

63. *Id.* at 563 (Stevens, J., concurring in part and dissenting in part).

64. *Id.*

65. *Id.* at 563 n.7.

66. *Id.* at 522 (O'Connor, J., concurring); see also RICE, *supra* note 57, at 62-63.

"[N]owadays many, if not most, Americans die because someone—doctors, family members or they themselves has decided that it is time for them to go. What might be called managed deaths, as distinct from suicides, are now the norm in the United States, doctors say. The American Hospital Association says that about 70 percent of the deaths in hospitals happen after a decision has been made to withhold treatment. Other patients die when the medication they are taking to ease their pain depresses, then stops, their breathing. . . . 'It's called passive euthanasia,' said Dr. Norman Fost, director of the Program in Medical Ethics at the University of Wisconsin. 'You can ask who's involved and is it really consensual, but there is no question that these are planned deaths. We know who is dying. Patients aren't just found dead in their beds.'"<sup>67</sup> "My intent," said Dr. Maurie Markman of the Cleveland Clinic, 'always is to relieve suffering. If that's my goal, I can look myself in the eye. I can go to sleep at night.'"<sup>68</sup>

In the 1997 right-to-die cases, the Supreme Court invited the states to turn a blind eye to euthanasia committed by withdrawal of food and water or by palliatives and sedation. All of these techniques can be morally justified in cases where they are employed without the intent to kill. In some cases they are employed with the intent to kill, which would appear to be the case when food and water are withdrawn from a patient who is not dying, who is not in significant distress and who has been kept alive by the feeding tube. Proponents of euthanasia do not have to assume the burden of justifying the overt techniques of a Dr. Jack Kevorkian. The Supreme Court has given them a green light to practice euthanasia under the guise of legitimate use of palliative care, sedation or withdrawal of treatment. Nor is it likely that such euthanasia will be limited to consenting patients. Rising health care costs will exert pressure on family, guardians, etc., to opt for termination of life in cases of the incompetent, the aged and the disabled. "The assisted-suicide debate has called the question on the health-care profession," said Dr. Steven Miles of the University of Minnesota, an expert in end-of-life care. "The public is demanding assisted suicide, in part because they are justifiably afraid of the quality of end-of-life care. There is a demand for a new paradigm, and the paradigm is palliative care."<sup>69</sup> In *Washington v. Glucksberg*, the Supreme

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67. Gina Kolata, *The Supreme Court: Likely Consequences; 'Passive Euthanasia' in Hospitals is the Norm, Doctors Say*, N.Y. TIMES, June 28, 1997, at A10.

68. *Id.*

69. Sheryl Gay Stolberg, *Cries of the Dying Awaken Doctors to a New Approach*, N.Y. TIMES, June 30, 1997, at A1.

Court commented on the evolution of euthanasia in the Netherlands, where the practice is not to prosecute for active assisted suicide:

This concern is further supported by evidence about the practice of euthanasia in the Netherlands. The Dutch government's own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia (defined as "the deliberate termination of another's life at his request"), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition to these latter 1,000 cases, the study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent. . . . This study suggests that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia.<sup>70</sup>

The Supreme Court noted the Netherlands' experience to justify Washington's judgment that allowing assisted suicide could lead to involuntary euthanasia. It would appear, however, that the allowance of "passive" measures for ending life has the same potential to slide into involuntary termination. This would appear to be especially so in light of the aging of the population of the United States:

The population is rapidly growing older and will continue to do so in the next half-century. Between 1995 and 2010, the population of people 65 and older will grow slowly by about 6 million, from 33.5 million to 39.4 million, as people born in the 1930's and early 1940's (when fertility was low) age. By contrast, between 2010 and 2030, with the baby boomers aging, the number will soar by about 30 million, from 39.4 million to 69.3 million. Meanwhile, the population in the prime working ages of 20 to 59 will remain stationary at 160 million. In 1900, there were 10 times as many children below 18 as there were adults over

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70. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2274 (1997) (citing *PHYSICIAN ASSISTED SUICIDE AND EUTHANASIA IN THE NETHERLANDS: A REPORT OF CHAIRMAN CHARLES T. CANADY TO THE SUBCOMMITTEE ON THE CONSTITUTION OF THE HOUSE COMMITTEE ON THE JUDICIARY*, 104TH CONG., 2D SESS., at 12-13 (Comm. Print 1996)).

65. By 2030, there will be slightly more people over 65 than under 18.

In fact, the population is aging because both fertility and mortality rates are below their long-term historic averages. Unless fertility rates increase, the population will not become younger even after the boomers have left the scene.<sup>71</sup>

Who will support all those old and infirm people? The utilitarian answer is, as Colorado Governor Richard Lamm said to the elderly: "You've got a duty to die and get out of the way. Let the other society, our kids, build a reasonable life."<sup>72</sup>

#### IV. THE EFFECT OF THE MISGUIDED EFFORT OF THE ESTABLISHMENT PRO-LIFE MOVEMENT TO REGULATE ABORTION THROUGH AN INCREMENTAL APPROACH.

Candor requires an assessment of the role the establishment pro-life movement, including the National Right to Life Committee and the bureaucratic apparatus of the Catholic bishops, has played in solidifying in our law and culture the underlying nonpersonhood premise of *Roe v. Wade*.

The years immediately following *Roe* presented an opportunity to reverse it on its basic holding before the cultural acquiescence in legalized abortion put such a remedy beyond reach. On March 7, 1974, Cardinals Krol, Manning, Cody and Medeiros testified before the Senate Subcommittee on Constitutional Amendments. They insisted on restoration of constitutional protection to an unborn child as a person. And they refused to support the Buckley Amendment which purported to restore personhood but would have allowed abortion to save the life of the mother. The Cardinals said that "the prohibition against the direct and intentional taking of innocent human life should be universal and without exceptions." As Cardinal Krol put it, "I could not endorse any wording that would allow for direct abortion."<sup>73</sup> If the pro-life movement had held fast to that position, the constitutional and cultural situation would be more favorable to the right to life than it is today.

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71. Samuel H. Preston, *Children Will Pay*, N.Y. TIMES MAG., Sept. 29, 1996, at 97, 97.

72. Gov. Lamm Asserts Elderly, if Very Ill, Have 'Duty to Die', N.Y. TIMES, Mar. 31, 1984, at A16.

73. *Abortion and the Constitution: Hearings on S.J. Res. 119 and S.J. Res. 1340 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. 29 (1974) (statement of Cardinal Krol); see also 4 *Cardinals Urge U.S. Abortion Ban*, N.Y. TIMES, Mar. 8, 1974, at 40.

Since at least 1981, major elements of the pro-life establishment, including the Catholic bishops' bureaucracy, have retreated from the Cardinals' position. They have themselves promoted incremental legislation that would allow abortion for the life or health of the mother and in pregnancies caused by rape or incest and for minors with parental consent.<sup>74</sup> And they have urged the states' rights solution which would allow the states to allow or forbid abortion.<sup>75</sup> Both the incremental and states' rights approaches, however, affirm the nonpersonhood holding of *Roe*. If an innocent human being is subject to execution at the discretion of another whenever the legislature so decrees, he is a nonperson with no constitutional right to live.

These compromise approaches are advanced as a method of saving lives. But it is fair to suggest that they have increased the toll of lives from abortion. For example, the enactment of a requirement that an unmarried minor obtain parental consent before an abortion does in fact decrease the number of abortions from those under a previously unrestricted law. But that comparison is oversimplified. A more reliable comparison would be between a situation, on the one hand, where the law was either wholly permissive or required parental consent, and, on the other, a situation where the pro-life movement was insisting that the law can never rightly allow the murder of the innocent. A law allowing abortion with parental consent treats the killing of an unborn child as qualitatively the same as getting one's ears pierced. And ideas have consequences. The incremental strategy, which seeks to regulate rather than prohibit abortion, conveys to the public the message that even the "pro-life" advocates agree that innocent life is negotiable.

The dominant abortions of the near future will be committed by pills, implants or other devices. The only way that the law can reach such early abortions will be by licensing and prescription restrictions and similar regulations, and such will be largely ineffective with respect to items that have non-abortive as well as abortive uses. Moreover, the only way to mobilize sufficient support for any such restrictions will be to restore the public conviction that all life is sacred and must be protected by the law. The incremental strategy, which seeks to regulate rather than prohibit abortion, undermines that conviction because it permeates

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74. See *MORNING ADVOCATE*, June 21, 1991, at 1 (Baton Rouge, La.); see also *AMERICAN LIFE LEAGUE, LEGISLETTER*, Jan.-Feb. 1992, at 2.

75. See *NATIONAL COMMITTEE FOR A HUMAN LIFE AMENDMENT, NEWSLETTER*, Sept. 21, 1981; see also *NATIONAL CATHOLIC REGISTER*, Jan. 10, 1982, at 4; *NATIONAL RIGHT TO LIFE NEWS*, Nov. 23, 1981, at 1.

the public discourse with the message that even the "pro-life" advocates agree that innocent life is negotiable.

Consider one local example. Station KELO-TV in Sioux Falls, South Dakota, conducted polls on abortion in late 1990 and late 1991. In 1991 the major pro-life effort in South Dakota was an attempt to forbid abortions except for rape, incest, and the life or physical health of the mother. After that campaign, the second poll, identical to the first and covering the same audience, showed that more people favored some abortion, and fewer opposed all abortions, than had been the case with the first poll. "[T]he large body of the public who remain 'unsure' where they stand on abortion look to committed pro-lifers and pro-death forces to help develop their views. And with many pro-lifers willing to allow some abortions legislatively, it appears the public has followed their lead. As a result, we have lost ground with the public."<sup>76</sup>

The 1992 and 1996 presidential elections confirm that a pro-life strategy of compromise contributes to the institutionalization of the abortion ethic. In those campaigns, Bill Clinton took the totally pro-abortion position. The "pro-life" candidates, George Bush, and Bob Dole, backed by the pro-life movement, supported legalized abortion in life of the mother, rape and incest cases.

Various polls, including the Washington Post-ABC News, Gallup, election day exit polls and others, indicate that those campaigns confirmed and reinforced the trend toward public acceptance of legalized abortion that has been evident since *Roe* was decided in 1973. Only about twenty percent believe abortion should not be legal. "The public's attitude toward abortion largely lines up with President Clinton's phrase that abortions should be 'safe, legal and rare,' said [University of Maryland Professor] Elizabeth Adell Cook . . . co-author of 'Between Two Absolutes,' an analysis of public opinion on abortion . . . Studies indicate an emerging consensus that 'it should be allowed under some circumstances but it isn't to be taken too lightly,' Dr. Cook said. . . . 'People think if there's a serious enough reason, it's O.K., but if they don't think the reason is compelling enough, they think it's wrong.'"<sup>77</sup> Support for legalized abortion coexists in the minds of many with their acknowledgment that abortion is murder: "In responses so paradoxical that they astound even experts like Dr. Cook, one third of the poll's respondents who

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76. Paul R. DOTT, *RESCUE THE PERISHING*, Jan. 1992, at 1.

77. Corey Goldberg & Janet Elder, *Public Still Backs Abortion, but Wants Limits, Poll Says*, N.Y. TIMES, Jan. 16, 1998, at A1.

said they considered abortion to be murder also agreed that abortion is sometimes the best course in a bad situation.<sup>78</sup>

Law is an educator. And *Roe v. Wade* has accelerated the dominance of a secular, relativist and individualistic ethic in which the right to life of the innocent is negotiable because it is evaluated according to the utilitarian norms characteristic of a pagan culture. It would be unfair to lay responsibility for this development simply at the feet of the establishment pro-life movement. That movement, however, has contributed to that development. It has forfeited its responsibility, which is its reason for being, to affirm the absolute sanctity of innocent life. Instead, it has bought into the pagan culture by itself treating the right to live as a political issue as negotiable as a highway appropriation. It has sought tactical, political victories at the price of strategic retreat.

The campaign to ban Partial Birth Abortion (PBA) won a major tactical victory by raising awareness of the depravity of the abortion culture. That campaign, however, is likely to have the unintended effect of reinforcing that culture. The PBA, despite its gruesome character, is qualitatively no different from any other abortion method. Unfortunately, the focus of the campaign on the method of the PBA killing, distracted attention to some extent from the reality that the law can never validly tolerate any abortion or any other intentional execution of the innocent. For example, the pamphlet distributed nationally by the National Conference of Catholic Bishops headlined its first page: "4/5 Infanticide, 1/5 Abortion," and went on to say, "Why all the furor over partial birth abortion? Because unlike any other abortion, this procedure kills a living infant when she is almost fully delivered from her mother's womb. It's a painful, brutal procedure that's paving the way to open infanticide."<sup>79</sup> Abortion, however, is not wrong because it leads to infanticide. All abortion is wrong in itself. If it is not wrong, what is wrong with infanticide? While it was legitimate and tactically effective to describe the PBA as practically infanticide, that tactic invited a strategic defeat, reinforcing the abortion culture by focusing on the method of the murder rather than on the murder as such.

These comments are not intended as a reflection on the proponents of the PBA ban. The effort to ban PBAs was, of course, flawed in its allowance of the PBA to save the life of the mother. If the PBA is such a horrendous atrocity that it must be

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78. *See id.*

79. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, 4/5 INFANTICIDE, 1/5 ABORTION 1 (undated leaflet) (on file with author).

banned, why should it—or any other type of abortion for that matter—be allowed in order to save the life of the mother? Since when should any civilized society allow the intentional killing of an innocent, helpless non-aggressor even to save the life of the killer? If two people are on a one-man raft in the ocean, the law does not give one the right to throw the other overboard.<sup>80</sup> Given the moribund state of the establishment pro-life movement, however, the PBA effort was a tactically effective attempt to jump-start the pro-life effort. And the public commitment of the Catholic bishops and their agencies to that effort was laudable and courageous. Nevertheless, the PBA effort is a testimony to the weakness rather than the strength of the pro-life movement.

In any civilized society, the issue must be *whether* innocent human beings may be intentionally and legally killed. Over the past two decades, however, the establishment pro-life leaders have sought to limit, but not wholly prohibit, abortion, thus framing the issue as *which* innocents may be killed. The campaign to prohibit partial-birth abortion is a further retreat, framing the issue not in terms of *whether*, and not even in terms of *which*, but in terms of *how* innocent human beings may be legally executed.

#### *A Note on the Principles Governing Incremental Legislation*

The principles governing legislation on abortion were spelled out by John Paul II in *Evangelium Vitae*, where he said that “a civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law. . . . In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, or to ‘take part in a propaganda campaign in favour of such a law, or vote for it.’”<sup>81</sup> The Pope went on to examine the responsibility of legislators

where a legislative vote would be decisive for the passage of a more restrictive law, aimed at limiting the number of authorized abortions, in place of a more permissive law already passed or ready to be voted on. . . . [W]hen it is not possible to overturn or completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at *limiting the harm* done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This [is] not in fact an

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80. See, e.g., *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383); *Regina v. Dudley & Stevens*, 14 Q.B.D. 273 (1884).

81. POPE JOHN PAUL II, *EVANGELIUM VITAE* NOS. 72-73 (1995) [hereinafter *EVANGELIUM VITAE*].



illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects.<sup>82</sup>

Note that the Pope says that a legislator "could" licitly support such a proposal. He does not say that he "should." This leaves open the prudential question of whether pro-life support for such compromise measures might actually increase the "negative consequences" of legalized abortion "at the level of general opinion and public morality," especially when such compromises are promoted by "pro-life" advocates themselves. This is not to say that a legislator is acting immorally if he reluctantly votes as a last resort for a bill that would allow some abortions, e.g., with parental consent or for rape, incest, or the life of the mother. But it is to say that his action is self-defeating.

A separate question is whether the requirements of No. 73 are met in a particular case, especially with respect to a legislator making "well known" his "absolute personal opposition to procured abortion." Many legislators who seek cover under No. 73 do not fulfill its terms. In such cases, their actions would not appear to be morally justified. However, it is not fruitful to question whether they are acting morally. Instead a prudent response would be simply to state the terms of No. 73, emphasizing that even in its stated circumstances, it says "could," not "should," and then address the reality that the incremental approach is unjustified in prudential terms. We are reminded again that the first problem with pragmatism is that it does not work.

Probably the most intimidating argument for the incremental approach is that we have a duty to save whatever lives we can. Don't you want to save lives? Why will you permit babies, whom you could save, to be killed just because you can't get a perfect law? Support for partial protection of the right to live can be morally justified, as Bishop John J. Myers put it, "only if the legislator decides there is at that time no reasonable hope of enacting legislation which would protect equally all unborn children." However, for more than a decade, the pro-life movement has shown a virtually automatic tendency to slide from reluctantly accepting exceptions to actively promoting them. A form of Gresham's Law operates here. The pro-life political climate is dominated by those who have convinced themselves that full protection cannot be enacted, without ever really having tried to achieve it. And no one even bothers to seriously promote bills that would restore full protection. Those who might do so are dissuaded by

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82. *Id.* at No. 73.

the argument that to do so would be divisive. So if Able introduces a bill to forbid some abortions and to allow others, support for that bill becomes the test of pro-life solidarity. If Baker introduces a no-exception prohibition of abortion and refuses to support Able's compromise bill, Baker is labeled as divisive. Able, however, is not required to support Baker's no-exception bill because everyone knows that it is impractical and visionary. Bad bills drive out the missing, no-exception position. The no-exception position has not failed. It has never really been tried. The point is not that the proposal of exceptions is necessarily immoral, but that, in prudential terms it is inherently self-defeating.<sup>83</sup>

*Evangelium Vitae* does not precisely address the morality of endorsement or acceptance of exceptions by others than legislators. In No. 28, John Paul asserts that "we all [have] the inescapable responsibility of *choosing to be unconditionally pro-life*."<sup>84</sup> However, since a legislator "could licitly support" exceptions in the circumstances defined in No. 73, pro-life individuals and groups could assist him in drafting and explaining such legislation. *Evangelium Vitae* does not specifically address the limits of such assistance in its discussion of cooperation in No. 74.<sup>85</sup> At some point, of course, pro-life organizations could exceed the bounds of permissible material cooperation in their work on exception provisions.

Similarly, while a pro-life voter could morally vote in some situations for the less objectionable of two pro-abortion candidates, that course, too, has failed to work. That approach in practice has subordinated pro-life principles to the interests and judgment of "the great human scourge of the twentieth century: the professional politician."<sup>86</sup> Professional politicians not only do not fear the compromising pro-lifers; they eat them for breakfast. The politicians half-heartedly endorse marginal pro-life proposals in exchange for pro-life endorsement of their re-election campaigns. And the pro-lifers give the politicians a veto power over their agenda by proposing only those proposals likely to get the approval of the politicians. Solely concerned with re-election, the politicians know they can placate the pro-lifers with small-change rhetoric and guarded endorsements of peripheral bills without arousing the focused opposition of the pro-abortion

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83. RICE, *supra* note 57, at 86-87.

84. EVANGELIUM VITAE, *supra* note 81, at No. 28.

85. See generally *id.* at No. 74.

86. PAUL JOHNSON, MODERN TIMES 510 (1985).

camp. The "practical" pro-lifers are so devoted to politics as "the art of the possible" that they risk becoming professional politicians themselves. As Solzhenitsyn asked, "Is it not true that professional politicians are boils on the neck of society that prevent it from turning its head and moving its arms?"<sup>87</sup> The political pro-life movement will be counterproductive until it stops playing politics and stands firm on the basic truth that the law can never validly tolerate the intentional killing of innocent human beings. Our only chance to succeed is through fidelity to the truth. But we should be faithful to the truth on this matter of life-and-death principle whether it brings political success or not. We should be "faithful," wrote Charles Colson because, "we are motivated not by a desire to make an impact on society but by obedience to God's Word and a desire to please him. When our goal becomes success rather than faithfulness, we lose the single-minded focus of obedience and any real power to be successful."<sup>88</sup>

In a perceptive letter to the *New York Times*, Jason McNeill said the approval of RU-486

may end up galvanizing the anti-abortion movement rather than squelching it. RU-486 can be prescribed by any doctor, not just abortionists, so no one will know when a woman is using it. But RU-486 is used only in the early stages of pregnancy. Late-term and mid-term abortions will continue in the abortion clinics. These late abortions will now become the focus. As more Americans realize that abortion clinics serve no purpose but to kill viable babies, the opposition to mid- and late-term abortions will grow, and the anti-abortion movement will gain even more steam.<sup>89</sup>

Mr. McNeill is probably right. The establishment pro-life movement will continue its campaign to impose marginal restrictions on surgical abortions. The National Right to Life Committee, the Christian Coalition and other elements in the pro-life establishment take no position on contraception. However, abortifacients that prevent implantation of the embryo in the womb are now treated by the medical profession, and increasingly by the law, as contraceptives. Neither such abortifacients,

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87. ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO*, PART I 391 (1973).

88. Charles Colson, *Living in the New Dark Ages*, CHRISTIANITY TODAY, Oct. 20, 1989, at 30, 32; see also RICE, *supra* note 57, at 110.

89. Jason McNeill, *Abortion Pill Will Galvanize the Opposition*, N.Y. TIMES, Sept. 20, 1996, at A14 (letter to the editor).

nor later-acting abortifacients such as RU-486, are likely to be effectively opposed by the pro-life establishment which is fixated on its marginal effort to restrict the increasingly obsolete surgical abortions.

## V. THE DECISIVE IMPACT OF THE CONTRACEPTIVE ETHIC

It was not until 1930, with the Anglican Lambeth Conference, that any Christian denomination ever said that contraception could ever be objectively right.<sup>90</sup> Contraception prevents life while abortion kills existing life. But both involve the deliberate separation of the unitive and procreative aspects of sex. In his 1968 encyclical, *Humanae Vitae*, Pope Paul VI stressed that the law of God prohibits "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or a means."<sup>91</sup> This teaching "is based on the inseparable connection, established by God, which man on his own initiative may not break, between the unitive significance and the procreative significance."<sup>92</sup> And a contraceptive society requires abortion as a backup for cases in which contraception fails or is not used. The availability of abortion is also a factor in the decision of some to engage in sexual relations without using contraception. Also many so-called contraceptives are abortifacient in that they cause the destruction of the developing human being.

In *Evangelium Vitae*, Pope John Paul noted that the pro-abortion culture is especially strong precisely where the Church's teaching on contraception is rejected. Certainly, from the moral point of view, contraception and abortion are *specifically* different evils: the former contradicts the full truth of the sexual act as the proper expression of conjugal love, while the latter destroys the life of a human being. . . . But despite their differences of nature and moral gravity, contraception and abortion are often closely connected, as fruits of the same tree. It is true that in many cases contraception and even abortion are practiced under the pressure of real-life difficulties, which nonetheless can never exonerate from striving to observe God's law fully. Still, in very many other instances such practices are rooted in a hedonistic mentality unwilling to

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90. See Charles A. Selden, *Lambeth Bishops Back Arbitration for All Peoples*, N.Y. TIMES, Aug. 15, 1930, at 1.

91. POPE PAUL VI, *HUMANAE VITAE* NO. 14 (1968) [hereinafter *HUMANAE VITAE*].

92. *Id.* at No. 12.

accept responsibility in matters of sexuality, and they imply a self-centered concept of freedom, which regards procreation as an obstacle to personal fulfillment. The life which could result from a sexual encounter thus becomes an enemy to be avoided at all costs, and abortion becomes the only possible decisive response to contraception. The close connection between . . . contraception and . . . abortion . . . is being demonstrated in an alarming way by the development of chemical products, intrauterine devices and vaccines which, distributed with the same ease as contraceptives, really act as abortifacients in the very early stages of the development of the life of the new human being. . . . [T]here exists in contemporary culture a certain Promethean attitude which leads people to think that they can control life and death by taking the decisions about them into their own hands.<sup>93</sup>

The acceptance of contraception affirms that man, rather than God, is the arbiter of when life shall begin:

At the origin of every human person there is a creative act of God. No man comes into existence by chance; he is always the object of God's creative love. From this fundamental truth of faith and reason it follows that the procreative capacity, inscribed in human sexuality, is—in its deepest truth—a cooperation with God's creative power.

It also follows that men and women are not the arbiters, are not the masters of this same capacity, called as they are, in it and through it, to be participants in God's creative decision. When, therefore, through contraception, married couples remove from the exercise of their conjugal sexuality its potential procreative capacity, they claim a power which belongs solely to God: the power to decide, in *a final analysis*, the coming into existence of a human person. They assume the qualification not of being cooperators in God's creative power, but the ultimate depositories of the source of human life.

In this perspective, contraception is being judged, objectively, so profoundly unlawful as never to be, for any reason, justified. To think or to say the contrary is equal to maintaining that in human life situations may arise in which it is lawful not to recognize God as God.<sup>94</sup>

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93. EVANGELIUM VITAE, *supra* note 81, at Nos. 13, 15.

94. Pope John Paul II, *Discourse*, Sept. 17, 1983, in 28 THE POPE SPEAKS 356, 356-57 (1983); *see also* RICE, *supra* note 57, at 47-50.

If, through contraception, man makes himself the arbiter of when life begins, he will predictably make himself the arbiter, through abortion, suicide and euthanasia, of when it ends. All are based on a utilitarian approach. The acceptance of contraception and abortion accustomed people to the idea that some lives are not worth living, that they are not worth bringing into existence or continuing in existence. This attitude clears the way for euthanasia of the terminally ill, the retarded and others whose lives are considered "useless." Euthanasia is postnatal abortion, as abortion is prenatal euthanasia. More than three decades of contraception and abortion have left the United States with a diminished pool of workers to support the elderly, sick and disabled. In 1900, there were 10 times as many children below 18 as there were adults over 65. By 2030, there will be slightly more people over 65 than under 18.<sup>95</sup> Fittingly, John Paul II described euthanasia as

one of the more alarming symptoms of the 'culture of death,' . . . in prosperous societies, marked by [a] preoccupation with efficiency . . . which sees . . . elderly and disabled people as intolerable and too burdensome. These people are . . . isolated by their families and by society, which are organized . . . on . . . criteria of productive efficiency, according to which a hopelessly impaired life no longer has any value.<sup>96</sup>

The prevailing culture "presents recourse to contraception, sterilization, abortion and even euthanasia as a mark of progress and a victory of freedom, while depicting as enemies of freedom and progress those positions which are unreservedly pro-life."<sup>97</sup>

Contraception is the defining vice of our age. The cultural acceptance of the separation of sex from procreation has contributed to the trivialization of sex. Man (of both sexes) is entirely the arbiter of whether it shall be recreational or procreational. Apart from its impact with respect to abortion and euthanasia, the dominance of the contraceptive ethic is a factor in other culturally significant developments. For example, pornography, like contraception, involves the separation of sex from life and the reduction of sex to an exercise in self-gratification. *Humanae Vitae* warned that contraception would cause women to be viewed as sex objects, that

a man, who grows accustomed to the use of contraceptive methods may forget the reverence due to a woman and,

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95. See *supra* note 71 and accompanying text.

96. *EVANGELIUM VITAE*, *supra* note 81, at No. 64.

97. *Id.* at No. 17.

disregarding her physical and emotional equilibrium, reduce her to being a mere instrument of his own desires, no longer considering her his partner whom he should surround with care and affection.<sup>98</sup>

While contraception is the taking of the unitive without the procreative, in vitro fertilization is the reverse. If we insist on the right to take the recreational without the procreational, how can we object to the reverse? Nor is there any realistic prospect of putting the brakes on human cloning without restoring the conviction that God, and not man, is the arbiter of when and how human life begins and ends. Human cloning will be regulated but it is unlikely that any effective prohibition of it will be enacted in the prevailing culture which is characterized by the dominance of technology liberated from moral restraints.

Moreover the cultural toleration of promiscuity, divorce and homosexual activity cannot be understood apart from the underlying premises of the contraceptive ethic. According to the natural moral law and the Commandments, sex is reserved for marriage because sex is inherently connected with procreation and the natural way to raise children is in a marriage. But if, through contraception, we claim the power to decide whether sex will have anything to do with procreation, why should we have to reserve sex for marriage? In the natural order, marriage should be permanent because sex is inherently related to procreation and children should be raised by parents permanently married to each other. But if it is entirely up to us whether sex will have any relation to children, if sex and marriage are not intrinsically related to new life, then marriage loses its reason for permanence.

Similarly, if sex has no inherent relation to procreation, and if man, rather than God, is the arbiter of whether and when it will have that relation, on what ground other than the pragmatic and esthetic can homosexuals be denied the right to marry? The contraceptive society cannot say that homosexual activity is objectively wrong without denying its own basic premises.<sup>99</sup>

## VI. WHAT, IF ANYTHING, CAN BE DONE AT THIS TIME TO RESTORE THE RIGHT TO LIFE?

In legal terms, the short answer is: Not much.

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98. *HUMANAE VITAE*, *supra* note 91, at Nos. 17.

99. See the discussion in CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW 256-57 (1993).

There is no practical prospect, for the foreseeable future, of restoring authentic legal protection to the right to life. Instead, a restoration of that protection will be achieved only through the building, from the bottom up, of a new "culture of life" affirming the dignity of every human being, without exception, as a person created in the image and likeness of God. "[W]e are facing", said John Paul II, "an enormous and dramatic clash between good and evil, death and life, the 'culture of death' and the 'culture of life.' We find ourselves not only 'faced with' but necessarily 'in the midst of' this conflict: we are all involved and we all share in it, with the responsibility of *choosing to be unconditionally pro-life*."<sup>100</sup> Numerous private initiatives, including pregnancy help centers, the home-school movement and other efforts to reclaim education from the secular state, and a growing movement to affirm and live to "family values," all reflect the reality that many are living counter-culturally by "choosing to be unconditionally pro-life." "God is preparing a great springtime for Christianity," said John Paul in *The Mission of the Redeemer*, in 1990, "and we can already see its first signs."<sup>101</sup>

In a sense, we suffer from the 60's and 70's generation in power. But, like an oil slick on a river, this, too, will pass. Pro-life legal efforts should be directed not toward the maintenance of a corrupted constitutional and legal order, but rather toward keeping the state off the backs of those who choose to live "unconditionally pro-life." In this way, a "culture of life" can emerge from the bottom up. As that culture matures, the legal system will follow. Perhaps the most encouraging sign is the reaction of young people to the Vicar of Christ:

The youth of the 90s are not the youth of the 60s. The youth of the 90s have been forced to grow up with the mistakes and moral nightmares of the 60s generation: drugs, illicit sex widely condoned, addition, abortion and the Culture of Death which flowed from this ill-conceived social revolution. Divorce deprived them of parents and stability. Contraception deprived them of brothers and sisters, often replaced by the toys and junk of materialism. Euthanasia and assisted suicide threaten to deprive them of the wisdom of age and reverence for suffering.

Where the 60s generation eschewed authority, the 90s generation *craves* and *recognizes legitimate* authority. Legitimate authority is the authority of love. God's love which John Paul II radiates. You can't kid kids. The youth of today

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100. EVANGELIUM VITAE, *supra* note 81, at No. 28.

101. JOHN PAUL II, REDEMPTORIS MISSIO No. 86 (1990).



love John Paul II *because* his message is difficult, not *despite* it. They know he loves them enough to tell them the truth. They know he is calling them to a love and beauty that does not come cheap and does not always make one popular, but which is worth it. They know well the pain and squalor of the alternative.

They also know that if they were born after 1973 their status is that of survivor. They could not be blamed for thinking, "Thirty-seven million others were aborted, why not me?" Children have been discarded in one way or another for the last 35 years, while their elders pursued vanity and the way of the Self. Children got in the way. In truth, the only thing wrong with the younger generation is that there are not enough of them.

Alternatively, John Paul II, the greatest figure on the world stage, throws his arms open to the youth and proclaims, "You are my hope!" And they have responded to him in kind for almost 20 years.<sup>102</sup>

A detailed discussion of the emerging "culture of life" is beyond the scope of this essay. Suffice it to say that the legal developments noted here with respect to abortion, euthanasia and other issues reflect the character of this era as one of inescapable and fundamental choice.

With the approach of the millennium and the total or near collapse of many ideologies rooted in atheism—most notably Marxism, Freudianism, and Darwinism—there appears to be an increasing return to a radical choice for humanity, not unlike the one represented in the first centuries of the Christian era, that between a fixed credal, hierarchical Christianity, with its sacramental system and the message of the 'gift of self,' and a despairing hedonistic paganism with its corollaries in Gnostic and 'nature' religions, the modern forms of which are worship of progress and modern science.<sup>103</sup>

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102. *Editorial*, THE SOONER CATHOLIC (Oklahoma City, Okla.), July 27, 1997, at 8.

103. C. John McCloskey III, *The Rise of Christianity* 231 (Position Paper 284/285, Dublin, Ireland, Aug.-Sept. 1997).