FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees,

On Appeal From The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Of Counsel:
ROBERT J. LIPSHUTZ
2300 Harris Tower
233 Peachtree Street
Atlanta, Georgia 30043
(404) 688-2300

LEE BOOTHBY
(Counsel of Record)
BOOTHBY, ZIPRICK & YINGST
208 West Mars Street
Berrien Springs, MI 49103
(616) 471-7787
STEVEN GREEN
Vermont Law School
P.O. Box 96, Chelsea Street
South Royalton, Vermont 05068
(802) 763-8303
ROBERT W. NIXON
6930 Carroll Avenue
Takoma Park, Maryland 20912
(202) 722-6320
Attorneys for *Amicus Curiae*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

NOTICE: This PDF is a personal typed copy of the original amicus.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, *et al.*,

Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *ET AL.*,

APPELLEES,

On Appeal From The United States Court Of Appeals For The Eighth Circuit

---

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution.

Americans United has some 50,000 individual members of various religious beliefs and some of no religious belief, plus 4,000 cooperating religious organizations, in all states of the

United States, including the State of Missouri. Both the governing board of Americans United and its National Advisory Council (which elects the organization's Board of Trustees) include clergy and laypersons who have varying views on the question of abortion with many of them personally opposed to abortion on philosophical, moral, or religious grounds.

In this brief, Americans United takes no position on the questions of whether public funds or facilities should be utilized to provide abortions or the regulation of abortions. Our concern, rather, is directed to what we believe to be theologically-derived legislative findings by the Missouri legislature that personhood begins at the moment of conception. Such an inherently theological, but controversial, determination violates a core purpose of the Establishment Clause of the First Amendment—that is, the absolute prohibition against government preference of one religious sect or denomination over another and the placing of the state's imprimatur on a particular religious dogma.

The membership and governing board of Americans United believe that this specific legislation does not present the appropriate vehicle to resolve the other non-Establishment Clause concerns which this Court will at some later date address. American United further believes that any judicial determination ignoring the Establishment Clause question which is unique to this legislation will only generate additional political divisiveness along religious lines.

This *amicus* brief will only address the specific question of whether the Missouri statute here in question violates the Establishment Clause of the First Amendment to the United States Constitution. Americans United understands that no other *amicus* brief will specifically address Establishment Clause concerns of the law's stated legislative findings and its impact.

SUMMARY OF ARGUMENTS

This brief narrowly focuses on the question of whether the Missouri anti-abortion statute violates the Establishment

Clause of the First Amendment. The statute, co-authored by the Missouri Catholic Conference, is based upon inherently theologically-derived legislative findings over which there has been a long and continuing history of deep division within the Judeo-Christian community.

Although civil government is not a competent arbiter of Scripture, the Missouri legislature, in the written text of the statute, determined that human life or personhood is conferred at the time of conception. Such an idea is not subject to scientific or medical confirmation and always has been viewed as theological in character.

Although Americans United readily acknowledges that religious organizations have the constitutional right to speak to moral and ethical issues and to influence public policy, that does not exempt legislation from the proscriptions of the Establishment Clause. It has also become a part of our Establishment Clause jurisprudence that legislation may parallel sectarian teachings and belief without resulting in a violation of the Establishment Clause. Americans United, however, contends that the text of the Missouri statute reveals a legislative purpose of endorsing a sectarian belief. The program has a perceived and actual effect of advancing the religious aims of certain religions. The message conveyed, therefore, is one of endorsement of a particular religious belief to the detriment of those who do not share it. As such, the statute cannot withstand the Establishment Clause. Appellants contend that the legislative finding that personhood is conferred at the moment of conception is neither a necessary nor operative provision. If appellants are correct, there can be no valid claim that the legislative declaration merely parallels a religious belief. Rather, it must be concluded that the legislature has adopted, endorsed, and encouraged a specific and divisive sectarian belief as the stated purpose for the remainder of the statute.

In fact, the theologically-derived finding as to personhood is operative since the statute itself requires all laws in Missouri, presumably both existing and future, to be interpreted and

construed so as to acknowledge on behalf of the unborn fetus at every stage of development all the rights, privileges, and immunities available to all other persons. The endorsement of a sectarian belief with the requirement that the theological view embraced by the legislation will be used to interpret all other related laws in the state clearly creates the potential for political divisiveness. As such, it provides a warning signal suggesting that the legislative act is perceived as an endorsement of religion. Legislation enacted under the guise of securing secular values cannot be promoted in theological terms by religious figures without those values taking on an inherently sectarian character.

This Court has recognized that the common law and, until the mid-nineteenth century, a large majority of jurisdictions in this nation recognized that an abortion performed before quickening was not an indictable offense. Arguments have been raised suggesting that somehow the theological concept that personhood is conferred at the time of conception has been engrafted as part of the Fourteenth Amendment's reference to persons. Those arguments focus on what is perceived to have been the prevailing mood of the nation and the existing laws relative to abortion at the time of its adoption. This contention, however, ignores the fact that the language of the Fourteenth Amendment tracks with the language of the Fifth Amendment. It is only logical that the authors of the Fourteenth Amendment, in using the word "persons," had in mind the same definition of persons as used by the drafters of the Bill of Rights.

This legislation, suffused with the use of theological terms and concepts, should be disposed of on Establishment Clause grounds for the same reasons considered by this Court in reviewing the Alabama moment of silence legislation in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), and the Louisiana creation-science legislation reviewed by this Court in *Edwards* v. *Aguillard*, 107 S.Ct. 2573 (1987). The motivating and perceived legislative purpose for the enactment of this statute was

sectarian in nature and thus unlike *Harris* v. *McRae*, 448 U.S. 297 (1980), it does not set forth a legislative will that merely corresponds with certain sectarian beliefs. Here, the imprimatur of the State of Missouri has been placed on sectarian views that have historically generated, and are currently the subject of, divisive theological debate which by its very nature can never be resolved by legislative findings derived from a consensus of the scientific and medical communities.

ARGUMENTS

I. THE LEGISLATIVE FINDINGS AND THE STATED PURPOSE OF THIS STATUTE TAKEN TOGETHER WITH ITS AUTHORSHIP CLEARLY DEMONSTRATE THE INHERENTLY RELIGIOUS BASIS OF THE STATUTE IN QUESTION.

The specific language of the Missouri statute here under review, which we believe raises serious Establishment Clause problems and demonstrates that the statute is predicated upon theologically-derived legislative findings, includes the statement that "[t]he life of each human being begins at conception" (Mo. Rev. Stat. § 1.205.1(1) (1986)) and a requirement that "laws of . . . [the State of Missouri] shall be interpreted and construed to acknowledge on behalf of the unborn child at *every stage of development*, all the rights, privileges, and immunities available to all other persns . . ." (Mo. Rev. Stat. § 1.205.1(2) (1986)) emphasis supplied).

In enacting the statute, the legislature stated its purpose as follows: "It is the intention of the General Assembly of the State of Missouri to grant the right of life to *all humans, born and unborn* . . ." (Mo. Rev. Stat. § 188.010 (1986)) (emphasis supplied).

Thus the Missouri statute is based upon what Americans United believes to be theologically-derived legislative findings and purpose which, read collectively, have the effect of declaring that personhood is conferred at the moment of conception

and that all existing and future legislation of the state must be interpreted from that sectarian viewpoint.

Such an interpretation of the legislative findings does not appear to be the product of a crabbed interpretation of the statutory language. In fact, key parts of the statute are quoted by major organizations in their *amicus* briefs to this Court demonstrating that those organizations had the same understanding from the reading of the text as did Americans United. The "Brief for 127 Members of the Missouri General Assembly as *Amicus Curiae* Supporting Appellants," at 10, states: "In the 1986 Act, the Missouri General Assembly expressed its continuing concern with the protection of human life by finding 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.'"

That same brief, *id*. at 12, later states: "The Missouri legislature has defined personhood to include all human beings—and not to exclude any."

The "Brief of *Amicus Curiae* Missouri Catholic Conference in Support of Appellants," at 1-2, explains in its Statement of Interest:

> The interest of the Missouri Catholic Conference in this case arises from the position of the Catholic Church as expressed by the National Council of Catholic Bishops, which includes all of the Catholic Bishops of Missouri, that "human life is a precious gift from God; that each person who receives this gift has responsibilities toward God, toward self, and toward others and that society through its laws and social institutions, must protect and sustain human life at every stage of existence. These convictions grow out of [the] Church's constant witness that life must be protected with the utmost care from the moment of conception." *Pastoral Plan for Pro-Life Activities: A Reaffirmation*, Nov. 14, 1985. Based on these principles, the Missouri Catholic Conference supported, through testimony before committees of the Missouri General Assembly, the legislation which is the subject of this lawsuit.

> *The Missouri Catholic Conference believes that the Missouri legislature should be permitted to express the wishes of the majority of the residents of the State, including the Catholics of Missouri, regarding when an unborn child is deemed to be a human being*, and regarding the use of public facilities or public employees to perform or assist in an abortion as provided in the challenged statute. [Emphasis supplied.]

The Missouri Catholic Conference was one of two organizations that *prepared* the language of the statute in question, according to its publication, the MCC Messenger, May 30, 1986, at 1, under the headline "State Paid Abortions—Not Here" (a copy of which appears as Appendix B to this brief at 42a):

> The most significant package of pro-life legislation since 1979 was enacted into law by the General Assembly this year. H. B. 1596 was approved by a vote of 119-36 in the House of Representatives and 23-5 in the Senate.
>
> The final bill is a combination of a bill *prepared* by the Missouri Catholic Conference, prohibiting the use of public funds, facilities and employees for the performance or promotion of abortions, in an omnibus pro-life bill *prepared* by Missouri Citizens for Life. [Emphasis supplied.]

The "Brief of the Lutheran Church-Missouri Synod, the Christian Life Commission of the Southern Baptist Convention, and the National Association of Evangelicals as Amici Curiae in Support of Appellants," at 4, states:

> This case squarely presents this Court with the question of whether, under the United States Constitution, a state legislatively may determine when its protectable interest in human life begins, and, predicated upon that interest in human life, thereafter regulate abortion. *Missouri, in prefacing its abortion law with a statement of the will of its people that human life begins at conception*, reveals its intent to enact a statute . . . to protect the interest of the state in human life before birth, as distinguished from a statute predicated principally upon protection of the health and welfare of the mother. [Emphasis supplied.]

The Lutheran Church-Missouri Synod, Christian Life Commission of the Southern Baptist Convention, and National Association of Evangelicals apparently recognized that the legislative finding was not, and could not, be based upon scientific evidence because their brief, *id.* at 6-7, further states:

> The Missouri legislature acted within the scope of its police power in enacting a statue stating that life begins at conception. Nothing in the Constitution prohibits the state from reaching the factual conclusion that life begins at conception and codifying it. The Supreme Court generally does not require legislatures to prove *their assumptions* or that the means which the legislature chooses will achieve only the ends which the legislature hopes to obtain. Reviewing courts "do not demand of legislatures 'scientifically certain criteria of legislation.'" *Ginsberg* v. *New York*, 390 U.S. 629, 642-43 (1968) (*citing Noble State Bank v. Haskel*, 219 U.S. 104, 110 (1911)). *Legislatures properly may rely on scientifically unprovable assumptions when protecting the broad social interest in order and morality. Paris Adult Theater I v. Slaton*, 413 U.S. at 60. [Emphasis supplied.]

In the same *amicus* brief, *id.* at 20, arguing that state laws prohibiting abortions are not unconstitutional establishments of religion, the organizations commented:

> The sanctity of human life from conception and opposition to abortion are, in fact, sincere and deeply held religious beliefs of The Lutheran Church-Missouri Synod, The Southern Baptist Convention, and of the other forty-seven church denominations represented in this brief. The Lutheran Church-Missouri Synod has, throughout its history, opposed abortion and has adopted official positions in its convention since 1971 condemning willful abortion as contrary to the will of God. Its convention resolution "To State Position on Abortion" adopted in 1979, states that based upon Scripture, "the living but unborn are persons in the sight of God from the time of conception;" that "as persons, the unborn stand under the full protection of God's own prohibition against murder;" and that abortion is not a moral option, except as tragically necessitated by medical procedures applied to prevent the death of the mother.

Likewise, the brief's Statement of Interest, *id*. at 2, states the beliefs of the National Association of Evangelicals: "The National Association of Evangelical's profound interest in this case stems from its position that, based upon Scripture, human life begins at conception and deserves protection against destruction from its earliest stage."

Although the Roman Catholics, Missouri Synod Lutherans, Southern Baptists, and Evangelicals in Missouri may have a uniform theological view about when human life or personhood commences, other denominations and religious traditions reject the theological concept that human life or personhood begins at the time of conception.

For example, Rabbis Raymond Zwerin and Richard I. Shapiro write that "according to Jewish law, a fetus is not considered a full human being and has no juridical personality of its own . . . . The Talmud contains the expression *Ubar yereah imo*—the fetus is as the thigh of its mother, i.e., the fetus is deemed to be part and parcel of the pregnant's woman's body." Zwerin and Shapiro, *Judaism & Abortion* 1-2 (1987). Another prominent Jewish leader, Rabbi Henry Siegman, Executive Director of the American Jewish Congress, testified before Congress that "the fetus is not a person, in Jewish tradition, until the moment of birth. . . ." *Human Life Bill: Hearing Before the Subcommittee on Separation of Powers of the Committee on the Judiciary*, 97th Cong., 1st Session 48-49 (1981).

Professor Paul D. Simmons, Professor of Christian Ethics at the Southern Baptist Theological Seminary, notes:

> Perhaps the major issue in the abortion debate centers on the question of the personhood of the fetus. Those who are working for a constitutional "human life" amendment to ban abortion in America argue that the Bible teaches (1) that the fetus is a human being and (2) that abortion is murder and thus should be legally prohibited.

Simmons, *Birth and Death: Bioethical Decision Making* 78 (1985). Adding that some traditional religious communities do

not agree with the proposition that human life or personhood begins at the moment of conception, Professor Simmons explains:

> Not all scholars are convinced the Bible teaches that abortion is murder or that the fetus is a person. John Stott, for instance, rejects the notion that a fetus is a human being; he believes that, at best, it may be regarded as potentially a person.
>
> Several things might be noted about these statements. First, many writers use the terms "human," "human life," "life," "person," and "human being" as if they were synonymous and thus interchangeable. Second, each statement reveals certain assumptions about what it means to be a human being or person. Third, each writer brings the teaching of the Bible as that writer understands it to buttress the argument. Finally, there is apparently no single teaching or definition in the Bible regarding personhood, or there would presumably be universal agreement among biblical scholars on this question. To understand the question of the personhood of the fetus and relate the teaching of the Bible more clearly to the question, it may prove helpful to deal with some of the assumptions involved.

Id. at 79. After reviewing the Biblical view of personhood, id. at 87-88, Simmons concludes:

> The biblical portrait of person, therefore, is that of a complex, many-sided creature with the godlike ability and responsibility of making choices. The fetus—certainly in the early stages of gestation—hardly meets those characteristics. At best, it begins to attain those biological basics which are necessary to show such capacities no earlier than the latter part of gestation. The "burden of proof" argument used by those who would equate fetus with person needs to be turned around. Brown argued, for instance, that the burden of proof is on those who say that the fetus is not a human person. "We must be able to say we are sure it is *not* human . . . . How can we be sure it is not a human being?" No one can disagree with him that the fetus is human. That is a simple statement that acknowledges the species to which the fetus belongs. Human is an adjective. The fetus is not bovine (cow), or feline (cat), but

> a *human* conceptus. The problem is asserting that the fetus is a person or human being. The terms are not synonymous. "Human being" is a noun and designates or names a living entity with the qualities of personality and life that distinguish *Homo sapiens* from all other creatures. Plainly the presence of life or animation is not a sufficient distinction, since all animals have life in that sense. The uniqueness of being person is reflecting the qualities of the image of God.

Annexed as Appendix A at 1a to 39a to this brief is a research paper of the Congressional Research Service of the Library of Congress entitled "Catholic Teaching on Abortion: Its Origin and Later Development," which traces the teaching of the Roman Catholic Church on the question of abortion including the theological question of personhood. This research shows that until relatively recent times there were conflicting but acceptable theological views within the Roman Catholic Church as to the beginning of human life or personhood.

Reviewing historic Roman Catholic writings on the subject, the research paper states (Appendix at 17a):

> For St. Thomas, "seed and what is not seed is determined by sensation of movement." What is destroyed in abortion of the unformed fetus is seed, not man. This distinction received its most careful analysis in St. Thomas. It was the general belief of Christendom, reflected, for example, in the Council of Trent (1545-1563), which restricted penalties for homicide to abortion of animated fetus only.

C. Whittier, *Catholic Teaching on Abortion: Its Origin and Later Development* 18 (1981).

The research paper, *id*. at 20 (Appendix at 18a-19a), further notes:

> In 1869 in his Apostolic Constitution *Apostolicae Sedis*, Pope Pius IX broke with the older tradition by omitting all distinctions in canonical penalties between the unformed and the formed fetus. The effect was implicitly to accept the theory of immediate ensoulment or, at least, to provide for it as a likely possibility. In 1917, with the promulgation

of the new Code of Canon Law by Benedict XV (1854-1922), the 40 to 80 day animation determination, still in effect for dealing with irregularities, was completely eliminated. The definition of abortion as the ejection of an immature or non-viable fetus by deliberate intent and efficacious means derives from Sixtus V. By fetus is meant the human organization in the womb after conception and before birth. In effect, the teaching of *Effraenatam* and the Council of Elvira has become the officially sanctioned position of the Church.

The research paper, *id*. At 34-35 (Appendix at 29a-30a), concluded:

> The official teaching of the Catholic Church at present was stated in 1970 by the United States Catholic Bishops: "from the moment of conception the child is a complex and rapidly-growing being endowed with the characteristics of human life"; in brief, "the child in the womb is human." This simply reasserts the judgment of Vatican Council II: "From the moment of its conception, life must be guarded with the greatest of care." Thus, in 1964, Pope Paul VI cited the words of Pius XII thirteen years before: Innocent human life, in whatever condition it is found, is to be secure from the very first moment of its existence from any direct liberate attacks . . . . Whatever foundation there may be for the distinction between these various phases of the development of life that is born or still unborn, in profane or ecclesiastical law, and as regards certain civil and penal consequences, all these cases involve a grave and unlawful attack upon the inviolability of human life."
>
> In conclusion, the pastoral and penitential practice of the Catholic Church regarding abortion today is to act as if the soul were present from conception, assuming the possibility, if not the probability, of fully human life or at least its unique potentiality in the *conceptus*. This represents a significant change from the dominant tradition in the past, which distinguished the unformed from the formed fetus in terms of canonical definition of abortion and of appropri ate penalties.

In a similar vein, ecumenical dialogue sponsored by the Catholic Bishops' Committee for Ecumenical and Inter-

religious Affairs of the National Conference of Catholic Bishops and the Caribbean and North American Area Council of the World Alliance of Reformed Churches (Presbyterian and Congregational) issued a statement on Ethics and Christian Unity, A Statement on Abortion that noted substantial agreement on certain basic principles concerning abortion but indicated substantial differences on "the moment and meaning of personhood," "the rights of the unborn in situations where rights are in conflict," "the role of civil law in matters pertaining to abortion," and "the interrelation of individual versus communal factors in decision making." C. Whittier, Catholic Teaching on Abortion, *id*. at 39 (Appendix at 34a-35a).

II. RELIGIOUS ORGANIZATIONS HAVE THE RIGHT TO SPEAK OUT ON MATTERS OF MORAL AND ETHICAL CONCERN.

Nothing stated in this *amicus* brief should be construed as criticizing the right of religious organizations to speak out on important issues of moral and ethical concern. As Justice Brennan wrote in *McDaniel* v. *Paty*:

> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. . . . The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association and political participation generally. "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 670 (1970).

435 U.S. 618, 640-41 (1978) (Brennan, J., concurring).

Justice Brennan in his same concurrence added that "[t]he Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion . . . . It may not

be used as a sword to justify repression of religion or its adherents from any aspect of public life." *Id*. at 641. However, the fact that religious organizations and their clergy have First Amendment rights to speak out on public issues and to seek to influence the political process in no way detracts from the Establishment Clause proscription against government adopting a sectarian belief on issues that are essentially religious. As Justice Brennan concluded in *McDaniel* v. *Paty*:

> Our decisions under the Establishment Clause *prevent government* from supporting or involving itself in religion or *from becoming drawn into ecclesiastical disputes*. These prohibitions naturally tend, as they were designed to, to avoid channeling political activity along religious lines and to reduce any tendency toward religious divisiveness in society. *Beyond enforcing these prohibitions, however, government may not go*. The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, *and, with judicial enforcement of the Establishment Clause*, any measure of success they achieve must be short-lived, at best. (Emphasis supplied)

Id. at 642.

In fact, Americans United firmly believes that religious organizations, like secular bodies and private citizens, have a constitutional right to speak to public questions. Members of the clergy and their religious organizations certainly have the right to speak out on matters of moral and ethical concern and have done so throughout this nation's history. This is why Americans United committed its resources to assisting the church plaintiffs in *Bemis Pentecostal Church* v. *State of Tennessee*, 731 S.W.2d 897 (Tenn. 1987), *appeal denied*, 108 S.Ct. 1102 (1988), in which thirteen churches in Jackson, Tennessee, publicly opposed a liquor-by-the-drink referendum, and challenged the constitutionality of Tennessee's Campaign Disclosure Act.

Thus, although religious organizations have the constitutional right to speak out on public questions, the ultimate protection remains within the political process *and with the courts* to enforce the guarantee against establishment of religion.

III. GOVERNMENT MAY PROPERLY TAKE ACTION AGAINST CONDUCT OR ACTIVITIES EVEN WHEN IT MAY PARALLEL SECTARIAN TEACHINGS AND BELIEFS WITHOUT VIOLATING THE PROSCRIPTION OF THE ESTABLISHMENT CLAUSE.

The developing Establishment Clause jurisprudence clearly accepts the proposition that mere parallelism between religious dogma and legislative action does not in and of itself result in an Establishment Clause violation. In fact, Judeo-Christian religious teachings may properly be the fountainhead from which community morals may spring. Americans United, however, believes that disputed sectarian dogma may not receive the imprimatur of the state as the stated purpose or predicate for governmental legislative action.

In *Harris* v. *McRae*, 448 U.S. 297, 319-320 (1980), this Court stated:

> It is well settled that "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion." *Committee for Public Education* v. *Regan*, 444 U.S. 646, 653. Applying this standard, the District Court properly concluded that the Hyde Amendment does not run afoul of the Establishment Clause. Although neither a State nor the Federal Government can constitutionally "pass laws which aid one religion, aid all religious, or prefer one religion over another," *Everson* v. *Board of Education*, 330 U.S. 1, 15, it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U.S. 420, 442. . . . The Hyde Amendment, as the District Court noted, is as much a

> reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. . . . In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, *without more*, contravene the Establishment Clause. [Emphasis supplied.]

Justice Stewart based part of his *Harris* v. *McRae* analysis on this Court's decision in *McGowan* v. *Maryland*. In that case, this Court specifically stated that a law may violate the Establishment Clause "if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion." McGowan v. Maryland, 366 U.S. 420, 453 (1961).

IV. THE MISSOURI LEGISLATURE, IN ADOPTING ITS ANTI-ABORTION STATUTE, DEMONSTRATED A RELIGIOUS PURPOSE AND ENTERED THE THEOLOGICAL THICKET FROM WHICH IT IS BARRED BY THE ESTABLISHMENT CLAUSE.

In *Harris* v. *McRae*, 448 U.S. at 319-20, this Court, although finding that a secular legislative purpose may properly parallel a sectarian interest, implied that a legistlative body may, nevertheless transgress the Establishment Clause when enacting anti-abortion legislation. In *Harris* the Court merely acknowledged that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church and would not, "without more," violate the Establishment Clause.

Americans United, however, believes that in the Missouri case the legislation does not merely coincide with a sectarian teaching. Rather, the text of the statute itself results in a breach of the wall between church and the state erected by the Establishment Clause of the First Amendment because the statute is predicated upon a theologically-derived legislative finding that "[t]he life of each human being begins at conception" (Mo. Rev. Stat. § 1.205.1(1) (1986)) and a requirement

that "laws of . . . [the State of Missouri] shall be interpreted and construed to acknowledge on behalf of the unborn child *at every stage of development*, all the rights, privileges, and immunities available to *all other persons* . . . ." (Mo. Rev. Stat. § 1.205.1(2) (1986)) (emphasis supplied).

The legislature, in enacting the statute, said its legislative purpose was "to grant the right of life *to all humans, born and unborn* . . . ." (Mo. Rev. Stat. § 188.010 (1986)) (emphasis supplied).

This legislative findings and statement of purpose go beyond a statement of "traditionalist values" represented by the Hyde Amendment and embrace theological dogma and are an attempt to place the imprimatur of the state on one side of the theological argument as to the "personhood" of a fetus.

In *McRae* the district court carefully observed that the consensus of the legislative opinion that gave rise to the passage of the Hyde Amendment prohibiting the use of federal funds for abortion "did not in truth turn on whether an embryo or fetus or, indeed, a zygote or blastocyst is a 'human being.'" *McRae* v. *Califano*, 491 F.Supp. 630, 715 (E.D. N.Y. 1980). The Missouri legislature, however, clearly predicated its legislation on a purely theological finding—a finding which has not been validated by a consensus within the medical or scientific communities.

Appellants and their supporting *amici* argue that the legislative finding is not an operative portion of the statute but merely contributes to a general understanding of the statute. We do not agree, but, whatever merit that argument may have, the legislative declaration nevertheless does clearly demonstrate that the legislative purpose was religiously based. Even though the purpose prong of the *Lemon* test usually looks to the subjective intent of the legislature, intent may be deduced from the face of the statute. *Edwards* v. *Aguillard*, 107 S.Ct. 2573, 2585 (1987). Therefore, if the legislative finding concerning when life begins is unnecessary to further the state's legitimate interests, as claimed by appellants, amicus believes

an improper intent may be inferred. It may be concluded that if the legislative declaration is unnecessary for the regulation of abortion, then Missouri is not "paralleling" a religious belief, but adopting and encouraging one.

Appellants argue that the state has a legitimate secular interest in regulating all trimesters of a pregnancy. If this is so, there is no reason for a legislative body to take the extra step and declare that life has in fact begun at the moment of conception, particularly when this issue has not been decided by the medical or scientific communities and is the subject of continuing theological debate. Such a legislative finding, therefore, serves no secular purpose but does demonstrate that the legislative purpose is religiously based.

This Court, over the years, has used a three-part test to analyze Establishment Clause challenges: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster an excessive entanglement with religion.'" *Lemon* v. *Kurtzman* , 403 U.S. 602, 612-13 (1971).

More recently Justice O'Connor has suggested additional refinements to the traditional *Lemon* test which we believe are helpful in the analysis of the Establishment Clause issue present in this case. In *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984), Justice O'Connor, concurring, suggested that the purpose prong goes to the issue of what government intended to communicate by its action (the "objective" meaning of the statement in the community), while the effects prong relates to what message governmental action actually conveyed whether intended or not (the "subjective" meaning of the statement). Justice O'Connor analyzed the issue as follows:

> The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent

> by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them the message actually conveyed may be something not actually intended. If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is thereby necessary to determine whether the action carries a forbidden meaning.
>
> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Id. *See also Estate of Thornton* v. *Caldor, Inc*., 472 U.S. 703, 711 (1985) (O'Connor, J., concurring).

Justice O'Connor further suggested in *Lynch* v. *Donnelly* that in viewing the question of whether the action of government "was understood to place its imprimatur on the religious content" and thereby "communicates endorsement of religion is not a question of simple historical fact." Rather, the question, "like the question whether racial or sex-based classifications communicate an invidious message," is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Id*. at 693-94. Further, Justice O'Connor suggested that, in making such an analysis, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded.

Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny." *Id*. at 694.

In *Wallace* v. *Jaffree*, 472 U.S. 38, 73-74 (1985), Justice O'Connor, in applying her modified *Lemon* test analysis to an issue substantially the same as the question addressed here—that is, whether the purpose of the so-called moment of silence legislation enacted by the Alabama legislature had the purpose of advancing religion—stated:

> The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer. This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion.

In *Wallace* Justice O'Connor also suggested that any inquiry into the legislative purpose to determine Establishment Clause violations "should be deferential and limited" without attempting "to psychoanalyze the legislators." *Id*. at 74. In this case, however, Americans United believes that that portion of the text of the statute setting forth the aforementioned legislative findings and purpose of the legislation is inherently religious in character. This, coupled with the acknowledgement that the legislation actually was co-drafted by the Missouri Catholic Conference, should relieve this Court of any need for an intensive investigation of legislative motive.

The Establishment Clause is violated by the advancement of a particular religious belief. *Stone* v. *Graham*, 449 U.S. 39, 41 (1980); *Edwards* v. *Aguillard*, 107 S.Ct. at 2578. Also, this Court in *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968), stated that a law should not "be tailored to the principles or prohibitions of any religious sect or dogma." Nevertheless, this is exactly what the Missouri legislature has done.

In *Wallace* v. *Jaffree*, 472 U.S. 38, 75 (1985), Justice O'Connor in her concurrence stated:

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that government not intentionally endorse religion or religious practice.

It seems clear, as demonstrated earlier in this brief, that a historic and contemporaneous link exists between the teachings of certain religious groups and the human "life begins at the time of conception" finding of the Missouri legislature. In *Edwards* v. *Aguillard*, 107 S.Ct. at 2582, this Court stated: "Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment."

This Court also stated in *Edwards* v. *Aguillard*, 107 S.Ct. at 2583, that "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose." *See also Wallace* v. *Jaffree*, 472 U.S. a 74 (O'Connor, J., concurring); *Richards* v. *United States*, 369 U.S 1, 9 (1962); *Jay* v. *Boyd*, 351 U.S. 345, 357 (1956).

Justice Blackmun concluded in his dissent in *Bowen* v. *Ken*-comm *drick*, 108 S.Ct. 2562, 2590 (1988), that secular value may be properly promoted by legislation: "Whereas there may be secular values promoted by the AFLA, including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that *when promoted in theological terms by religious figures, those values take on a religious nature.*" (Emphasis supplied.)

V. THE MISSOURI STATUTE HAS THE PERCEIVED EFFECT OF ENDORSING A CONTESTED THEOLOGICAL POSITION CONTRARY TO THE PROHIBITION OF THE ESTABLISHMENT CLAUSE.

In *Larson* v. *Valente*, 456 U.S. 228, 244 (1982), this Court stated that "[t]he clearest command of the Establishment

Clause is that one religious denomination cannot be officially preferred over another,"

In *Wallace* v. *Jaffree*, 472 U.S. 38, 69-70, Justice O'Connor reviewed her suggested modifications of the *Lemon* test and stated:

> Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community," . . . Under this view, *Lemon's* inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.

Justice O'Connor continued:

> A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the state could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.

Id. at 69-70. Justice O'Connor further stated:

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes religious liberty of the non-adherents for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

Id. at 70. Here the power and direct coercive pressure of the state are exercised on behalf of a sectarian teaching about "personhood."

Under Justice O'Connor's endorsement test, courts must examine whether a statute under review "in fact conveys a message of endorsement," irrespective of the state's actual intent. *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984). As Justice O'Connor added in her concurrence in *Presiding Bishop* v. *Amos*, 107 S.Ct. 2862, 2874 (1987), "To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer acquainted with the text, legislative history, and implementation of the statute."

Not only were Missouri Catholics informed through their own church newspaper, the MCC Messenger (Appendix B herein at 40a), that the Missouri Catholic Conference had co-authored, not merely promoted, the anti-abortion bill enacted into law, but also the general public was informed by the secular press that the executive director of the Missouri Catholic Conference and the state legislative chairman of Missouri Citizens for Life had "ghost written" the legislation. The Kansas City Times noted that the role played by the Missouri Catholic Conference was no secret and quoted the executive director to the effect that "some critics of the proposal at the time noted his involvement and charged that religious beliefs were being advanced in the form of state legislation." Sentell, *Abortion Law was Work of Ghostwriters*, The Kansas City Times, Jan.23, 1989. A copy of this article is annexed hereto as Appendix C at 43 a.

Also, if an objective observer reading the text of the Missouri statute considers the declaration of personhood contained in the legislative findings as being unnecessary to achieve a valid state interest, then the effect of the statement would be to convey a message that the particular theological theory of life is "favored or preferred." *Wallace* v. *Jaffree*, 472 U.S. at 70. In essence, if the legislative finding does not further the state's

interest, and is in fact an encroachment into a religious area, then both the actual purpose and effect must be to endorse a particular religious viewpoint.

At the very least, the legislative finding made by the Missouri legislature sets forth a legislative preference for a specific theological idea. As Justice Blackmun stated recently, "A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable. *Texas Monthly, Inc.* v. *Bullock*, 57 U.S.L.W. 4168, 4175 (U.S. Feb. 21, 1989) (Blackmun, J., concurring).

In *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981), this Court reasserted the principle that "[c]ourts are not arbiters of scriptural interpretation." If this is beyond the competence of the Judicial Branch, it is equally outside the domain of the Legislative Branch.

Although noting in *Wallace* v. *Jaffree* that it is possible that a legislature will enunciate a sham secular purpose for a statute nevertheless Justice O'Connor had "little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an express secular purpose is in doubt." 105 S.Ct. at 75. Arguments that the legislative purpose was based upon secular concerns are belied by the sectarian foundation of the legislative action. According to Justice O'Connor, "While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share." *Id.* at 75-76.

VI. IF THIS COURT SHOULD VALIDATE A LEGISLATIVE ACT PREDICTED ON A THELOGICALLY-DERIVED LEGISLATIVE FINDING INTENDED TO BE USED IN THE INTERPRETATION OF ALL EXISTING AND PROSPECTIVE LEGISLATION TOUCHING ON THE STATUS OF "THE UNBORN CHILD AT EVERY STAGE OF DEVELOPMENT," SUCH LEGISLATION CREATES THE POTENTIAL FOR EXCESSIVE ENTANGLEMENT BETWEEN CHURCH AND STATE.

The Missouri legislature specifically stated that its findings that "the life of each human being begins at conception" are to be utilized in interpreting and construing the laws of the state. Thus, the suggestion that the findings and purpose portion of the statute is not operative is pure fiction. Apparently such a mandated interpretation would apply to both existing and prospective legislation. The legislature specifically stated that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and construction of this state." (Mo. Rev. Stat. § 1.205.1(2) (1986)).

It is clear that the legislature in this case went beyond restricting the use of public funds or facilities in abortions. It attempted to place a theological interpretation on all existing and future legislation touching on "the unborn child at every stage of development." Such a statutory requirement portends a myriad of unpredictable ways for wreaking havoc in the future.

In *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), this Court indicated that the "potential for political divisiveness" was relevant in determining whether legislation created excessive entanglement

between church and state. In *Nyquist* this Court noted that "while the prospects for such divisiveness may not alone warrant the invalidation of state laws . . ., it is certainly a 'warning signal' not to be ignored." 413 U.S. at 797-98.

In *Lynch* v. *Donnelly,* Justice O'Connor in her concurring opinion stated that "[p]olitical divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion." 465 U.S. at 689.

VII. THERE IS NO LOGICAL BASIS FOR IMPLANTING ONE THEOLOGICAL VIEW OF PERSONHOOD INTO THE FOURTEENTH AMENDMENT.

In *Roe* v. *Wade,* 410 U.S. 113, 132-133 (1973), this Court recognized that "abortion performed *before* quickening' was not an indictable offense at common law and that "[t]he absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins."

This Court in *Roe* v. *Wade* also acknowledged that "the law in effect until mid-nineteenth century was the pre-existing English common law" and that by the end of the 1950's a large majority of jurisdictions banned abortion "unless done to save or preserve the life of the mother." *Id*. at 138, 139. This Court also noted that "at the time of the adoption of our Constitution, and throughout the major portion of the nineteenth century, abortion was viewed with less disfavor than under most American statutes" in effect at the time of the *Roe* v. *Wade* decision. *Id*. at 140.

A number of *amicus* briefs filed in this case in support of appellants have argued that the Fourteenth Amendment to the United States Constitution somehow changed the common law and somehow included a fetus as a "person" who could neither be deprived of "life, liberty, or property without due process of law" nor be denied the "equal protection of the law." For

instance, the brief of a number of religious pro-life groups addresses "the personhood, under the Fourteenth Amendment, of human beings conceived but not yet born." *Amicus* Brief of Catholics United for Life at 4. That brief argues that the "absence or dearth of case support for unborn personhood is irrelevant" and takes a gigantic leap in logic by citing Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) tying such a concept to the preposition that the framers of the Fourteenth Amendment intended that "in the eyes of the Constitution, every *human being* within its sphere . . . from the President to the slave, is a person." *Id*. at 7, 14.

Similarly, the *amicus* brief of the Knights of Columbus argues that "viability is an invalid benchmark for construing the meaning of 'person' in the Fourteenth Amendment because it has nothing to do with attributes of personhood, or a particularized state of being, but only the state of medical technology." Brief of the Knights of Columbus at 2. In effect, the Knights of Columbus would have this Court substitute Roman Catholic theology for "medical technology," the sectarian for the secular.

Even the Knights of Columbus brief admits, however, that "the legislative history of the [Fourteenth] Amendment makes no explicit reference to the unborn or to abortion." *Id*. at 18. Whether the term "human being" includes all unborn children to the time of their conception also is not demonstrated in any Fourteenth Amendment generated case law, and, therefore, would rest solely on church dogma or teaching.

The *amicus* briefs of Catholics United for Life and Knights of Columbus focus on what they perceive to have been the prevailing mood of the nation and the existing abortion laws at the time the Fourteenth Amendment was adopted. Then, *ipse dixit*, they engraft on the Fourteenth Amendment the concept that its protection of "persons" includes a fetus. This argument ignores the fact that the common law and the prevailing view at the time of the adoption of our Constitution and the Bill of Rights fails to support any such notion.

The fifth Amendment contains the same type of language and restraint as does the Fourteenth Amendment. Both provide that a "person: shall not be deprived of "life, liberty, or property, without the due process of law." The only difference is that the Fifth Amendment proscribes actions by the federal government, and the Fourteenth prevents similar action by state governments. How ironic it would be if the same language within the Constitution could produce distinctly different results according to whether the action is federal or state. It is more logical to believe that the authors of the Fourteenth Amendment, in using the word "persons," had in mind the same definition of persons as used by the drafters of the Bill of Rights.

CONCLUSION

The legislative findings and stated legislative purpose establishing the Missouri statute in question on a theological teaching about which there are deep divisions within the religious community require a constitutional determination by this Court that both the purpose and effect of the statute violate the Establishment Clause of the First Amendment because they place the imprimatur of the state upon a particular sectarian belief. For this reason, this Court should affirm the decision of the Court of Appeals.

Dated: March 30, 1989

Respectfully submitted,

Of Counsel:
ROBERT J. LIPSHUTZ
2300 Harris Tower
233 Peachtree Street
Atlanta, Georgia 30043
(404) 688-2300

LEE BOOTHBY
(Counsel of Record)
BOOTHBY, ZIPRICK & YINGST
208 West Mars Street
Berrien Springs, MI 49103
(616) 471-7787
STEVEN GREEN
Vermont Law School
P.O. Box 96, Chelsea Street
South Royalton, Vermont 05068
(802) 763-8303

ROBERT W. NIXON
6930 Carroll Avenue
Takoma Park, Maryland 20912
(202) 722-6320
Attorneys for *Amicus Curiae*

APPENDIX

APPENDIX A

CONGRESSIONAL RESEARCH SERVICE
THE LIBRARY OF CONGRESS

CATHOLIC TEACHING ON ABORTION:
ITS ORIGIN AND LATER DEVELOPMENT

Charles H. Whittier
Analyst in American National Government
(Religion and Humanities)
Government Division
May 15, 1981

HQ 780

ABSTRACT

This report examines the origins and later development of Catholic teaching regarding abortion. It seeks to present that teaching in relation to changing beliefs on the nature of fetal life and the infusion of the human soul. It provides a context for clarifying continuities and discontinuities in the development of a complex tradition and notes areas for possible dialogue in the search for understanding and consensus.

CONTENTS

CATHOLIC TEACHING ON ABORTION: ITS ORIGIN AND LATER DEVELOPMENT

INTRODUCTION

Few issues have proved to be more controversial and difficult of resolution than the status of abortion. Whatever the law may permit or forbid at any given period of history, it is evident that widely divergent convictions are held today regarding the moral and ethical principles involved. A carefully nuanced awareness of tradition, its sources and development through history, can strengthen better understanding of differences among men and women of good will, an important condition for the rational dialogue essential to a free and increasingly pluralist society.

Historically, the Judaeo-Christian tradition has been the single most important factor shaping the moral consensus of Western civilization toward the status and character of abortion in religion, medicine, and law. Within that mainstream tradition, Catholic, Orthodox, and traditional Protestant have shared fundamental presuppositions regarding the nature of life in the womb in contradistinction to the culture and law of the pagan world, particularly the Roman Empire.[1]

Within that Judaeo-Christian context, the fetus has been accorded what John Noonan has called an "almost absolute" value[2]—that is to say, an intrinsic (because God-given) worth

---

[1] See Nardi, Enzo. Procurato Aborto Nel Mondo Graeco Romano. Milan, Dott. A. Giuffre Editore, 1971. Though not yet translated, it is reviewed by Prof. John Scarborough in the American Historical Review, vol. 78, February 1973, p. 77. The practice of abortion (like infanticide), though often condemned, appears to have been widespread in the Graeco-Roman world, reflecting popular indifference to fetal life. No distinction was made between abortion and contraception.

[2] Noonan, John T., ed. The Morality of Abortion. Harvard University Press, 1970. p. 1.

and rightful claim upon life.

While there has been general agreement on the presence of human life or its unique potentiality in the fetus from its conception, certain crucial distinctions have been made by moral theologians at various times in history regarding the so-called "therapeutic exception" (direct or indirect abortion in order to save the life of the mother) and the criteria for its sanction. Further distinctions were recognized from the earliest period—distinctions explicitly considered by the 5th century—regarding the infusion of the soul into the fetus in relation to the understanding of embryonic development prevalent in the early centuries of the Christian era and into modern times. As a result of these distinctions in the hominization[3] and ensoulment of the fetus, there was some variation in the analysis of abortion as a sin and as a *delict*[4] and, consequently, in the canonical penalties prescribed.

The most developed theology of abortion occurred within the Roman Catholic Church, which, adhering to the common Christian consensus in respect to abortion, gave rise to a long traditional casuistry—that is, the application of moral principles to the exigencies of particular situations, with distinctions in penalty (the private penance or *poena*, punishment) appropriate to the case. During the great formative period of Western canon law in the Middle Ages, the apostolic and patristic tradition was incorporated into the law of the Latin Church and the distinctions of embryotic ensoulment

[3] The process of becoming fully human.

[4] That is, a crime, a morally imputable violation involving objective, subjective and juridic elements. The *delict* of abortion (which requires both malicious intent and use of deliberate means) always presupposes a mortal sin, but not every sin of abortion is a *delict.* Abortion is punished by excommunication. It constitutes an irregularity for those (males) seeking Orders, and clerics are liable to deposition. The canons on abortion are analyzed in detail in Huser, Roger J., O.F.M. the Crime of Abortion in Canon Law. Washington, Catholic University Press, 1942. p. 79-121.

further refined in a process which may be said to have continued to the present day, as "an ever-growing appreciation of insights possessed from the beginning."[5]

This development in the history of theology and casuistry, which has profoundly affected beliefs, attitudes, and feelings in the moral and ethical consciousness of Western civilization, and which is significant not only to religious believers but to the larger community, can further understanding of the complex process by which moral judgment is shaped in history through the conflict of values. In addition, widely-popularized misunderstandings associated with the ensoulment controversy,[6] supposed changes in the Church's teaching, and related matters, are clarified and corrected by careful examination of the historical context.

SCRIPTURE AND APOSTOLIC TEACHING: THE EARLIEST TRADITION

Abortion—that is, deliberate detachment and expulsion of a previable fetus, incapable of extra-uterine existence—was

[5] Kerns, Joseph. Relevant Currents in the History of Sexuality. The Problem of Population—Moral and Theological Considerations. Edited by Donald Barrett. Notre Dame, Indiana, University of Notre Dame Press, 1964. P. 39.

[6] Thus, the Supreme Court in 1973 (*Roe* v. *Wade*, 410 U.S. 113, p. 45) declared "mediate animation" to have been "official Roman Catholic dogma until the 19th century," though it never was, before or since the 19th century. Further, the Court spoke of the "existence of life from the moment of conception" as "now, of course, the official belief of the Catholic Church," whereas the Church has always taught that human life is present incipiently, even if the soul is not infused at conception, and has therefore always condemned abortion at every stage. (See the text of the 1974 Declaration on Abortion by the Sacred Congregation for the Doctrine of the Faith, Appendix A, p. 35). The Court also refers to "agreement" among canonists and theologians that destruction of the pre-formed fetus was "not a homicide"; no mention is made of traditional teaching regarding feticide or destruction of the embryo as anticipatory homicide.

associated with infanticide by early Christians and condemned as a grave sin, a form of homicide. The Bible does not deal specifically with abortion, though some argue that the sanctity of fetal life is clearly implied by passages which speak of the pregnancies of Mary and Elizabeth: Matthew 1:18, and Luke 1:41 and 42, especially the former where the "babe" (*brephos)* is said to have "leaped in [Elizabeth's] womb," for joy at the greeting of Mary. The Pauline condemnation of the "desires of the flesh" in Galatians 5:17-21 includes *pharmakeia*, usually translated as "sorcery" or "witchcraft" but actually meaning medicine in the sense of drugs with magical or occult power, used as abortifacients. Similarly, the practitioners of such magic, the *pharmakai*, are condemned in Revelation 21:8 and 22:15, where they are associated with homicides, fornicators, and the like. Deliberate abortion was linked in the Christian view with lust and violence. This association is made in the authoritative *Didache*[7], the *Teaching of the Twelve Apostles*, a first century treatise on morals and discipline emanating from the Syrian Christian community: "You shall not practice medicine (*pharmakeia*). You shall not slay the child by abortions. You shall not kill what is generated" (*Didache* 2:2). They are said to be "killers of the child who abort the mold (*plasma*) of God," which may be a reference to the distinction between "unformed" and "formed" fetuses. If so, it is a thoroughgoing prohibition of abortion at any stage of fetal life.

Other writings of the Apostolic Church repeat this condemnation: the Epistle of Barnabas, composed between 70-100 AD at Alexandria, which associates abortion with sinning against one's neighbor; the second century Apocalypse of Peter, the most important and popular of the apocryphal apocalypses[8]; and the Apocalypse of Paul (fourth century).

Much controversy has surrounded the seemingly explicit reference in Scripture to abortion—if, indeed, it is a reference

[7] The Didache was discovered in 1875 and first published in 1883.

[8] Books, outside the official cannon of Scripture, claiming to reveal "hidden" truth concerning the Last Days.

to abortion: Exodus 21:22-25, which prescribes penalties for injuries to a pregnant women resulting in the premature birth of a dead child. Rabbinic law generally did not regard the fetus as a human being until birth, though some scholars have held that the ancient law prescribed the death penalty for abortion of a "completed" or "formed" fetus. In any event, the Greek Septuagint[9] translation of the Hebrew Bible, popular among Christians, expanded the Hebrew text in Exodus 21:22 so that "life shall pay for life" (the *lex talionis* or law of retaliation) for the accidental killing of a "formed" fetus. Thus, the Septuagint reading, reflecting the understanding of fetal development in the Graeco-Roman world, influenced Christian thinking as we shall see, regarding the difference between the "formed" and "unformed" fetus.

THE FATHERS OF THE CHURCH, AND THE HOMINIZATION OF THE FETUS

The Fathers of the Church, both before and after the 4th century, reflected and continued earlier teaching on abortion.[10] Clement of Alexandria (d. c. 215 AD) in his *Paedagogus*, the "Schoolmaster,"[11] dealing with Christian life and manners, condemns destruction of the embryo with abortifacient drugs. Similarly, Athenagoras of Athens, a 2nd century apologist, in his letter to the Emperor Marcus Aurelius and his son Commodus, denounces abortion. "the fetus in the womb is not an animal, and it is God's providence that he exist" (the *Apology* or *Supplication,* the "Embassy for the Christians," dated c. 177

[9] From the tradition of its having been translated by 72 scholars in Alexandria for Greek-speaking Jews. It became the early Christians' Bible. The great Hellenistic Jewish philosopher and Scriptural exegete, Philo (d., c. 50 AD) of Alexandria, interpreted Exodus 2:22-25 in the Septuagint reading as condemning both accidental and intentional killing of the formed fetus.

[10] Patristic writing and early Conciliar legislation are discussed in: Huser, The Crime of Abortion, p. 1229.

[11] Paedagogus 2.10.86.1

AD).[12] Minucius Felix, an African Christian lawyer (d. c. 200 AD), in his *Octavius*, writes of the pagans: "By drinks of drugs they extinguish in their viscera the beginning of a man-to-be and before they bear, they commit parricide," an interesting use of a term drawn from Roman law, *parricidium*, the killing of a near relation, to include abortion.[13]

Tertullian (d. c. 220 AD), also an African and a lawyer, perhaps the greatest theologian of the African Church before Augustine, angrily repudiates the accusation of infanticide and replies: "For us, indeed . . . it is not lawful to destroy what is conceived in the womb while the blood is still being formed into a man . . . . He who is man-to-be is man, as all fruit is now in the seed."[14] It is sometimes argued that Tertullian, in the *De Anima*, "On the soul" (25.4), accepts the possibility of therapeutic abortion of the "unformed" or pre-formed fetus—that is, embryotomy to prevent matricide. It seems clear that he did hold to the belief that a full human being (*homo*) is present in the womb only after a certain stage of development and formation. The evidence that he allowed for therapeutic abortion is still debated.[15]

---

[12] Embassy for the Christians, c. 35, given in Patrologiae Curcus Completus, . . . Series Graeca, 6.191 (the Greek Fathers).

[13] Octavius 2.43 in the Corpus Scriptorum Ecclesiasticorum Latinorum (the Latin Fathers).

[14] Apologeticum ad nations 1.15. Tertullian is not always consistent as to the character of the soul which some form of mediate animation from the moment of conception is said to have influenced Albert the Great.

[15] The passage in question is translated by Noonan in his Morality of Abortion, p. 13 (based on the Latin edition of H.J. Waszink, Amsterdam, 1947). He argues that it would be inconsistent with Tertullian's general position regarding abortion. George Williams, however, believes that Tertullian "was constrained to make one sad exception" in his condemnation of abortion, i.e., the "therapeutic exception" to save the mother's life. Williams, George. Religious Residues and Presuppositions in the American Debate on Abortion, Theological Studies, Vol.31, No.1, March 1970. P. 25-26

Gradually a "consensus Patrum" or "authoritative patristic tradition emerged on abortion, finding its legislative expression in the acts of the Council of Ancyra in 314 and the Council of Elvira around 306. The former, representing Bishops in Syria and Asia Minor, reduced the penance for abortion from the excommunication for life to ten years. Since the Council retained the life of penance for all other forms of voluntary homicide, its action may be viewed as a recognition of mitigating circumstances, at least in the Eastern Church. By contrast, in the West, the Council of Elvira in Spain extended lifetime excommunication to women whose abortion was the result of adultery and, in an extraordinarily severe ruling, precluded even death-bed reconciliation. The differing approaches by Ancyra and Elvira indicate that already by the 4th century, through abortion was universally condemned, distinctions in gravity and thus in penalty were evident, probably in response to the special pastoral problems of various regions.[16] The canons of Ancyra later acquired immense authority in both East and West by their ratification at the Fourth Ecumenical Council held at Chalcedon in 451. Eventually the milder penalty for abortion received the force of the law in the West under Charlemagne in the 8th century.

Though neither Ancyra nor Elvira touch upon the formed-unformed distinction, the 4th century is also the period in which that problem is first dealt with explicitly and, in terms of future policy, authoritatively by several of the greatest and most influential among the Church Fathers—Augustine and Jerome. Following the hylomorphism of Aristotle—the belief that the actuality of every entity is determined by its material form—both Augustine and Jerome distinguish the "unformed"

[16] The cannons of Elvira and Ancyra, canon 53 and canon 21 respectively, are given in Mansi, J.D., Sacrorum Conciiiorum Nova et Amplissima Collectio 2.5-19 and 2.16.

from the "formed" fetus, influenced again by the Aristotelian teaching, generally accepted in the ancient world (as well as by the Septuagint reading of Exodus 21:22), that there are developmental stages in the emergence of uterine life. For Aristotle, full hominization does not occur until approximately 40 days after conception in the case of males and 90 days in the case of females.[17] Some scholars hold that this belief is probably reflected in Leviticus 12:1-5, where the ritual purification for women after childbirth is prescribed at 40 days for a male and 80 days for a female.[18] In any event, it was widely believed that the fetus became a human being at the moment of "formation," prior to which Aristotle distinguished stages of "unformed" fetal development. This teaching of gradual hominization, inevitably bound up with Christian doctrine regarding the infusion of the soul by God (dealt with in greater detail in Section VI on ensoulment), is evident in the fact that both Augustine and Jerome, sharing a cautious agnosticism on (the time of) ensoulment, accepted the unformed-formed distinction.

---

[17] Aristotle, History of Animals 7.3.583. The belief in progressive ensoulment from vegetable to animal to rational or human stages in fetal life appears in many other writers—for example, the Stoic philosopher, Poseidonius of Apamaea (fl. Syria, c. 51 BC), who held that the rational soul, infused at birth, was distinct from the corporeal spirit that conferred sentient and appetitive life.

[18] See Connery, John R., S.J. Abortion: The Development of the Roman Catholic Perspective. Chicago, Loyola University Press, 1977. p. 18, 108, 326-327. The eighty-day Levitical computation was generally accepted by later writers for female formation, including St. Albert the Great (d. 1280), who attributed the difference between male and female formation to the greater heat believed to be generated by the male. The Levitical computation appears as late as the 15th century in the *Summa* of St. Antoninus of Florence (d. 1459). It may derive from the *De natura puerorum* of Hippocrates in the 4th century B.C., which is probably reflected in Aristotle and in Leviticus alike. Hippocrates is cited for the time of animation as late as the 17th century—by de Lugo (d. 1660), one of the greatest theologians of his age.

In his commentary on Exodus,[19] Augustine notes that abortion before formation, for him equivalent to "animation" or ensoulment, does not constitute homicide "for there cannot yet be said to be a live soul in a body that lacks sensation when it is not formed in flesh and so not yet endowed with sense." Similarly, Jerome writes that "seeds are gradually formed in the uterus, and it [abortion] is not reputed homicide until the scattered elements receive their appearance and members."[20] Whether the non-formed or unformed fetus has life, is "vivified," is left unresolved—Augustine, for example, is uncertain in the matter.

However, the abortion of the unformed *conceptus*, though not classified as murder, is still severely condemned.[21] Indeed, Augustine in his *Marriage and Concupiscence* provided what would become a classic text against abortion of the *un*formed fetus, a text later incorporated into the authoritative collections of canon law by Gratian and Peter Lombard in the 12th century. In the famous section beginning *Aliquando* ("sometimes") Augustine describes abortion of the "pre-vivified" fetus as "lustful cruelty or cruel lust" in which "the wife (becomes) the harlot of her husband, or he is [as] an adulterer with his own wife."[22]

Alongside this Augustinian view of fetal development, a more rigorist position continued to exist, which ignored (if it did not reject) the unformed-formed argument. Thus, St. Basil the Great (d. c. 379), Bishop of Caesarea in Cappadocia, in his letter to Amphilocius, write: "the hair-splitting difference between formed and unformed make no difference to us . . .

---

[19] On Exodus 21:80.

[20] Epistola ad Algasiam, 121.4.

[21] Epistola ad Eustochium 22.13. Philo, similarly, condemns intercourse for any purpose other than procreation (Joseph 9:43), reflecting Rabbinic, Stoic, and later Christian views.

[22] De nuptiis et concupiscentia 1.15.17. The text is discussed in: Noonan, John T. Contraception. Cambridge, Mass., Harvard University Press, 1954, p. 171-173.

Whoever deliberately commit abortion are subject to the penalty for homicide."[23] Nevertheless, he retains the more lenient penance imposed by Ancyra—ten years rather than life. These views acquired canonical status in the East and may be said to have influenced those in the West who favored a stricter position regarding early abortion.

ENSOULMENT

The disagreement over the status of the unformed as against the formed fetus was crucial for Christian teaching on the soul. It was widely held that the soul was not present until the formation of the fetus 40 or 80 days after conception, for males and females respectively. Thus, abortion of the "unformed" or "inanimate" fetus (from *anima*, soul) was something less than true homicide, rather a form of anticipatory or quasi-homicide. This view received its definitive treatment in St. Thomas Aquinas and became for a time the dominant interpretation in the Latin Church.[24]

However, the contrary view—that the human soul is infused at the moment of conception—has always been maintained within the Church, both East and West. It is found in Gregory of Nyssa (d. c. 395),[25] the younger brother of Basil the Great, where, however, it is associated with what is called traducionism, the belief that the soul is transmitted by parents to their offspring.[26] In a spiritualized form traducionism has been

---

[23] Epistola ad Amphilochium 188. There is a translation into English of the "Basilian Canon," in part, in: Huser, The Crime of Abortion, p. 22.

[24] See Reany, William. The Creation of the Human Soul. New York, Benziger Brothers, 1932. p. 173-180.

[25] Ibid., p. 182 (citing St. Gregory's De anima et resurrectione, "On the soul and the resurrection")

[26] For an extended discussion of traducionism, see The New Catholic Encyclopedia. Vol. 14. New York, McGraw-Hill, 1967. p. 230. It was condemned in 498 by Pope Anastasius II in a letter to the Gallican bishops, noting that the soul is said to be infused four weeks after conception.

taught by many, and was revived in the last century by Rosmini-Serbati (d. 1855) and others. The teaching of Tertullian—"he is a human being [in essence] who will be one"—influenced Augustine and, later, Luther and the Reformers generally toward what is often said to be traducionism or "generationism," signifying the creative power of the soul given by God to generate and transmit another soul. In fact, however, the Church Fathers are often difficult to interpret when dealing with the origin of the soul. Traducionism, though formally condemned, has survived in differing forms as the attempt to explain and reconcile the spiritual and biological aspects of human life in its inception.

There is then no unanimous and authoritative teaching in Catholic tradition regarding every aspect of the nature of the soul in relation to the body[27] (except for the character of the soul as simple, immaterial, created, immortal, and infused), and the Church has never defined the manner of the origin of the soul or the time of its infusion—"immediate" (at conception) and "mediate" (delayed) animation alike have been held at various times both in the past and today.

[27] Ibid., Vol. 13, p. 462 and 470-471. See also Connery, Abortion, p. 212: "Distinctions the Church makes, or does not make, in regard to penalties do not constitute church teaching. So while it is true that the church today penalizes abortion at any stage, it would be wrong to conclude from this that it teaches immediate animation or infusion of a rational soul in the fetus. This it has never done." Fr. Connery further notes (p. 308), "The only opinion the Church has ever condemned was that which identified animation with the time of birth. It has never taught immediate animation. Even the fathers of Vatican II resisted efforts to elicit such a teaching statement in connection with its condemnation of abortion. And the most recent declaration (1974) on abortion from the Scared Congregation for the Doctrine of the Faith made a similar bypass of the question. "See Appendix A, p. 41, the Declaration on Abortion by the Sacred Congregation.

THE CANONISTS IN THE MIDDLE AGES: "SI ALIQUIS . . . AND "SICUT EX. . ."

The decretals *Si Aliquis* and *Sicut Ex* are the two most important rulings affecting the treatment of abortion by the canonists in the Middle Ages.

In contradistinction to the Augustinian view of mediate animation, based upon the unformed-formed distinction, the more rigorist view, treating abortion at any stage as homicide, found classic expression in the famous anonymous 10th century decretal *Si Aliquis* ("If anyone . . ."),[28]. Significantly, *Si Aliquis* was omitted in 1906 from the *Panormia* of Ivo of Chartres (d. 1116), the most influential canonical collection before Gratian in the 12th century. The *Panormia* included three canons citing patristic authority (Augustine and Jerome) in support of the distinctions between the unformed and formed fetus and differentiated penalties. This, the less rigorous view, was given definitive status in Gratian's *Decretum* of c. 1140: "he is not a murderer who brings about abortion before the soul is in the body"[29] He cites Ivo of Chartres, Augustine, Jerome, and a spurious text attributed to Augustine (Pseudo-Augustine) which states explicitly that there is "no soul before the form." The distinction in penalty between homicide and quasi-homicide is made by the commentators on Gratian, notably Rufinus (1157-59) and the *Glossa Ordinaria* (1215-1245).

In his famous letter of 1211 to the Carthussians (concerning a monk who has accidentally caused his mistress to abort), Pope Innocent III (1960-1216) held that homicide could occur only after the fetus was "vivified" or ensouled (i.e., formed, animated). As the canon *Sicut ex*,[30] this letter was included in the

---

[28] There is a discussion of *Si aliquis* in John T. Noonan's Contraception, p. 208-210. The decretal, erroneously attributed by Burchard of Worms (d. 1012) to a council held at Worms in 830, is associated with Regino of Prum (c. 900-915).

[29] Gratian, Decretum 2.32.2.8-10.

[30] The full text of *Sicut ex* (Inasmush as . . .) is given in Huser's The Crime of Abortion in Canon Law, p. 50.

definitive *Decretales*[31] of Gregory IX (1148-1241) by the compiler, Raymond of Pennafort (d. 1275), and promulgated in 1234 in the Bull "Rex Pacificus." This was the last authentic collection of canon law for the Roman Church until 1917 and the first legislation applicable to the whole Church which incorporated the theory of delayed or mediate animation. *Si Aliquis* was also included in the *Decretales*, and was reconciled with *Sicut ex* by use of the "quasi-homicide" category for abortion of the unformed fetus, an act subject to lesser penalties than abortion as homicide (i.e., of the formed fetus). No official judgment was rendered then—or at any later time—as to the moment of animation, though most canonists accepted some variant of the Aristotelian theory reflected in the Septuagint Exodus and in Leviticus. The distinction in penalties on this basis was taught by the greatest canonists of the Middle Ages, including Bernard of Parma or de Bottone (d. 1264), Hostienses[32] (Henry of Suso or Segusio, d. 1271), Joannes Andreae (d. 1348), and Panormitanus (Nicolaus de Tudeschis, d. 1445). The last two explicitly cite the 40-80 day norm for formation and animation or ensoulment.

ST. THOMAS AQUINAS ON MEDIATE ANIMATION

The theory of mediate animation, incorporated in canon law, was taught by the most authoritative theologians of the Middle Ages. It appears in the *Sentences* of Peter Lombard (d. 1160),[33] and in the commentary of Albert the Great (d. 1280)[34] upon the *Sentences*. Abortion of the unformed fetus is treated not as homicide but as a sin against marriage, the natural law, and the

---

[31] Gregory IX, Decretales 5.12.20.

[32] Hostiensis is perhaps the first to speak of aborting unformed fetus as "interpretative" homicide or homicidium conditionaliter: Summa aurea 5.1 (written c. 1253).

[33] Libri IV Sententiarum 4.31 (See, however, the Appendix B for Albert on the Soul's infusion.)

[34] In libros IV sententiarum in Opera, vol. 30, 4.31.18.

rightful use of the reproductive organs. The teaching of Albert was further developed in his greatest pupil, St . Thomas (d. 1274).

For St. Thomas, as for mediaeval Christendom generally, there is a lapse of time—approximately 40 to 80 days—after conception and before the soul's infusion. Until that action by God, there is a primitive embryonic organization associated with a vegetative and later a sensitive "soul" or vital principle, related potentially to but distinct from the fully human or rational soul and deriving from the "formative virtue" in the semen—an attempt to reconcile the materialist metaphysics of Aristotle's hylomorphism[35] with the supernatural understanding of the origin of life and of the soul in Christian teaching. The vegetative and sensitive souls are by definition corruptible, unlike the rational or intellectual soul, which is incorruptible, simple, immaterial, yet all three constitute the unity of the soul as the form of the body, a union destined by God. St. Thomas ascribed this successive or delayed animation, in part, to the principle of proportionality in terms of the rudimentary character, as was generally supposed, of embryonic activity and organization in the period after conception.

For St. Thomas, "seed and what is not seed is determined by sensation and movement."[36] What is destroyed in abortion of the unformed fetus is seed, not man. This distinction received its most careful analysis in St. Thomas. It was the general belief of Christendom, reflected, for example, in the Council of Trent (1545-1563), which restricted penalties for homicide to abortion of an animated fetus only.

LATER LEGISLATION: CHANGING TEACHING ON ENSOULMENT

The rigorist tradition reappeared, however, in the Counter-Reformation. In 1588 Pope Sixtus V (1521-1590), in the course

[35] The belief that the soul is the form of the body.

[36] St. Thomas, In octo libros politicorum 7.12.

of a vigorous campaign against prostitution in Rome, issued the Bull *Effraenatam*, imposing severe penalties for abortion at any stage. In effect, Bull abolished the formed-unformed distinction, reverting to the position of the Council of Elvira. Abortion at any stage was defined as homicide, entailing the full penalties of secular and canon law alike. Since this position was in conflict with canonists and theologians as well as with the Sacred Penitentiary, the body charged with administering penances, it encountered considerable opposition.[37]

In 1591, Sixtus' successor, Gregory XIV (1590-91), acted to repeal all the penalties of *Effraenatam* except those applying to an ensouled fetus. His Apostolic Constitution *Sedes Apostolica* of 1591 represented a return to the mainstream of mediaeval tradition, reserving absolution and penance for abortion of the unformed fetus to the local Bishop. This, the so-called Sixtine-Gregorian law, remained in effect until the mid-19th century—indeed, until the revision of canon law in 1917.

In 1869 in his Apostolic Constitution *Apostolicae Sedis*, Pope Pius IX broke with the older tradition by omitting all distinctions in canonical penalties between the unformed and the formed fetus. The effect was implicitly to accept the theory of immediate ensoulment or, at least, to provide for it as a likely possibility.[38] In 1917, with the promulgation of the new Code of Canon Law by Benedict XV (1854-1922), the 40 to 80 day animation determination, still in effect for dealing with irregularities, was completely eliminated. The definition of abortion as the ejection of an immature or non-viable fetus by deliberate

---

[37] The contrasting policies of Sixtus and his successor, Gregory, are discussed in: Grisez, Germain G. Abortion. New York, Corpus Books, 1966. p. 167-168. Pertinent texts from the Sixtine-Gregorian law are cited in Huser, The Crime of Abortion in Canon Law, p. 62-80.

[38] See Callahan, Daniel. Abortion: Law, Choice, and Morality. London, Collier-Macmillan, 1970. p. 413. See also Granfield, David. The Abortion Decision. Garden City, New York, Doubleday Image Books, 1970. p. 62-63.

intent and efficacious means derives from Sixtus V. By fetus is meant the human organization in the womb after conception and before birth. In effect, the teaching of *Effraenatam* and the Council of Elvira has become the officially sanctioned position of the Church. This shift was, in large measure, the result of changing opinion regarding ensoulment at conception and growing knowledge of fetal development.[39] It also reflected the increased moral authority of the Holy See and the consequent tendency of canonists and theologians to follow papal leadership in contrast with earlier periods.

Other factors helped shape Catholic thought in this area, including the fact that belief in the doctrine of the Immaculate Conception had become general in the course of the 16th century, though it would not be defined as dogma until 1854 by Pius IX. However, as early as 1701 it was declared a feast of universal obligation by Clement XI, and its liturgical observance heightened popular consciousness concerning the sanctity of fetal life from its conception.

In 1620 Thomas Fienus, a physician at Louvain, argued that the rational soul was infused three days after conception. In 1621 a more influential work appeared, a treatise on medical-legal questions by Paolo Zacchia a physician of Rome. Wholly rejecting the Aristotelian—Thomistic theories, he argued that the rational soul "must be infused in the first moment of conception." His views were to be widely debated, but in 1644 he received a signal mark of Papal approbation, being named

[39] Increasing scrutiny of aborted embryos and the discovery of spermatozoa by Leeuwenhoek in 1677 seemed to support a preformationist theory of life as fully present in seminal form and unfolding in gestation, popularly understood as the homuculus in the ovum, ensouled at or three days after conception. A similar view appears to have been held by the philosopher Leibniz (d. 1716). The older view of epigenesis, life manifest in successive stages, the "metamorphosis of souls" in the embryo, was in increasingly challenged as lacking substantiation.

"General Proto-Physician of the Whole Roman Ecclesiastical State" by Innocent X.

The changing climate of opinion[40] in the Holy See was evident when in 1979 the Holy Office under Innocent XI condemned sixty-five propositions as "at least scandalous and in practice dangerous." The censure concerned itself with their prudence rather than their truth; nevertheless it marks the influence of conservative theologians at Louvain and Rome against "laxism," the tendency to relax the obligations of natural and positive law in difficult cases of conscience.[41] Specifically, it rejected the views of Tomas Sanchez (d. 1610) and Caramuel y Lobkowicz (d. 1682). Caramuel was associated with the belief that the rational soul is infused at birth, and Sanchez with the argument that "a girl, detected as pregnant" could licitly abort (before ensoulment) to save herself from harm at the hands of relatives.[42]

It should be noted that the official position in canon law and in moral theology still held to the unformed-formed, inanimate-animate distinction. Thus, the greatest and most influential Catholic moral theologian of the 18th century, Alphonsus Liguori (1969-1878), in his *Theologia* (1753-1755), held it to be "certain" that there is no immediate ensoulment, though (he noted) "some say badly"[43] to the contrary. Already, however, as

---

[40] Fuller background for this change is given in: Grisez, Abortion, p. 170-177.

[41] For laxism, see Cross, F.L., ed. Oxford Dictionary of the Christian Church. London, Oxford University Press, 1958 p. 791-792.[3]

[42] De matrimonia 9, disp. 20, N. 11. Sanchez' arguments are examined in Noonan's Contraception, p. 442-444. See also Connery, John. Grisez on Abortion in Theological Studies, Vol. 31, No. 1, March, 1970. p. 173-74. Sanchez provides other instances in which he justifies therapeutic abortion (before ensoulment): the endangered survival of the mother, and rape. In both cases the fetus is an innocent aggressor against whom the mother mas act in self defense.

[43] Liguori, Theologia Moralis 6.394.

early as 1736, there had been a theological analysis of abortion by Constantino Roncaglia arguing the "most probable" view for ensoulment at conception or "at least from the third or seventh day." Roncaglia's *Universale Moralis Theologia* was published at Lucca in 1834. Even Liguori, who did not accept this position, acknowledged that "there flourishes the opinion, received not without approbation from experts, that the fetus from the beginning of conception, or at least after several days, is informed by a soul."[44] Since at least 1658 and the *Baptisms of Doubtful Men* of Geronimo Florentinio, significantly enough a member of the same order as Roncaglia (the Congregation of the Mother of God),[45] it had been held that a fetus should be baptized even if taken from its mother's womb before 40 days after conception, given the possibility (which eventually came to be seen as the probability) of the soul's having been already infused.

Thus, within about two or three centuries—from the mid or latter 17th to the mid-19th—the Church's official teaching "developed to an almost absolute prohibition"[46] of abortion at any stage, a "substantial return" to the earliest tradition associated with the Church Fathers.

THE THERAPEUTIC EXCEPTION

The so-called "therapeutic exception," abortion to save the life of the mother, has never been officially sanctioned by the

---

[44] Ibid., 6.121.

[45] Founded at Lucca in 1573 by St. John Leonardi—hence the popular name Leonardini—the Clerks Regular or Religious of the Mother of God, conceived in the spirit of Counter-Reformation piety, were instrumental in fostering devotion to the Immaculate Conception.

[46] Noonan, The Morality of Abortion, p. 36. It should be noted that the human ovum was not discovered until 1827 by Karl Ernest Baer (1792-1876), and not till nearly half a century later was the union of ovum and sperm at conception determined.

Church. Nevertheless, some form of therapeutic abortion has been defended as licit by a number of eminent theologians since the 14th century.[47] The Dominican John of Naples (fl. 1310-36) argued that a physician "ought to give (such) medicine [abortifacient]" in order "to preserve a pregnant woman" if the fetus were not ensouled. Antoninus of Florence (1389-1459) cites this opinion as probable, though he himself rejected it as dangerous if there is any doubt. The same view is cited with caution by Sylvester da Prieras (d. 1523). The leading canonists of the 16th century, Azpilcueta (d. 1586), held that if the physician "believed with probability" that the fetus was not ensouled,[48] he was not guilty of homicide in prescribing abortifacients. He cites this as the common opinion.[49] These opinions coincided with and may be seen as the reflection of the rise of probabilism, the teaching that in any doubtfully licit action; a solidly probable opinion favoring liberty or leniency is permitted even though the opposing opinion, favoring the law, may be more probable.[50] (Eventually, under the influence of Liguori, a more nuanced form of probabilism became generally accepted throughout the Church.)

---

[47] The theological history of the "therapeutic exception" is considered in Noonan, The Morality of Abortion, p. 26-32; in Grisez. Abortion, p. 166-184; and in Connery, Abortion, p. 173-313.

[48] For Azpilcueta, as for most canonists in his day, this meant 50 days after conception.

[49] The argument of the Franciscan Antonius de Corduba (d. 1578) in support of *acceleratio partus* (hastening the delivery) by means directed to saving the mother's life was widely accepted by many authorities, including the noted Jesuit theologians Theophile Raynaud (d. 1663), Edmund Voit (d. 1780), de Lugo, and Antonius Diana (d. 1663), all of whom permit indirect and "accidental" abortion of an unanimated fetus where the mother's life is endangered. Such views were rejected by Cardenas (d. 1684) and others because of the possibility that the fetus might be animated by a rational soul.

[50] For Probabilism, Probabiliorism, and Equiprobabilism see: The New Catholic Encyclopedia, vol. 11, p. 814- 815, and vol. 5, p. 502-503.

It remained for Sanchez (1550-1610), generally regarded as the greatest Catholic moral theologian of his time, to provide a fuller theoretical defense of therapeutic abortion.[51] He noted exceptions to the prohibition on abortion: when the mother's life is endangered and the fetus not ensouled, abortion "more probably" is lawful. Sanchez invokes the "double-effect" argument from St. Thomas on self-defense (as well as "just war" theory, calling to mind the rabbinic tradition which regarded the fetus in such cases as an "innocent pursuer" or "unjust aggressor" against whom the mother may act in self-defense). That is, he argues that while direct abortion is, of course, always illicit, the mother is not bound to sacrifice her life for an unensouled embryo. Hence, "indirect" means are licit to induce abortion. The Jesuit theologian, Leonard Lessius (1554-1623), himself a pupil of Suarez, carried this argument further, justifying therapeutic abortion broadly, provided there be no "direct intention" to kill the fetus.[52]

Liguori himself followed this line of reasoning, holding Sanchez' opinion to be probable. He cites Bernard Busenbaum (d.1668) for the view that for the mother whose life is threatened by an unensouled fetus, "it is lawful to take (an abortifacient), and according to some she is bound to take it, intending

---

[51] For a different perspective from that of Noonan see Means, Cyril. A Historian's View. In Hall, Robert, ed. Abortion in Changing World. New York, Columbia University Press, 1970. p. 16-24. Citing ten authorities from John of Napes to Paul Laymann (d.1635) in favor of therapeutic abortion, Means holds further that St. Thomas "seems to have condoned "Tertullian's alleged approval of embryotomy *sub silentio*, an argument "from silence" and hence subject to widely varying interpretations. The argument "from silence" also appears in articles by Pietro Avanzini (d. 1874), sometime editor of the official journal of The Holy See, in favor of craniotomy.

[52] Lessius, De justitia et jure (1635) 2.9.2.58. Many who defended the "therapeutic exception" cited St. Thomas in the Summa Theologiea II-II, p. 64, a.7.

directly only her own health, although indirectly and consequently the fetus is destroyed"[53]

In 1872 the Sacred Penitentiary, consulted regarding embryotomy (craniotomy), replied: "Consult approved authors, old and new, and act prudently."[54] Such counsel reflected the prevailing practice. However, from 1884 to 1902 a series of Holy Office responses, reflecting doubtless the changing sentiment on ensoulment, ruled against embryotomy regardless of intention.[55] In 1902 even the ectopic (extra-uterine) exception was eliminated in a ruling that permitted the operation only if both lives—mother and fetus—would be protected "by ordinary results." This position was reaffirmed by Pius XII in 1951 and by Paul VI in 1968.

Many theologians now hold that fetal death not due to purpose or intent by mother or physician, but rather as the side-effect of seriously needed therapy or surgery, may be justified according to "double effect"—that is, if a threatened abortion is so acute as to appear medically "inevitable," the physician may act to save the mother's life so long as he neither seeks nor intends the death of the fetus and so long as his procedures do not materially accelerate that death. Only two instances have been cited by theologians as licit, using these criteria: removal of a pathological tube in the case of an ectopic pregnancy,

---

[53] Liguori, Theologia Moralis 3.394.

[54] Response of November 28, 1872 to a question directed to the Penitentiary on September 2, 1869, cited by: Bouscaren, T. Lincoln. Ethics of Ectopic Operations. 2nd ed. Milwaukee, Bruce Publishing Co., 1944. p. 13. Means notes that a number of authorities taught the licitness of therapeutic abortion: he cites Guiseppe Pennacchi and Augustin Lemkuhl (d. 1917) among them; Pennacchi in his De abortu et embryotomia, published in 1884, appears to have accepted Tertullian's alleged precedent. Lemkuhl is the author of the 1872 ruling, given in his Theologia Moralis, 10th edition, vol. I, p. 505, no. 804 1902).

[55] The questions and responses are given in full in Bouscaren's Ethics of Ectopic Operations, p. 183-186.

defended by Huser as "in most cases . . . justifiable," and removal of a cancerous uterus.[56]

PRESENT TEACHING AND ITS STATUS

The spread of abortion in modern times and the gradual erosion of the Aristotelian-Thomistic analysis of gestation have led to condemnation of abortion at every stage, "erasing the distinction between a formed (ensouled) and unformed fetus." Thus, the 1911 edition of Slater's *Manual of Moral Theology* notes that "following the common opinion, we may put aside as antiquated the hypothesis of a living fetus not yet informed by a human soul. The human soul is infused into the fetus at the moment of conception, according to the common opinion." In Volume I of the 1918 edition, it is said that the soul is infused at conception "as in commonly held by theologians."[57] In fact, however, this does not appear to have been the "common opinion" until a later time. Thus, McHugh and Callan's *Moral Theology* (Volume II, 1930) speak more cautiously of abortion as always homicidal "if done after animation, which according to many today is simultaneous with conception."[58] In his *A Manual of Neo-Scholastic Philosophy*, published in 1923, Charles Barschab, writing of St. Thomas and the infusion of the soul, observes that "today this option is not shared gener-

---

[56] See: Huser, The Crime of Abortion, p. 137; and Noonan, Contraception, p. 46-50, on the debate between Agostino Gemelli (d. 1959) and Arthur Vermeersch (d. 1936) in 1933. See also: Connery, Abortion, p. 297-303: "Theologians generally accepted the conclusion of Bouscaren . . . that the tube might be removed as a pathological organ when necessary to save the life of the mother."

[57] Slater, Thomas. Manual of Moral Theology. Vol. II. New York, Benziger Brothers, 1918. P. 312.

[58] McHugh, John A. and Charles Callan. Moral Theology. Vol. II, Sect. 1848. New York, Joseph F. Wagner, 1930, p. 115. The authors emphasize that "the mother is not obliged to prefer the temporal life of the child to her own life" (i.e., if the latter is endangered by pregnancy).

ally (i.e., delayed animation). However, to us its ground appears solid and we have nothing better to put in its place."[59] Similarly and with far greater authority, Cardinal Mercier (1851-1926) in his *A Manual of Modern Scholastic Philosophy*, describes the traditional teaching of St. Thomas (that "the soul is created during embryonic life") as "much more probable" than immediate ensoulment at conception. He adds: "As to what precise moment the embryo reaches the degree of organization required for its being informed by the rational soul, it is, of course, quite impossible to determine."[60] The evidence of history would seem to support Fr. William Reany's careful conclusion in his *The Creation of the Human Soul* that "although there is no decision in the Catholic Church in this matter, it may be said without exaggeration that there is no doubt ecclesiastical authority has always favored the opinion that there is a lapse of time between conception and the infusion of the human soul into the body." He cites the opinion of St. Thomas and "several enactments emanating from the highest authority" presupposing that opinion (Innocent III, Gregory XIV, and Clement VIII), the Catechism of the Council of Trent, and the 15th Thomistic thesis as approved by the Scared Congregation of Studies and confirmed by Benedict XV in 1911. Abortion before the infusion of the soul he calls "an anticipated homicide," the killing of that intrauterine life which is a *preparatio* for rational ensoulment. When done with malicious intent, it constitutes abortion but not homicide.[61]

"Anticipatory homicide" is the term used by Cardinal Lepicier (d. 1936) in 1910:[62] "abortion is always homicide, although the fetus is supposed not yet to have a rational soul: for it (the fetus) is ordered to men's formation; therefore, every case of

---

[59] Barshab, Charles. A Manual of Neo-Scholastic Philosophy. New York, Herder, 1923. p. 199.

[60] Reany, The Creation of the Human Soul. p. 189.

[61] Ibid., p. 195-197.

[62] Ibid., p. 196.

abortion should be called an anticipatory homicide; accordingly, the withdrawal of the clause *post animatum foetum* (in the revision of canon law) does not prove that the mind of the Church is that the fetus is always a man in the strict sense of the word, but rather indicates that no one is now excused from the censure (of abortion) on the pretext that the fetus has no soul. . ."

Opinions differ as to whether the direction of the present trend among theologians is toward delayed or immediate animation. Fr. Hyacinthe Hering in 1951 is cited by Fr. Joseph Donceel[63] as a representative advocate of the older view of successive or mediate animation. Medical research in the area of human reproduction does not appear to have undermined the possibility of some form of the traditional belief regarding ensoulment. Any one four crucial "moments" in the development of the fetus may be plausibly defended as the moment when human life begins and, hence, of full ensoulment: 1, the moment of conception, when the ovum is fertilized; 2, after the moment of possible segmentation (at which the fertilized ovum could subdivide or recombine); 3, implantation of the embryo in the womb (blastocyst); 4, the beginning of the development of the cerebral cortex (between the 15th and 40th days of pregnancy). Nothing that recent embryology has discovered has affected the Church's teaching on abortion. "At most," writes Fr. Arthur Mcnally, "it may somewhat diminish the malice of early abortion."[64] There would appear to be room for the

---

[63] Donceel, Joseph. Why is Abortion Wrong? Commonweal, August 16, 1975. p. 65-67; and Abortion: Mediate vs Immediate Animation. Continuum 5, Spring 1967. p. 167-171. See also: Wassmer, Thomas. Questions About Questions. Commonweal, June 30, 1967. p. 418. Donceel himself argues vigorously for a revival of the "delayed animation" theory, holding that the soul can exist only in a highly organized human body: see Immediate Animation and Delayed Hominization. Theological Studies, Vol. 3 No. 3, September 1970. p. 76-105.

[64] McNally, Arthur, Life in the Womb. The Sign. April 1975. p. 35-36. See also: Hellegers, Andrea. Fetal Development. Theological Studies, Vol. 31, No. 1, March 1970. p. 3-9.

"intermediate" opinion mentioned by Fr. Reany that the infusion of the fully human or rational soul is preceded by only one (sensitive or vegetative or nutritive) "soul." The moment of that infusion is left open.[65]

The present view is authoritatively stated by Fr. Bernard Haring, described by Noonan as "the most persuasive of [Catholic] moral theologians in postwar Europe." In his magisterial *Das Gesetz Christi*, Fr. Haring writes: "At best, however, one can grant only a slight probability to the ancient view of Aristotle . . . to me, it seems wholly untenable . . .; assuming this (to be so), every abortion is to be regarded as morally equivalent to murder."[66] On the other hand, he recognizes that "the theory of successive animation . . . is gaining ground once more." He adds that "at least after the twentieth day there is an *individuum*; and there is an inborn dynamism, a principle of life in this *individuum* . . . The uncertainty about the status of person does not at all justify an arbitrary destruction of such a living being on the way to ever greater development of humanity."[67]

Since 1869 the Catholic Church no longer distinguishes between a fetus with a soul and a living embryo or even a zygote, though neither forbidding free scientific and theological discussion nor precluding responsible investigation of the

---

[65] See, for example: Nogar, Raymond J. Evolution, Human Philosophical Aspects. New Catholic Encyclopedia. Vol. 5. p. 684. Nogar believes that animation occurs "probably not before the end of the third month."

[66] Haring, Bernard. Das Gesetz Christi. Vol. 3. Munich, Wewel, 1966. p. 220. The translation given in Noonan, The Morality of Abortion, p. 39, as "every abortion is murder" is taken from Edward Kaiser's rendering from the German and does not accurately convey Haring's carefully nuanced statement—"ist bei jeder Abtreibung sittlich der Tatbestand des Mordes zu statuiren."

[67] Haring, A Theological Evaluation in The Morality of Abortion. p. 131.

whole question. Should it be determined that ensoulment occurs sometime after conception (successive animation), as was taught from Augustine to Ligouri—approximately 1300 years—the deliberate, voluntary destruction of an unanimated embryo and of a fetus animated with a soul would be sins specifically distinct. However, even where there is today a probable opinion that the soul is infused several weeks after conception, the abortion of a live fetus at any stage is presently regarded as homicide since this is a case in which probabilism is not permitted. Rather, the weight of probability rests with the possibility of life being present from conception. Only if it were conclusively proven that the rational soul is not yet present in the early stages of fetal life would abortion be a sin less grave than homicide. Therefore, while the criteria for identifying human life *in utero* are still medically unclear, the position of the Catholic Church regarding abortion of that life is clearly defined. "After a certain stage of intrauterine development it is perfectly evident that fetal life is fully human. Although some might speculate as to when that stage is reached, there is no way of arriving at this knowledge by any human criterion, and as long as it is probable that embryonic life is human from the first moment of its existence, the purposeful termination of any pregnancy (involves) moral malice.[68]

The official teaching of the Catholic Church at present was stated in 1970 by the United States Catholic Bishops: "from the moment of conception the child is a complex and rapidly-growing being endowed with the characteristics of human life"; in brief, "the child in the womb is human."[69] This simply reasserts the judgment of Vatican Council II: "From the moment of its conception, life must be guarded with the greatest of care."[70]

---

[68] Abortion II—Moral Aspect. New Catholic Encyclopedia. p. 29.

[69] Statement by National Conference of Catholic Bishops, November 18, 1970.

[70] Pastoral Constitution "De ecclesia in mundu huius temporis." Section 51.

Thus, in 1964, Pope Paul VI cited the words of Pius XII thirteen years before: "Innocent human life, in whatever condition it is found, is to be secure from the very first moment of its existence from any direct deliberate attacks . . . Whatever foundation there may be for the distinction between these various phases of the development of life that is born or still unborn, in profane or ecclesiastical law, and as regards certain civil and penal consequences, all these cases involve a grave and unlawful attack upon the inviolability of human life."[71]

In conclusion, the pastoral and penitential practice of the Catholic Church regarding abortion today is to act as if the soul were present from conception, assuming the possibility, if not the probability, of fully human life or at least its unique potentiality in the *conceptus*. This represents a significant change from the dominant tradition in the past, which distinguished the unformed from the formed fetus in terms of canonical definition of abortion and of appropriate penalties. The present teaching, like that in the past, is authoritative rather than strictly infallible. Hence, there is the possibility of some modification, particularly if theologians and scientists should agree on developmental criteria for the humanization of the fetus, perhaps by returning to the distinction between unformed and formed, translated into contemporary language, or by distinguishing in some carefully defined way the stages of previable fetal development *in utero* so as to delineate the presence of human life in the fetus from the zygote, thus defining the point of ensoulment. The permissible norms for therapeutic abortion may possibly be somewhat broadened in accord with the "double effect" tradition.[72]

---

[71] Cited in the first statement condemning abortion to be promulgated by a general council (on December 5, 1965). The words of Pius XII, first spoken in 1951 to the Catholic Society of Midwives, were quoted by Paul VI in an address to the new England Obstetrical and Gynecological Society on October 3, 1964.

[72] The history and development of the "double effect" tradition in Catholic moral theology, with particular reference to "indirect" therapeutic abortion, is traced in Granfield's The Abortion Decision. Garden City, New York, 1971. p.126-138. Deriving originally from St. Thomas (Summa I-II, 64, 7), it was further refined by Cajetan (d. 1534) in his commentary, and made a general theological principle by Domingo de Santa Teresa (d. 1654) of the Salamancan school in 1647, Spanish Carmelites or the Diacalced Reform (introduced by St. Teresa of Avila, d. 1582), who between 1600 and 1725 produced a gigantic commentary on St. Thomas. The modem formulation dates from Jean Gury (d. 1866) and his 1850 compendium of moral theology, heavily influenced by Liguori. Gury's argument was annotated and upheld by Antonio Ballerini (d. 1881) in the 17th edition of the *Com*

However, it is inconceivable, given the moral unanimity or consensus of the Catholic Church regarding abortion throughout its history, that direct, deliberate abortion will ever be less than a very grave sin.[73] The change in the Church's present teaching does not represent something new, but rather the fruit of reflection upon the significance of scripture, tradi-

pendium (published in 1866).

[73] Susan T. Nicholson, in Abortion and the Roman Catholic Church (University of Tennessee, Knoxville, Tennessee, 1978) argues that Catholic teaching has not always condemned abortion as a form of homicide but only as a "sin of sex" (i.e., lust); she cites the ensoulment controversy as evidence that it is a "recent development . . . to consider the fetus a human being from conception" (p. 14). She contends that Augustine's equation of abortion with contraception is reflected in later history, citing the 1930 Encyclical of Pius XI, "Casti Connubi" (sic). Christian moralists, however, were greatly influenced in these matters by the 2nd century Greek physician Soranus, whose Gynecology, in treating abortifacients and contraceptives together, cites potions which "not only impede conception but also destroy what is already conceived" (Gynecology 1.19.60.63). Noonan in Contraception emphasizes the esteem in which Tertullian and Augustine, for example, held Soranus. Christian use of terms such as homicide and parricide for users of abortifacients reflects "neither biological nor legal but moral" norms in which "protection of life at the fetal stage" was later extended to the "life-giving process," in opposition to the teaching and practice of the Manichaeans, for whom procreative sex was intrinsically evil.

tion, doctrine, and scientific discoveries regarding embryonic life. It is not so much an innovation, despite an element of departure from long-established practice, as it is a considered return to the earliest tradition of the Church, a tradition never wholly lost.[74]

At the same time, that patristic tradition, in its utilization of scripture, Greek philosophy, and embryology, presents "no clear and unified view of fetal life."[75] There is support in the Catholic tradition for various theories of delayed hominization, and there is some theological precedent for certain limited forms of the "therapeutic exception" where the mother's life is endangered—if the latter has received no explicit endorsement by the Church, neither has it been explicitly condemned.[76] In the matter of delayed hominization, "the Catholic community enfolds a philosophic-theological pluralism,"[77] whose exploration may stimulate renewed dialogue and mutual understanding among persons who, differing greatly in belief, yet share a concern for the common good.

SUMMARY

Throughout its history from the earliest days, the Catholic Church has consistently condemned abortion. For much of that history, a distinction was recognized in the development of fetal life and in its ensoulment or hominization. The Fathers themselves were divided as to when the soul and therefore specifically human life appears. The dominant tradition favored mediate or delayed animation; a minority view upheld immediate animation at conception. Penalties for abortion were dis-

---

[74] See Appendix B on the soul's infusion according to Albert the Great.

[75] Springer, Robert H. Abortion in Current Theology. -Theological Studies, Vol. 31, No. 3, September 1970. p. 492-507.

[76] Connery, John R. Grisez on Abortion. Theological Studies, Vol. 31. No. 1, March 1970. p. 173.

[77] Springer, Abortion in Current Theology, p. 501.

tinguished accordingly. Similarly, while the dominant tradition opposed abortion for any reason, a minority tradition, arguing from the double-effect theory, defended the "therapeutic exception" where the mother's life was endangered.

Conflict cases involving the distinction between direct and indirect abortion would appear to be the only possible area for further development consonant with the reaffirmation of traditional Catholic teaching. Of the three areas of exception to that teaching proposed for consideration among theologians by George H. Williams, two—abortion to save the life of the mother, and abortion in instances of felonious intercourse (rape and incest)—can claim some precedent in the history of Catholic tradition. This might provide a basis for renewed theological exploration of "the doctrine of indirect effect,"[78] the double-effect principle, taking into account the rights of both fetus and mother as well as the interests of the larger community—the state and the medical, legal, socio-psychiatric, and religio-ethical professions. Such a co-sovereignty of progenitors and the state over fetal life might facilitate some ethical accommodation among diverse traditions in a pluralistic democracy.

Rethinking of the "double-effect" principle among Catholic theologians is discussed by Fr. Richard McCormick[79], who cites the German theologian Franz Scholz on conflicting goods. Fr. McCormick notes that "the ontological status of human life at this stage [i.e., before blastocyst] may be different than after this period," given the biological events which converge "during the earliest days," of conception.[80] Such a position would permit interception to prevent implantation in the 7-day period after conception in such extreme situations as rape. He advances this argument "with extreme caution," noting the

[78] Williams, George H. The Sacred Condominium. In Noonan, The Morality of Abortion, p. 146-171.

[79] McCormick, Richard. Notes on Moral Theology. Theological Studies. Vol. 39, No. 1, March 1978. p. 104-116 and 122-128.

[80] Ibid., p. 127-128.

concern of those who emphasize the presence in the fertilized ovum of that genetic code present from the beginning and uniquely human.

Ecumenical dialogue has also begun.[81] Perhaps the most constructive statement to date is that on Ethics and Christian Unity, A Statement on Abortion, adopted by the Roman Catholic—Presbyterian and Reformed Consultation, sponsored by the Catholic Bishops' Committee for Ecumenical and Interreligious Affairs of the National Conference of Catholic Bishops and the Caribbean and North American Area Council of the World Alliance of Reformed Churches (Presbyterian and Congregational), conducted in 1976-79 at Washington and Princeton. The Report seeks to define basic principles held in common as well as areas of "substantial difference."[82]

---

[81] Ibid., p. 104-116.

[82] Ethics and the Search for Christian Unity, Two Statements by the Roman Catholic-Presbyterian Reformed Consultation, I. A Statement on Abortion. Washington-Princeton, 1980 (not published) Seeking to define basic principles held in common as well as areas of "substantial difference," the Report declares:

> Some of the basic principles on which the Consultation was able to reach agreement include the following:
>
> 1. the transcendent basis for respect for human life is the image and likeness of God in which human beings are created;
> 2. the ultimate responsibility for moral decision—making rests with the individual conscience guided by reason and grace;
> 3. authentic moral decisions can never be exclusively subjective or individualistic but must take account of the insights and concerns of the broader religious, social, and familial community;
> 4. judicial and legislative standards are not always coterminous with moral demands, and therefore the legalization of abortion does not of itself absolve the Christian conscience from moral responsibility;
> 5. religious groups have the right to use licit means to influence civil policy regarding abortion.

Some of the areas in which substantial difference were discovered and which call for further dialogue between our two traditions include the following:

1. the moment and meaning of personhood;
2. the rights of the unborn in situations where rights are in conflict ;
3. the role of civil law in matters pertaining to abortion;
4. the interrelation of individual versus communal factors in decision making.

In light of our common Christian heritage and in recognition of our real differences, our ministry, with regard to abortion, will be characterized by the following: We will attempt to clarify the basic principles pertinent to decision making in this area. We will

It remains an open question as to whether and to what extent traditional teaching on the nature and time of fetal animation, revised and restated in the light of modern embryology, may prove to be relevant for present-day consideration of abortion.

---

always respect the personal dignity of those involved in making decisions about abortion. Regardless of the ultimate decision reached, we will offer pastoral support insofar as our personal conscience and moral convictions allow. We will not resort to stereotypes and abusive language. We will work to transform societal arrangements which press people into untenable moral dilemmas.

The Report concludes:

In spite of these differences there is one important agreement among the members that offered hope, namely, that our Churches must continue the dialogue on these painful questions with mutual respect, total honesty, fidelity to our respective traditions and the kind of charity and perseverance that will ultimately provide the resolution of these differences and create the desired societal ethos that is abortion-free.

APPENDIX A

ANIMATION AND THE DECLARATION ON ABORTION (1974)

In a footnote to the Declaration, the Sacred Congregation for the Doctrine of the Faith observes:

> The present Declaration deliberately leave untouched the question of the moment when the spiritual soul is infused. The tradition is not unanimous in its answer and authors hold different views: some think animation occurs in the first moment of life, others that it occurs only after the implantation. But science really cannot decide the question, since the very existence of an immortal soul is not a subject for scientific inquiry; the question is a philosophical one. For two reasons the moral position taken here on abortion does not depend on the answer to that question: 1) even if it is assumed that animation comes at a later point, the life of the fetus is nonetheless incipiently *human* (as the biological sciences make clear); it prepares the way for and requires the infusion of the soul, which will complete the nature received from the parents; 2) if the infusion of the soul at the very first moment is at least *probable* (and the contrary will in fact never be established with certainty), then to take the life of the fetus is at least to run the risk of killing a human being who is not merely awaiting but is already in possession of a human soul.

The Declaration thus reiterates the position enunciated by the drafting committee in preparing Vatican Council II's statement in 1965: "the time of animation is not touched on." (The full text of the Declaration is given in translation in The Pope speaks, vol. 19, no. 13, 1975; p. 150-262.) The Congregation cites numerous authorities against abortion, including canonical enactments by the first Council of Mainz (847) and by Popes Gregory III (d. 741) and Stephen V (d. 891).

APPENDIX B

ALBERT THE GREAT AND IMMEDIATE ENSOULMENT

Recently, many writers on abortion, associating St. Albert the Great with belief in ensoulment at conception, contrary to the theory of successive animation taught by St. Thomas, have asserted that theologians since that time have tended to agree with Albert. This is stated authoritatively by Fr. Bernard Haring who speaks of successive or delayed ensoulment as "the more common opinion before St. Albert the Great."[83]

While these authorities do note the differing theories of the soul held by St. Thomas and Albert, it is far from accurate to say that after Albert's time theologians tended toward his opinion as against Thomas. The historical reality has been far more complex. Nor can belief in immediate animation be ascribed unconditionally to Albert.

Mitterer does emphasize that St. Thomas' belief in successive animation—"the spiritual soul replaces all preceding souls"—was rejected by Albert as "unreasonable," wholly contrary to Albert's opinion." Albert's supposition, influenced by Tertullian's view of ensoulment at conception, is said by Ruff to have replaced the Thomistic distinctions (between unensouled embryo and ensouled fetus) in the 19th century.

A careful scrutiny of Albert's teaching renders this assertion doubtful, whereas what Ruff call the "Aristotelian-Thomist" position clearly dominated in both theology and canon law during the succeeding centuries.

The teachings of Albert on the soul illustrate the judgment of Dom David Knowles that "he was neither a consistent Aristo-

---

[83] He cites studies by Fr. Wilfried Ruff in *Stimmen der Zeit* and by Rudolph J. Gerber in *Laval Theologique et Philosophique*, which appear, in turn, to be influenced by Albert Mitterer's *Die Zeugung der Organismen, Inbesondere des Menschen* (Vienna, Herder, 1974) ("The Generation of Organisms, Especially of Mankind").

telian nor a perfectly consistent thinker."[84] As Albert himself wrote: "if we consider the soul in itself, we follow Plato; if we consider it as the animating principle of the body, we agree with Aristotle." Moreover, it should be noted that he retained the traditional distinction in canonical penalties for abortion of the unformed and the formed fetus. While he could write that "the body is prior to the soul, which is not infused into it till it is organized," he held to the unity of that rational or intellectual soul, regarding the vegetative and sensitive souls as immanently present potentialities (though in some sense extrinsic); hence, his opinion in favor of ensoulment at conception. For Albert, the soul is essentially a substance using a body, the neo-Platonic view held by Avicenna (Ibn Sina, d. 1037), an *actus* or activity (rather than a *forma* or form) which informs the body but is distinct from it. The contradictory aspects of his teaching were unresolved.

For St. Thomas, in contrast, the soul is essentially the form of the body (Aristotle). A new *forma substantialis* or soul replaces the preceding forms (vegetative, sensitive) as each substantial stage of development, the body regarded as the appropriate *materia disposita*[85] for the unfolding ensoulment through a process of generation and corruption in which imperfect forms are discarded for the more perfect. As with Albert, the spiritual soul has within it the powers of the vegetal and sentient souls, but for St. Thomas it is not in itself present from the beginning of conception. For Albert, it is not reasonable to hold that the soul as spiritual substance can undergo this process of generation, corruption, and change. The vegetive and sentient powers immanent in the intellectual soul may be explained by Albert's teaching of seminal reasons (derived from Gregory of Nyssa and Augustine) or invisible principles, potential and causal, in all creation and perhaps inherent in the

[84] Knowles, David. The Evolution of Mediaeval Thought. Baltimore, Helicon Press, 1962. p. 253.

[85] Matter suitably prepared and naturally disposed to receive each stage of ensoulment.

soul. Whether this be or so not, it has been argued that the Church itself in the Council of Vienne (1311-12) implicitly supported St. Thomas (and delayed animation) by condemning the teaching of the Spiritual Franciscan Petrus Olivi (d. 1298) on the manner of the soul's union with the body. The decrees of Vienne, the so-called Clementine decretals or Liber Septimus of Pope Clement V, were promulgated as canonical by John XXII in 1317. The opinions of Olivi (who was not condemned by Name) clearly suggest the influence of Albert in the view of the soul as active and dynamic, essentially consubstantial with (rather than the form of) the body, and containing vegetive, sensitive, and intellective powers. In Albert these powers, also called "qualities," are said to emanate from the soul constitutent substance, thus associating a neo-Platonic manner of thinking with Aristotelian teaching on the soul's powers.

It is clear that the opinion of immediate ensoulment as taught by Albert did not commend itself to Catholic thought after his time nor can it be shown to have affected mainstream theology in any later period. To the extend that theologians have returned to an earlier belief in animation at conception, that belief is based upon other grounds than those held by Albert or, for that matter, by Gregory of Nyssa.

APPENDIX B

MCC MESSENGER, MAY 30, 1986

"STATE-PAID ABORTIONS NOT HERE"

The most significant package of pro-life legislation since 1979 was enacted by the General Assembly this year. HB 1596 was approved by a vote of 119-6 in the House of Representatives and 23-5 in the Senate.

The final bill is a combination of a bill prepared by the Missouri Catholic Conference, prohibiting the use of public funds, facilities and employees for the performance or promotion of abortion and an omnibus pro-life bill prepared by Missouri Citizens for Life.

The bills were sponsored in the Senate by Senators John Schneider (D-Florissant) and Fred Dyer (R-St. Charles) and in the House by Rep. James Barnes (D-Baytown). The Governor is expected to sign the bill.

The bill gives our state a clear public policy favoring birth over abortion, a policy which, although it cannot outlaw abortion, clearly states that Missouri will not use public funds, facilities or employees to perform or promote the killing of unborn children.

Although, like any major controversial issue, a court chal lenge is expected, the basic provisions of this bill are supported by the United States Supreme Court decision in *Poelker* v. *Doe*, 97 S.Ct. 2391 (1977) and other cases.

In the attempt to defeat the bill, opponents and newspapers with pro-abortion editorial policies have made a number of false and exaggerated statements as to the contents of the bill. In the following summary the contents of HB 1596 are listed. If you would like to read the full bill as enacted by the Legislature, write MCC or the House Bill Room, State Capitol Building, Jefferson City, MO 65101 and request a copy of HB 1596.

1. HB 1596 recognizes legal rights of unborn at all stages of development except as taken away by the United States Supreme Court's abortion decision.

Although that Court ruled an unborn child has no protection against its own mother's desire to have an abortion, the court did not declare an "open hunting season" on the unborn by persons other than the mother. For example, a criminal has no right to assault or kill an unborn child or to embezzle a trust fund for the unborn's education or support. HB 1596 gives express recognition to the rights of the unborn against others. This section will not be effective until 1988 in case adjustments need to be made in the Probate Code or other statutes.

2. Abortions at 16 weeks or later must be performed in a hospital. Abortions after 16 weeks are 24 time more dangerous to the mother's life than earlier abortions according statistics.

3 After 20 weeks of gestation a physician must determine if an unborn child is viable. If the child is viable, existing law requires that the abortion be necessary to preserve the life or health of the mother, that the physician utilize the available techniques of abortion most likely to preserve the life of the child, and that there be a second attending physician to provide immediate medical care to the child.

4. Employers, public and private, cannot compel employers to "participate in abortion" or discriminate against them for their refusal to do so. "Participate in abortion" is defined to mean, "to perform, assist in, refer for, promote, procure, or counsel a woman to have an abortion not necessary to save the life of the mother or to undergo an abortion."

Also medical, nursing school and other students are protected if they refuse to participate in abortions. Students may also refuse to pay any part of student fees that are used to pay for abortions.

5. So-called "wrongful life" suits are prohibited. For example, a handicapped child or his parent cannot sue a doctor for failing to have the child aborted.

6. HB 1956 clearly states that tax money and other public resources shall not be used to subsidize abortion (not necessary to save the life of the mother). No public funds or facilities may be used to perform or assist an abortion or to encourage a woman to have an abortion.

No public employee, acting within the scope of his employment may perform or assist an abortion. Public doctors, nurses, social workers and counselors, etc. may not encourage a woman to have an abortion. The bill does not prohibit providing full medical information to patients.

Public funds and employees include not only the state but local counties, cities, school district, etc.

Although a state may not prohibit abortion, due to rulings of the U.S. Supreme Court, that court has also said that the state does not have to pay for them and may prefer childbirth over abortion in the allocation of public funds.

Taxpayes have the right under HB 1596 to stop unlawful actions by going to court.

7. The bill also makes corrective changes in Missouri's existing abortion regulation laws required by past court decision.

APPENDIX C

THE KANSAS CITY TIMES, JAN. 23, 1989

"ABORTION LAW WAS WORK OF GHOSTWRITERS"

Two little-known Missouri legislative advocates could become footnotes in history.

The U.S. Supreme Court has decided to review a 1986 Missouri abortion law. Some predict that the case could make large changes or even reverse the high court's historic 1973 decision that legalized abortions.

What's hardly known outside the Capitol in Jefferson City is that the law under review was written primarily by two abortion critics, neither of whom is a legislator.

They are Samuel Lee, state legislative chairman of Missouri Citizens for Life, and Louis DeFeo, general counsel and executive director of the Missouri Catholic Conference.

Three years ago DeFeo was pushing a bill that, among other things, would ban the use of public facilities for abortions. Lee was trying to win support for a second bill that included a highly controversial provision that said life began at conception.

During the legislative process the two bills were combined, won approval by the General Assembly and started off on a course that has reached the U.S. Supreme Court.

DeFeo's role in helping write the legislation was no secret. Indeed, DeFeo said some critics of the proposal at the time noted his involvement and charged that religious beliefs were being advanced in the form of state legislation.

Lee said anti-abortion forces hoped in 1986 that the issue would reach the country's high court. What they did not know was that the law would reach the court after changes in the membership that could make the ruling on the Missouri law a historic one.

—Will Sentell