Choice, Shmoice

Argue Like (or with) a Libertarian About Abortion

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First comes Sex, then comes Abortion, then comes Breakup in its Bitter Portion.

Introduction

Libertarianism is a political doctrine that strongly favors laissez-faire capitalism, unrestricted private property rights, freedom – both personal and entrepreneurial, international peace, and at the most minimal government. It comes in many flavors and has various intellectual foundations and defenses.

The classical enunciation of the proper status of abortion in libertarian law is found in Murray Rothbard's *Ethics of Liberty* which takes a robust pro-choice stance and in Walter Block's doctrine of evictionism which he deems a compromise between the pro-life and pro-choice camps. These will be our primary sources.

This book will take a natural law property rights-based rather than utilitarian or political approach. As a result, libertarian reasoning will seem relentlessly rigorous, logical, deductive, and uncompromising. Abortion is an emotional subject, but we will try our best to stay cold-blooded and surgically precise.

The discussion will depend on the self-ownership thesis: each person justly owns his own body. This, too, is a legal notion, distinct from the primordial fact that each person naturally *controls* his own – yet no one else's – body via an intimate link. I believe that self-ownership can be *proven*, but for our purposes we can assume it as uncontroversial or even axiomatic.

There is a bit of a complication here as to exactly what owns what: e.g., does the soul own the body? Under materialism, for example, it is unclear how "matter" can own anything, least of all "itself."

If dualism is true, then how far can it be pushed? If you own a wrench and it breaks, then you lose the wrench. But if you own yourself and you die, do you lose yourself? What does it even mean? It's not just the thing owned that dies but the owner, too. Would a member of our newly minted oppressed victim class, the transsexuals, have, for example, a feminine soul stuck in the body of a male due perhaps to a "reincarnation" gone wrong?

In other words, the body is not an external tool – the hand is not like a wrench – nor a costume but an aspect of our human nature as *power* as much as *intellect* and *will*. This power is what allows us to manipulate, and in turn be affected by, the material world. These three faculties are united in a most sublime fashion, though exactly how is a mystery. Humans are partly, though not fully, mechanical. We work according to the laws of both physics and economics; we produce effects by both physical and teleological causation.

Despite these issues, I think the concept of self-ownership is intelli-

gible, and we can perhaps follow G.A. Cohen in considering it to be simply a reflexive relation of something owning itself. *X* can be "as tall as" *Y*, and *X* is also "as tall as" itself; likewise, *X* can own *Y*, and *X* also owns itself. We can concede, however, that self-ownership is a stronger relation than ownership of external goods: I own a car, but I am not the car; yet I own myself, and I also am myself.

The proof that man can own external property is more involved, but again I will not say much about it in this book. I will take it as given that it is possible lawfully to homestead unowned material goods including nonhuman animals – and we'll look at some subtleties concerning the legitimate ways of doing so – and acquire goods via production and voluntary exchange. We will also discuss the nature of parental custody rights.

Libertarianism, on this approach, is a theory of justice, or political vision, or speculative ideological system. Consider, for example, the nonaggression principle (NAP) which states roughly that it is unlawful for anyone to initiate violent physical force against another's person or justly owned property. It is clear in the first place that it both requires and complements a correct theory of rights. For example, suppose that instead of "first to mix labor with" or "finders, keepers," we propose that the principle of just initial appropriation is the right of *government* possession. Regardless of who was the first comer, the "government," whatever it may be, has the right to despoil him and take his land or goods away. It will be objected that this theory of property is altogether wrong. And I agree. But the point is that one must first propound a correct theory, and then say that within its confines one ought not to initiate force. Under socialism, say, non-initiation of force may be exceedingly perverse – a slave principle. In fact, in *that* system, in order to get anything done, a person often cannot avoid stealing from the state, i.e., privatizing some property. This kind of theft may well be judged perfectly salutary from the libertarian perspective, such as because the state cannot *legitimately* own anything.

The NAP is not a personal moral code. You can count as a libertarian even if you don't practice what you preach, though practicing it helps. The motivation is to prohibit the *state* from being an aggressor. As the bumper sticker says, "Don't steal – the government hates competition!" Libertarians are sensitive to the double standard that is often ascribed to civil society vs. the state:

> In brief, the ideologists must explain that, while theft by one or more persons or groups is bad and criminal, that when the *State* engages in such acts, it is *not* theft but the legitimate and even sanctified act called "taxation." The ideologists must explain that murder by one

> or more persons or groups is bad and must be punished, but that when the *State* kills it is not murder but an exalted act known as "war" or "repression of internal subversion." They must explain that while kidnapping or slavery is bad and must be outlawed when done by private individuals or groups, that when the State commits such acts it is not kidnapping or slavery but "conscription" – an act necessary to the public weal and even to the requirements of morality itself.[1]

A problem with the NAP thus conceived is that it has anarchistic implications and is too strong, leaving non-anarchist libertarians out of the tent. If the "state" has no unique powers, such as to tax or regulate the economy or issue subpoenas or search warrants or punish criminals, then there is no state at all. A reply may be that natural-law justice indeed demands anarcho-capitalism, but there is more to politics than *that*. What if the state is after all (a) inevitable / necessary for any kind civilized existence and (b) beneficial? For example, while most of the time justice and welfare are in harmony with each other, sometimes they conflict. In such a case we can have one or the other but not both. Taxation *is* always theft, but sometimes theft may be a practical solution. We might need to accept the (minimal) state *reluctantly*, perhaps precisely as a concession to the fact that our human nature is far from pure but actually corrupt, necessitating, as it were, that we fight fire with fire.

In any case, violent physical aggression or threat thereof against one's body, such as murder or assault, or against justly owned property, such as theft or extortion, is proscribed by natural law, at least generally.

Natural law is not limited exclusively to man's conquest of nature, in that, what is our direct concern, man is divided into the male and female sexes, and women bear children inside their bodies. These facts, too, give rise to natural law which make the libertarian view of abortion decidedly nontrivial. Yet it is precisely ignoring property relations that has stymied the non-libertarians.

Why should you read this book? There are people out there on the front lines of the abortion controversy fighting a seemingly eternal conflict. In the U.S., this was the result of several Supreme Court decisions that overturned the majority of state anti-abortion laws and decreed almost complete liberty of abortion for the entire country. This supposedly final solution brought abortion laws into national politics, poisoning it efficiently. The Supreme Court is hardly any sort of ultimate lawgiver to be obeyed without question, and a lot of people dissented. Nor, in all honesty, were the judges the brightest bulbs in the country. (We'll dissect their reasoning in due course.) The bitter and apparently fruitless quarrel between the pro-life and pro-choice factions has gone on ever since. I sympathize. But you don't want to spend your life in thrall to

false ideas, even – and especially – if you're already leaning toward a particular view. Few things are less appealing than an idealist wholeheartedly promoting a dubious cause. Learn how to think rationally and dispassionately about this controversy. And then, with your strengthened intellectual power, crush your enemies with arguments, see them driven before you, and all that.

NOTES

[1] *EL*: 168.

1. Ancient Prohibitions

We can begin by surveying some historical attitudes toward abortion.

1.1. Old Testament

In the Book of Genesis, God makes a promise to the childless Abraham to make him into a great nation which Abraham's grandson Jacob fulfills by begetting numerous children. This is regarded as a major blessing, a continuation of "Be fruitful and multiply; fill the earth and subdue it"[1] and similar blessing to Noah.[2] The issue of abortion thus seems out of place in a severely underpopulated world. It is precisely sterility that is shameful and a source of sorrow, and the wives of Abraham, Isaac, and Jacob all suffered from this curse which was lifted by divine grace. Rebekah, whose unborn children "jostled each other," in particular, was comforted by the Lord as follows: "Two nations are in your womb, two peoples are separating while still within you."[3] Neither she nor God took to heart Baruch Brody's observation that "it is easy enough to take the fetus, hidden and unknown, as a being alien from humanity and to give no more thought to its destruction than to drowning of an unwanted kitten."[4]

The Mosaic law scarcely discusses the subject, saying only, "If people are fighting and hit a pregnant woman and she gives birth prematurely but there is no serious injury, the offender must be fined whatever the woman's husband demands and the court allows."[5]

Nevertheless, Moses' legacy is life-affirming: "If you pay attention to these laws…, then the Lord your God… will bless you and increase your numbers. He will bless the fruit of your womb, the crops of your land… You will be blessed more than any other people; none of your men or women will be childless, nor will any of your livestock be without young."[6]

It is the Lord "who formed you in the womb," Isaiah points out[7], in which he is echoed by other prophets: "Before I formed you in the womb I knew you, before you were born I set you apart."[8] It seems hardly appropriate to kill someone, even if he is not yet born, who is already in a relationship with God.

Another passage, on the other hand, almost mandates an abortion for the unfaithful wife. If the husband is suspicious that his wife has "gone astray," let a priest perform a ritual that would serve as a Lord-appointed test. The wife was to drink a bitter substance, consisting of holy water and some dust from the floor of the tabernacle. If the woman was guilty, the drink would curse her

by causing a miscarriage and future infertility.[9] If this actually worked, it must have functioned as a deterrent to adultery, and no doubt at least to spare the cheated husband the further dishonor of supporting children who are not his own.

The law was strict, and many disasters befell the ancient Israelites for their crooked ways, so the lack of references to abortion indicates either that the Lord did not consider it to be an unequivocal crime or that it was not in common practice.

Again, the Canaanites were guilty of many indiscretions, such as idolatry, adultery, all sorts of sex fiendishness, and even child sacrifice, but abortion is not mentioned in the list of their sins.

1.2. India

Atharva Veda, one of the books of the Indian religion, pictures abortion as one of the worst sins so beneath contempt that no suitable scapegoat could even be found for it. It's a defilement of the creative power of both man and the gods.[10] "Within the womb Prajapati [the Lord of Life] is moving: he, though unseen, is born in sundry places."[11] Another text condemns a person who eats beef to suffer reincarnation as a sinner such as an abortionist.[12]

Anugita lists "destroying an embryo" among some very serious crimes and prescribes a penance for it.[13] *Gautama Samhita* regards abortion as a mortal sin, causing "deprivation of rights and privileges of a Brahmana, and a degraded status in the next world."[14]

The Laws of Manu consider abortion to be a cause of impurity: "libations of water shall not be offered… to women who procure an abortion," it says, along with to women who "have joined a heretical sect, who through lust live (with many men)," and suchlike.[15] Bringing about abortion, another Hindu law said, is a "special cause of the degradation of women," on par with killing their husbands.[16] Most people would agree in calling abortion dirty business, but that does not entail that it is an injustice or ought to be banned.

In the classical period, intercaste procreation was regarded with considerable horror, Julius Lipner points out, yet nowhere in the texts is abortion suggested as a remedy either for the parents or the child in such miscegenation.[17] Even the monstrous practice of suttee, the Indian custom of a wife burning herself alive on the funeral pyre of her dead husband, was waived for pregnant women. *Sushruta Samhita*, Lipner goes on, speaks of fetal development in terms of the "progressive manifestation of a personhood previously only latent rather than origination of personhood *ab initio*."[18] Being a *person* entitled to the protection of the laws and having a *personality* are intimately

linked, and we'll discuss this connection in Section 4.3.

Avesta, the Zoroastrian scripture, declares ensoulment to occur after a woman has been pregnant for four months and ten days. Abortion at least after that period was censured in no uncertain terms: "And if the damsel, being ashamed of the people, shall destroy the fruit in her womb, the sin is on both the father and herself, the murder is on both the father and herself; both the father and herself shall pay the penalty for willful murder."[19]

1.3. Greece and Rome

"I will not give to a woman a pessary to cause abortion," the Hippocratic Oath goes. This is an aspect of the professional morality of the physician; it makes him essentially a conscientious objector who for his own reasons would not perform an abortion; it leaves open the question whether, and why, abortion is generally immoral or naturally unlawful or ought to be criminalized. It is also possible that the reason for the oath was the great danger of abortions to women until recently. The various laws prohibiting abortions have been justified in part as public health measures. The Oath also cleaves the profession of doctor from surgeon, saying, "I will not use the knife, not even… on sufferers from stone, but I will give place to such as are craftsmen therein." This rule would permit surgical abortions unless "surgeons" adhered to a similar moral code.

Plato proposed in *Republic* that children of incest, illegitimate children, and children of parents outside their prime, which he set at between 20 and 40 years of age for females, and 25 and 55 for males, be aborted, and "if any force a way to the birth, the parents must understand that the offspring of such a union cannot be maintained and arrange accordingly."[20]

Aristotle was in favor of infanticide for eugenic reasons, writing in *Politics* that "let there be a law that no deformed child shall live." Further, "if couples have children in excess, let abortion be procured before sense and life have begun; what may or may not be lawfully done in these cases depends on the question of life and sensation."[21] The principle according to which defective children can be freely aborted extends of course beyond the unborn, so Aristotle is at least consistent. Accidents and disease can strike after birth much as they can before. If we don't kill disabled adults to keep the race pure, what's the argument for killing defective fetuses who cling to life? It may be that the parents' wish for a healthy child is a weighty *reason* for them to abort a sick child, but whether they can do so depends on whether abortion is lawful generally. But if it is lawful generally, then they can abort a healthy child too, indeed for any reason whatsoever. Aristotle also solidified the Western tradition

of delayed ensoulment which we'll discuss in Chapter 8.

Cicero spoke of a Milesian woman who procured an abortion and was rightfully, he felt, given the death penalty, insofar as she "destroyed the hope of the father, the memory of his name, the supply of his race, the heir of his family, a citizen intended for the use of the republic."[22]

Dionysius of Halicarnassus discussed the population policy by the founder of Rome: "In the first place, he obliged the inhabitants to bring up all their male children and the firstborn of the females and forbade them to destroy any children under three years of age unless they were maimed or monstrous from their very birth. These he did not forbid their parents to expose, provided they first showed them to their five nearest neighbors and these also approved."[23] Another law by Romulus mentioned in Plutarch "forbids a wife to leave her husband but permits a husband to put away his wife for using poisons, for substituting children, and for adultery."[24] This differs strikingly from Justice Sandra Day O'Connor's opinion that the requirement that the wife simply notify her husband of her decision to abort is oppressive: "The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife."[25]

Seneca wrote that "we destroy monstrous births, and we also drown our children if they are born weakly or unnaturally formed," suggesting that certain forms of infanticide were not a crime in ancient Rome.[26] Mary Anne Warren offers a defense of this or like custom: "when an infant is born into a society which – unlike ours – is so impoverished that it simply cannot care for it adequately without endangering the survival of existing persons, killing it or allowing it to die is not necessarily wrong…"[27]

The philosopher Favorinus believed it was "an act worthy of public detestation and general abhorrence to destroy a human being in its inception." Those who "strive by evil devices to cause abortion of the fetus itself which they have conceived, in order that their beauty may not be spoiled by the weight of the burden they bear…" "showed madness."[28]

The Digest of Justinian, a collection of writings on Roman law issued upon the edict of the Eastern Roman Emperor Justinian I in the 6th century AD, part of his Body of Civil Law, sets the punishment to the woman who procured an abortion for herself to be exile but only a temporary one, "for it would appear shameful that she could with impunity deprive her husband of children."[29] Again, "those who administer an abortifacient…, even if they do not do so with guilty intention, are still condemned, because the deed sets a bad example, if of lower rank to the mines, if of higher status to relegation to

an island with the forfeiture of part of their property. But if for that reason a… woman dies, they suffer the extreme penalty."[30] The Romans seemed more concerned with protecting the interests of the father than of the unborn child.

The Jew Philo of Alexandria made the distinction between the fetus being "unfashioned and unformed" and having "assumed a distinct shape in all its parts, having received all its proper connective and distinctive qualities." This latter is fully a man, the irrelevant difference being only that nature "had not thought it as yet a proper time to produce him to the light but had kept him like a statue lying in a sculptor's workshop, requiring nothing more than to be released and sent out into the world." He goes on to condemn the parents who commit infanticide for a certain depravity. The following arguments against infanticide can presumably be applied to abortion, as well, given Philo's parallels between a reasonably fully formed fetus and a newborn child.

First, he argues, they deprive their children of the enjoyments and blessings of life, such as opportunities for rational contemplation and exercise of dominion over the earth. Don Marquis echoes this idea in arguing that abortion robs the fetus of a "future like ours." (See Section 4.3.4.)

Second, the parents are slaves to lust: who else would have a child only to kill it? We might grant that lust is a sin but raise a separate problem of whether lust ought to be punished by the state. Is it a legitimate social goal to discourage fornication, including by making pregnancy a sort of punishment by outlawing abortion? Some have thought so: e.g., in an 1849 Pennsylvania case, Judge John Pearson argued, among other things, that abortion liberty would result in a "general prostration of female virtue," if fornicating women and the men who pressured them could destroy the evidence of their disgrace. "Whatever act necessarily tends to the general destruction of public morals must be and is an indictable offence…"[31] A good question in this regard of course is, by what right do the authorities interfere with people's fun, even if these people are like "boars or he-goats seeking the enjoyment" of sex? Vindictive hatred for illicit sex was rarely a reason for outlawing abortions.

Third, Philo proposes, they evidence hatred of mankind: we cannot "imagine that these men can be humane to strangers who act in a barbarous manner to those who are united to them by ties of blood." It is conceivable that abortionists would be brutalized by their actions, but for the most part they seem able to live at peace with their fellow men. Is social cooperation injured by widespread abortions? Even if there is a nasty effect of legalized abortion on people, it may still be unjust to punish individuals with violence for it. For this *government* violence, too, may be a brutal act.

Finally, the children are completely innocent: it is impossible to "invent

an accusation against them, as they are wholly void of offence."[32] This is true, and important to keep in mind, but we will find that there are pro-choice arguments that do not rely on the idea of the fetus as an unjust aggressor.

1.4. Early and medieval Christianity

There is little in the New Testament about abortion, another indication either that this was not a social problem in ancient Near East or perhaps that God did not wish to pronounce on a controversy of some complexity. The innocence of children is mentioned in some passages as an essential for salvation complement to the wisdom of an adult.[33]

A particularly suggestive passage relates that Elizabeth's baby who was to be John the Baptist, when the mother met Mary also pregnant with Jesus, leaped in her womb for joy.[34] This would hardly have been possible if John had been merely a clump of cells or blob of protoplasm at the time.

The early Christian text, *Didache*, says that "the second commandment of the Teaching" includes "you shall not murder a child by abortion nor kill that which is born."[35]

St. Basil the Great, in a canonical letter, condemned abortion as follows: "The woman who purposely destroys her unborn child is guilty of murder. … In this case it is not only the being about to be born who is vindicated, but the woman in her attack upon herself; because in most cases women who make such attempts die. The destruction of the embryo is an additional crime, a second murder, at all events if we regard it as done with intent."

Again, "Women also who administer drugs to cause abortion, as well as those who take poisons to destroy unborn children, are murderesses."[36]

Clement of Alexandria considered abortion a mortal sin that destroyed charity: "women who resort to some sort of deadly abortion drug slay not only the embryo but, along with it, all human love."[37] This echoes Philo's argument above: if you kill your own children, is there any evil you're *not* capable of? Love for family and children seems to be somewhere in between the mere natural peaceful disinterestedness between strangers within the capitalist economy and charity for neighbors elicited by divine grace. Certainty to destroy *that* is to ruin a part of the foundation for all charity, but perhaps not all of it. This is because natural law commands not charity but merely absence of violent hatred toward fellow men. Whether abortion is *unjust* violence (rather than self-defense), and whether it is violence at all (rather than inculpable refusal to assist), impinges on whether it is hateful and hence against nature.

Tertullian refuted the slander that Christians "drank the blood of an infant that they have murdered." He counters: "But the gentiles, both cruelly

expose their children newly born, and before they are born destroy them by a cruel abortion. Christians are allowed neither to see nor to hear of manslaughter."[38]

Children born in compromising circumstances are not by that fact defiled, said St. Augustine: God "sometimes adopts for a son one whom He forms in the womb of an impure woman; and sometimes does *not* accept for a son him whom He forms in the womb of his own daughter."[39] Further, "not only the children of wedlock, but also those of adultery, are a good work in so far as they are the work of God, by whom they are created."[40] Even as regards birth defects, "they are born as feebleminded because of a defect that befalls them, but they are created as human beings by the work of God."[41] Such a child is still essentially a rational animal; the defect is an accident; moreover, we judge it a defect only by comparing it with normal fully actualized power of rationality. A cat is not defective on account of not being rational.

St. Thomas Aquinas made the point that a child still in his mother's womb cannot be baptized, since he is "something of hers through being joined with, and yet distinct, from her." In addition, "children while in the mother's womb have not yet come forth into the world to live among other men." They cannot yet be members of the visible Church. However, they may be part of the mystical body of Christ, and God, "in whose sight they live, so as, by a kind of privilege," can still sanctify them.[42] It may be that deprivation of baptism condemns the child at least to the Limbo and perhaps even to hell. However, this argument has almost never been emphasized in Christian theology.

John Calvin argued that abortion was a capital crime because "the fetus enclosed in its mother's womb already is a man"; it deserves permanent excommunication. Moreover, the womb is his house, and killing a man in his own house exacerbates the crime, since he should be safest there. In other words, a fetus's womb is his castle. Abortion is an additional and scandalous violation of property. Therefore, "it ought to be regarded as much more atrocious to kill a fetus who has never seen the light of day, in the womb."[43]

John Weemse reasons similarly: "It is a great cruelty to kill the child in the mother's belly, to kill this innocent in his first mansion, which should have been the place of his refuge."[44] As we'll see, there is a serious objection to this understanding. For the fetus is only a guest in this mansion or house. The house is owned by the mother, indeed it *is* the mother. The fetus is inside by the mother's consent. He has no natural right to occupy a place he in no way possesses. If the mother then insists on her property rights and evicts the fetus from her body, nothing unjust has seemingly taken place. We'll get into details on this later.

1.5. EUROPE

In the Christian nations in ancient and medieval times, punishments for abortion were often severe.

The Visigothic Code, laid down in Spain by King Recceswinth in 654, considered abortion a homicide, in fact it posited that "no depravity is greater than that which characterizes those who, unmindful of their parental duties, willfully deprive their children of life." For that reason, the woman who aborted, "if she is a slave, shall receive two hundred lashes, and if she is free-born, she shall lose her rank, and shall be given as a slave to whomever we may select." Those who resorted to abortion would be executed or blinded.[45]

The Seven-Part Code, compiled in Spain under Alfonso X of Castile in the 13th century, decreed that a woman who procured an abortion be put to death, unless she acted under compulsion, in which case it was her violator who would be punished thus. He who struck a woman, whether her husband or a stranger, and caused a miscarriage was also liable.[46]

In France, a 1556 edict by King Henry II turned the ecclesiastical crime of abortion which carried merely spiritual penalties into a legal offense. Abortion was a homicide punishable by death. The Penal Code of 1791 provided the penalty of 20 years imprisonment to anyone serving as an accessory but immunized the woman herself. The Napoleonic Code of 1810 stated that both women and third-party abortionists would be punished with hard labor.

Laws of Henry I, an important legal treatise on the customs and laws of England written in about 1115, deemed abortion to be only as an ecclesiastical offense subject to three years' penance if performed within forty days, and seven years' penance, "as if she were a murderess" if performed after quickening. Anyone else who killed an unborn child would be required to pay wergeld or compensation.[47]

Henry de Bracton declares that "if one strikes a pregnant woman or gives her poison in order to procure an abortion, if the fetus is already formed or quickened, especially if it is quickened, he commits homicide."[48] He does not specify whether the woman herself was also to be punished. Further, "if a woman has been condemned for a crime and is pregnant, execution of sentence is sometimes deferred after judgment rendered until she has given birth." The law also forbade torturing pregnant women, presumably on the ground that the child who is innocent ought not to be made to suffer.[49]

Edward Coke in a 1628 treatise makes the following distinction, laying down the born-dead and born-alive rules: "If a woman be quick with child, and by a Potion or otherwise kills it in her womb; or if a man beat her, whereby the child dies in her body, and she is delivered of a dead child, this is a great

misprision, and no murder; but if the child be born alive, and dies of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in *rerum natura*, when it is born alive."[50] He also grants a one-time stay of execution to a woman quick with child convicted of high treason or felony.[51]

Thomas Wood repeats this rule in his own 1720 work, saying that "life begins when an infant stirs in the womb."[52] The phrases "quick with child" and "stirs in the womb" suggest the cutoff date for legitimate abortion to be quickening. As we will see eventually, there is a theological ground for the importance of quickening in the consideration of abortion, or so I will argue. There is an ambiguity here as regards whether the stirring refers to the first actual fetal movement or to the mother's first perception of such movement. The latter, that is, perception, may at the time have been the first reliable sign of pregnancy and so sufficed for the purposes of law.

William Blackstone continued the tradition but grounded it more firmly in natural law: "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." He softened the language somewhat, proposing that abortion "at present is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor." By "misdemeanor" Blackstone did not mean a light offense like a traffic violation as distinguished in modern law from a felony, but something that merely does not warrant the death penalty. The common law, he pointed out, has regard for unborn children: "An infant in the mother's womb, is supposed in law to be born for many purposes," going on to mention inheritance, guardianship, and the like.[53]

1.6. *Effraenatam*

Of some interest is the peculiar episode of Pope Sixtus V's instant criminalization of all abortions in 1588 in his bull *Without Restraint*.[54] He decreed, breaking with tradition, that those "who by themselves or interposed third persons procure abortion of fetus so that it is expelled by means of blows, poisons, medicines, potions, weights, burdens, work and labor imposed on a pregnant woman" be subject to the same punishments the "law inflicts upon true murderers and assassins who have actually and really committed murder." This was regardless of the gestational age. Additionally, abortionists would incur "automatic excommunication." This policy was rescinded by the next pope, Gregory XIV, on the ground of not having produced the "hoped-for fruit." In 1869, Pope Pius IX revived the Sixtus' doctrine which has been with

the Catholics ever since. Sixtus gives the following reasons for the prohibition:

1. Abortions cause not only the bodies but also the souls to be lost. Presumably, these unborn children end up, in the words of William Lecky, in "the painless and joyless limbo," hardly a valuable consolation prize.[55]

2. They "exclude a soul created in the image of God and for which Our Lord Jesus Christ has shed His precious Blood, and which is capable of eternal happiness and is destined to be in the company of angels, from the blessed vision of God."

3. They "take away the service to God by His creature."

4. They are "ferociously cruel."

5. "The hand of God is always at work who is Creator of both body and soul and who molded, made, and wanted this child, and meanwhile the goodness of the Potter, that is of God, is impiously despised by these people."

6. is a compound reason. By this cruel and inhuman crime, Sixtus goes on:

First, "parents are deprived of their offspring that they have engendered." Regarding this, presumably the parents are not harmed but are positively delighted by this deprivation. If I throw away an empty plastic bottle into the trash, it cannot be said that I viciously deprived myself of it. An unborn child is hardly trash, of course, although if he is a mere "clump of cell" (see Section 4.2), then perhaps he is after all, but the analogy stands. A subtler point is that a child who is unwanted when unborn may be loved and treasured when he is 4 years old, at which point the parents would be horrified at having once been tempted to abort him. It may be in the parents' rightly understood or long-term or all-things-considered interests to have the child.

Second, "the engendered children of their life." And this certainly is true.

Third, "mothers of the rewards of maternity and marriage." Again, the mothers are happy at least in a narrow sense to be thus deprived; and what about women who already have other children? It would surely be strange to argue that by declining to buy a third car, one is forsaking the rewards of car ownership. Must everybody own a definite number of cars? As for marriage, I agree that insofar as easy availability of abortions encourages fornication, adultery, and suchlike, people may be harmed morally if not physically.

Fourth, "earth of its cultivators." That is beside the point since "earth" does not care whether it is cultivated or not, though I would agree with the statement that a high civilization cannot be built without a large number of people. It may be our destiny to transform the earth through economic and technological progress into a new Garden of Eden, but even then the Garden

will be for the sake of men and not vice versa.

Fifth, the Pope continues, "the world of those who would know it." Since human beings themselves are objective goods who ought to be loved, the world is indeed improved by added people.

Sixth, "the Church of those that would make it grow and prosper and be happy with an increased number of devoted faithful." I agree that the kingdom of God is best well populated than not. But this point hardly justifies punishments for not doing one's part in making it so.

It should be obvious from the remarks in this chapter that abortion is hardly just a woman's health issue and that laws forbidding abortions and moral condemnations of abortions are not a new thing. For example, Reagan 1997 is notable for the author's complete failure to grasp what a pregnancy *actually is* – the bearing of a child, instead of, as she calls it, "the cessation of the menses" which "indicated a worrisome imbalance in the body and the need to bring the body back into balance by restoring the flow."[56]

NOTES

[1] Gen 1:21.
[2] Gen 9:7.
[3] Gen 25:22-23.
[4] Brody 1975: 132.
[5] Ex 21.
[6] Dt 7:12-14.
[7] Is 44:24.
[8] Jr 1:5.
[9] Num 5:11-31.
[10] Griffith 1916-7, Vol 1: 6.113.2, p. 307.
[11] Ibid., Vol 2: 10.8.13, p. 36.
[12] Eggeling 1885: 3:1:2:21, p. 11.
[13] Telang 1882: Ch. 36, p. 389.
[14] Dutt 1908: Ch. 22.
[15] Buhler 1886: Ch. 5, §90, p. 184.
[16] Mandlik 1880: Ch. 3, §298, p. 270.
[17] Coward 1989: 50-1.
[18] Ibid.: 56.
[19] Darmesteter 1880: Ch. 15.9-16, pp. 174-5.
[20] Plato, *Republic*, Book 5, 461c.
[21] Aristotle, *Politics*, 1335^{b}20-25.
[22] Yonge 1852: *For Aulus Cluentius*, §11, p. 117.
[23] Cary 1937: Book 2, §15, p. 355.
[24] Perrin 1914: *Romulus*, §22, pp. 161-2.
[25] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).
[26] Stewart 1912: *On Anger*, Book 1, §15, p. 65.
[27] Warren, Mary Anne. "On the Moral and Legal Status of Abortion" in Dwyer 1997: 73.

[28] Rolfe 1927: Book 12, I, p. 355.
[29] Watson 1998: Book 47, §11.4, p. 298.
[30] Ibid.: Book 48, §19.38.5, p. 367.
[31] Joseph 2007: 312.
[32] Yonge 1855: 330-3.
[33] Mt 10:16; Lk 18:15-17.
[34] Lk 1:41-44.
[35] *ANF* 7: 377.
[36] *NPNF* 8: Letter 188, pp. 225-7.
[37] Clement 1954: §96, p. 174.
[38] *ANF* 4: *Minucius Felix*, Ch. 30, p. 191.
[39] Augustine 1957: Book 6, 43, p. 350.
[40] *NPNF* 5: *On Marriage and Concupiscence*, Book 2, Ch. 35, p. 297.
[41] Augustine 1999: Book 3, §160, p. 358.
[42] *ST*: III, 68, 11.
[43] Quoted in Grisez 1970: 158.
[44] Ibid., 159.
[45] Scott 1910: Book 6, Title 3, pp. 206-8.
[46] Scott 2001: Book 7, Title 8, Law 8, pp. 1346-7.
[47] Downer 1972, §70, 14-16, p. 223.
[48] Bracton 1968: Vol. 2, 341.
[49] Ibid.: 429.
[50] Coke 1817: Ch. 7, p. 50.
[51] Ibid.: Ch. 1, p. 17.
[52] Wood 1772: Book 1, Ch. 1, p. 12.
[53] Blackstone 1876: Book 1, Ch. 1, pp. 128-9; see also Book 4, Ch. 14, p. 197.
[54] Padre Antonio Trimakas of Mexico City trans.
[55] Lecky 1902, Vol. 2: 23.
[56] Reagan 1997: 8.

2. U.S. Abortion Cases

For a discussion of natural law I refer you to Ch. 3 of my book *Secrets of Metaethics* (2022). The American system of government is different from the "natural" system in which the judicial branch is first among equals in that the legislature is placed above the judges, but all exist under the constitution which enumerates the powers the state. A judge cannot invalidate a law for being unnatural, only unconstitutional. It is therefore more democratic than the natural version. Objections to judicial activism make sense under this system since in a natural system, judges would be far more active than they are now.

The constitution then charters a federal government by listing its powers such that whatever is not explicitly demanded from the state is forbidden to it. Within that system, the legislature is made supreme, and judges are not allowed to override congressional statutes, however immoral. At the same time, no bill may contradict the constitution. As long as that happens, a congressional action is allowed to prevail over any judicial tradition. The constitution itself is anti-majoritarian, requiring for an amendment to be passed the votes of the $^{2}/_{3}$ of the House and Senate and $^{3}/_{4}$ of all state legislatures. But it is more majoritarian and popular than rule by the judicial aristocracy.

Another solution may be discerned by studying the British system. The House of Lords is – or was until 2009 – an equivalent of the Supreme Court. A working system (which is not the British system) would then be to prevent any bill from passing until it is approved both by the legislature proper – the House of Commons – and by the chief judges – the members of the House of Lords. In this case, a law that clears both Houses provisionally acquires the dual status of both *efficient* in the sense of serving the greatest good for the greatest number (from Commons) and *just* in the sense of heeding the natural law (from Lords). Here the two branches would be fully equal.

Positive law is made via a deliberative process, perhaps even by the entire citizen body. The lawmakers have the entire system in view and seek to fine-tune it appropriately.

A judge, quite on the contrary, has only a single case before him on which he is supposed to rule. He has no vision of the whole legal system, however high his personal IQ is. This focus on one case makes the judge narrow-minded, unable to determine how his decision will affect the entirety of the legal system. If he by his own fiat proclaims what is *best* in some utilitarian sense (for example, "least inefficient practice or the fewest occasions of injustice in the future," in Ronald Dworkin's words[1]) as opposed to *right* or just,

then he risks ignorantly upsetting and unbalancing the legal code as a whole.

A judge is uniquely qualified to decide on natural law, that is, basic morality made difficult in hard cases yet matched and able to be discerned by the judge's wisdom. But the overall legal system cannot lie within his purview by virtue of the limitations on any one man's intellect and absence of essential-for-positive-lawmaking data presented to him, such as people's ideologies and interests.

There is therefore a perpetual tension within court arguments between the courts' desire to affirm fundamental or inalienable rights, in particular constitutional rights, and their duty to defer to the state and federal legislatures. A view that demands that the courts always protect rights may be called the natural rights doctrine; the view that they always defer to the legislative branch may be called legal positivism; but presumably a balance can be struck between favoring liberty and deferring to the state's police powers. If it were up to me, I'd unleash the judges to decimate our empire of millions of bad laws. In addition, since our interest is philosophical, the natural rights perspective will be given prominence.

In the 1971 Illinois case *Doe v. Scott*, which declared a state anti-abortion statute unconstitutional, the dissenting judge William Campbell wrote, "in these days of pressure groups regularly seeking from courts that which only legislatures can properly give, constitutional government is weakened each time courts place their personal philosophical views above the law."[2] Under a *natural* system, judges' referring to their personal philosophical views would be precisely the proper thing to do! Even more, if no positive law can contradict natural law, then it will be the express *function* of judges to overturn unjust legislation. If to have an abortion is a natural or as they call it fundamental right, then judges ought to affirm it as a matter of course.

State governments under the original design were unlimited and had full police powers as per the 10th Amendment, at least unless circumscribed by their own state constitutions. The 14th Amendment ratified in 1868 extended either the federal Bill of Rights or more generally the principle of limited government with its enumerated powers to the states. (The difference is that as per the 9th Amendment, there may be *un*enumerated rights and possibly plenty of them, those that are not listed in the rest of the Bill of Rights.)

There is some dispute over whether the 14th Amendment was actually kind to individual liberties; some argue that it actually centralized law enforcement, injured federalism, and largely overturned the 10th Amendment. Decentralization increases competition between political systems such that individuals can more easily vote with their feet by migrating from repressive juris-

dictions to freer ones, or perhaps vice versa. That such an arrangement is conducive to liberty becomes obvious even upon comparing the levels of federal vs. state taxation. States can afford to overtax less, for fear that they will lose their residents and businesses. It is far less costly for a person to move from California to Florida than from the United States to Brazil.

Jason Adkins argues that the Supreme Court "usurped states' authority to regulate abortion and imposed an extraordinarily radical and uniform system on the nation."[3] Since the abortion problem is controversial, national politics has become poisonously bitter and divided; the Court also did a disfavor to itself by undermining its own legitimacy as a lawgiver. From this point of view, the 14th Amendment, by strengthening the position of the 1 federal government over the 50 competing state governments, betrayed the American promise.

Natural law theorizing suffered a major setback in the 20th century. We can trace this decline by looking at several Supreme Court cases. The socialist and progressive ideologies were already undermining individual rights, it's just that it took a bit of time for the corruption to seep into the highest court.

2.1. TOTAL STATE

The 14th Amendment's "due process" guaranteed to an individual against a state government can be of two kinds: procedural and substantive. The first affirms the separation of powers and rule of law, especially in criminal trials: the right to counsel, to cross-examine witnesses, of habeas corpus, and suchlike. Substantive due process is a fancy name for respect for natural rights.

Consider the 1897 case *Allgeyer v. Louisiana*, where a Louisiana statute required all out-of-state insurance companies to be licensed and to maintain at least one agent within the state. The lawsuit focused on whether a citizen of Louisiana had the right to travel to New York and there insure his business with a firm absent from his home state. The Supreme Court of Louisiana decided in favor of the state, arguing that "individual liberty of action must give way to the greater right of the collective people in the assertion of well-defined policy designed and intended for the general welfare."[4] The U.S. Supreme Court reversed by invoking the 14th Amendment and proclaiming that "liberty… is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts… Such a statute as this in question is not due process of law, because it prohibits an act which under the federal Constitution the defendants had a right to perform."[5]

Justice Bradley pointed out in another case that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence."[6] Here the court was clearly engaged in natural lawmaking, believing that the right to contract and dispose of property as one sees fit was a natural right that the state, in this case a state government, could not abridge.

Lochner v. New York, litigated in 1905, rendered a decision on whether a New York state labor statute called Bakeshop Act forbidding employees to work more than 60 hours per week or 10 hours per day in bakeries was constitutional. The Court concluded that it was rather an "unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to labor." It refused to grant the legislature "unbounded power," otherwise any and every pretext, however spurious – welfare, morals, health – could be used to justify the repression of the individual. Then "no trade, no occupation, no mode of earning one's living could escape this all-pervading power" of the state. It concluded: "the act is not… a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best…"[7]

In the 1908 case *Adair v. United States*, a question was raised about the constitutionality of a federal law that denied a businessman the right to fire a worker on the ground that the worker had joined a labor union. The Supreme Court rejected the interstate commerce justification for the law, saying that "it is not within the functions of government… to compel any person in the course of his business, and against his will, either to employ, or be employed by, another. An employer has the same right to prescribe terms on which he will employ one to labor as an employee has to prescribe those on which he will sell his labor."[8] This again affirmed the "fundamental" human right to make contracts at will. The court was right that there is such a natural right, provided that the actions contractually agreed to are not themselves criminal.

This decision was reaffirmed in the 1915 case *Coppage v. Kansas*. The Court ruled that there is a "right to make contracts for the acquisition of property, chief among which is that of personal employment by which labor and other services are exchanged for money." The contract prohibiting an employee from joining a labor union was not coercive but merely "an innocent exercise of personal liberty" of the business owner. The exercise of liberties and rights to private property indeed results in inequalities, but there is nothing wrong with that. The state cannot try to equalize the bargaining power of different parties to the contract, as this will violate property rights. "The indivi-

dual has no inherent right to join a labor union and still remain in the employ of one who is unwilling to employ a union man," the Court argued.[9] This again is a perfect example of natural law theorizing. Contracts presuppose that there is an exchange of goods owned by the parties, a transfer of property titles. The employee sells his labor for the employer's money. There is a symmetry here, and the state cannot by fiat privilege any one party by abridging its rights.

A turning point was reached in the 1923 case *Adkins v. Children's Hospital of DC*. Congress had instituted a minimum wage for women and minors in the DC area. Two cases were considered: first, a hospital sought to defend its natural rights; second, a woman was fired because the hotel employing her was unable to pay her the legally mandated wage. She filed a legal complaint against the state, and her case too eventually reached the Supreme Court. The law was judged unconstitutional. I agree that minimum wage laws are both unjust and uneconomic; they both violate the individual right of the worker to sell his labor at whatever price the market will bear and are contrary to the good of society. For example, some of their social effects are institutional unemployment and destruction of upward mobility, as young people are prevented from getting entry-level jobs in which they can learn basic skills, both hard and soft. But it was the dissent that set the stage for subsequent rulings. Justice Taft argued that government interventions were already numerous, and minimum wage was no different from any other coercive enactment. Justice Holmes pointed out that "the law, in its character and operation, is like hundreds of so-called police laws that have been upheld."[10] This deference to the legislature would soon become the general policy of the courts.

Thus, in *Nebbia v. New York*, brought before the Supreme Court during the Great Depression in 1934, the lawsuit challenged price controls on milk enacted by the state. It was assuredly a monstrous policy, but the court had no interest in overturning it: if the legislature determined that "unrestricted competition" was socially harmful, then it was its prerogative to check it, including by violating the rights of business owners to set prices for their own products. "The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large," said the court, adding that the state's "authority to make regulations of commerce is… absolute. … the private right must yield to the public need." This is because "no exercise of the private right can be imagined which will not in some respect, however slight, affect the public."[11] Natural rights had bitten the dust. In fact, of course, there is no "public," only "private" individuals (who together may be said to constitute society) cooperating for mutual gain.

The 1937 case *West Coast Hotel Co. v. Parrish* sealed the deal on this by

explicitly overturning *Adkins*.[12] A further case, *Wickard v. Filburn* of 1942, may be used to illustrate the depths to which the Supreme Court had sunk.[13] A certain farmer planted and gathered more wheat on his farm than his allotted share according to the federal Agricultural Adjustment Act of 1938. The law might have applied, the farmer objected, if he had *sold* the wheat. But instead he used it for personal consumption. Surely, these actions had nothing to do with interstate commerce, and so the farmer could not be penalized. Now the regulation of interstate commerce was not an arbitrary power granted to the feds. Its meaning was always to *make commerce regular, promote it* by striking down trade barriers that might from time to time unjustly and foolishly be erected by the several states, as well as by dissolving state-chartered monopolies. It was to safeguard the United States as a continent-wide free trade zone. But what if this power was abused as it clearly was in this case? What right does the Congress have to interfere with a farmer's business decisions, especially of such an innocuous kind as harvesting wheat for his own consumption?

Thomas Jefferson wrote, "By an act passed in the 5th year of the reign of his late majesty king George the second, an American subject is forbidden to make a hat for himself of the fur which he has taken perhaps on his own soil; an instance of despotism to which no parallel can be produced in the most arbitrary ages of British history."[14] Wasn't the government's imposition on the farmer in this case no less tyrannical? The court decided that since the economy is an interconnected whole where the actions of each individual affect the entire market, the state's power to harm interstate commerce was for all intents and purposes unlimited. In particular, if the farmer *hadn't* grown the extra wheat, he would have sold less wheat on the market, therefore his decision still affected prices and quantity sold. It thus sustained the constitutionality of the law.

The *Lochner* jurisprudence was based on the idea that there is no conflict between individual liberty and social welfare. Even stronger, liberty was essential to welfare. In *Adkins*, the majority opinion was that "the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members." As socialist, interventionist, and anticompetitive measures became popular in the progressive era, laissez-faire ideas were discarded even by institutions as conservative as the courts.

The very point of law is to harmonize individual creative initiative and the common good. Classical liberalism held that only a few definite antisocial actions needed to be prohibited by force of law; left free, an individual enmeshed into the free market cannot help but promote general welfare simply

by pursuing his own self-interest. The new ideology insisted that individual liberty and common good were incompatible, and that the economy, in order to hobble along somehow, had to be continually managed and prodded and tinkered with by the government. Left to itself, the free market would fall apart. The individual was paradoxically declared to be a miscreant and enemy of society: his freedom results both in injustice and in social disintegration, as hosts of writers had proclaimed. If we add the final premise that no rights of a puny "individual" could stand against the interests of great and awe-inspiring "society," the case seems closed. The law became increasingly more complex in its attempts to plug "loopholes" that allowed the now distrusted free enterprise to function. Government police power was supreme, and individual liberty was at best only a means to an end, a means to social good, to be waved aside whenever a better means was devised. In fact, it was usually an inappropriate means. This remains the most dominant and popular view today.

For example, in the 1992 abortion case, *Planned Parenthood of Southeastern Pa. v. Casey*, the court found that "the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimum levels of human welfare."[15] In the 1963 case *Ferguson v. Skrupa*, Judge Black affirmed an existing law that seemed to abridge private property rights with the following statement: "Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."[16] There was no longer any such thing as substantive due process, that is, natural law legislation by judges.

It wasn't just interventionists or Mensheviks who debased the courts. The courts abandoned the doctrine of natural rights also under ideological pressure from communists (or Bolsheviks). They bought the idea that the state ought to have the full power to reshape society according to its own vision. (It would have been interesting to ask Black whether he would have objected if the legislature "took for its textbook" Marx, Lenin, and Stalin. Must judges be *complete* pushovers?) And it's true that human rights are a bourgeois concept that was developed during the long evolution of capitalism and private property law. They have no existence in a totalitarian state. The courts' slavish submissiveness to Congress and the executive, except as we'll see for such things as abortion rights and homosexual rights, still with us, is the legacy of socialist ideas.

The courts' deference to police power rested on three assumptions. First, that the state has "good intentions." It seeks only one thing: to benefit society, to promote general welfare. This is an extremely naive view, as in fact

the state is more likely to destroy society in wars, to plunder it, and even to freeze it, checking economic progress than merely to guard the commonwealth. Second, that the state is inerrant and omniscient: it can calculate the consequences of its policies from now until kingdom come. This is beyond hopeless. And third, that the legislature has the absolute power to sacrifice individuals for the sake of society or more plausibly for the sake of the state, for some alleged greater good, with the courts properly having no say as to the protection of individual rights. So much for checks and balances here.

2.2. TOTAL FREEDOM

Our story receives a twist at this point. In the Abortion Cases, such as *Roe v. Wade*, it's as if the court remembered in a spasm of nostalgia that it had some obligation to protect individual rights. It still had no interest in the ideology of economic laissez faire, but all of a sudden it became concerned with certain personal and especially sexual liberties. It discovered in the Constitution the right to personal privacy which it applied to abortion and used the 14th Amendment to extend this right to everyone in the country. The court declined to rule whether businessmen were heroic civilization-builders or ruthless rapacious exploiters who harmed the vast majority of workers, such that it was the legislature's holy duty to restrain them in any way it chose; but lo and behold, killing unborn children would now be a sacred individual right of every woman. The Court may have subconsciously aimed to deny its own irrelevance. Government omnipotence was the order of the day. Did the people lack bread? Let them eat their own democratic cake, was the idea. Fortunately, the judges awoke from their long slumber to save the day, or ruin it, as the case may be.

By the time of the Abortion Cases, the natural right of contract was dead. For example, in the 1961 case *Poe v. Ullman*, Judge Harlan argued: "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its preeminence as the seat of family life. And the integrity of that life is… fundamental."[17] The separation of "home" from "property rights" makes his dissent arbitrary. There is no distinction between economic and non-economic property rights such that the former can be infringed upon by law for any reason, while the latter cannot be. In other words, the Court may have wanted to distinguish between personal and private property. There may be something to this distinction if one is a *communist* who permits people to own toothbrushes while forbidding "private ownership of the means of production." This distinction does not belong to a free capitalist society.

As we saw in Section 1.5, after the Revolution, abortion after quickening was a crime under common law in the United States, but state legislatures did not outlaw it by statute. In the 1860s, there was a push to do just that in both states and federal territories such as Arizona, Colorado, Idaho, Montana, and Nevada. One reason was the intent to codify the common law, to promulgate rules to the public more explicitly and reliably. Another was the new developments in embryology that seemed to cast doubt on the meaningfulness of quickening in the legal code. If human life began at conception, as it started to seem to people, then perhaps it ought to be protected *beginning from* conception. The intent was not any resurgence of some puritanical or Victorian morality but undoubtedly to protect the lives of the unborn. Until the middle of the 20th century, prohibition had been the status quo.

The Abortion Cases were preceded by some important litigation regarding education of children, contraception, and marriage. Compulsory public schooling in Oregon was overturned in 1925 in *Pierce v. Society of Sisters*. The law "interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control." Liberty "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[18] The ruling was self-evidently correct; it is tyrannical to force all children into government schools.

Griswold v. Connecticut, argued in 1965, ruled on the constitutionality of an 1879 Connecticut law prohibiting not only contraceptives but even the giving of medical advice as regards preventing conception.[19] Griswold, Executive Director of Planned Parenthood**,** and Buxton, a gynecologist, opened a clinic in New Haven with the explicit intent to be arrested and thereby to challenge the law. The state defended the law on the ground that it was necessary to "discourage extramarital relations." The idea presumably was that illicit sex would be deterred by the threat of pregnancy.

The majority of the Court argued that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." This right to marital privacy radiated from the 1st, 3rd, 4th, and 5th Amendments; even if this right were not enumerated, the 9th Amendment could be deployed in its defense. The 14th Amendment would then apply this individual right against the states. Judge Douglas asked incredulously, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" Judge Goldberg balked at the "totalitarian" implication that "if a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control

also would seem to be valid." Interestingly, the judges found no constitutional fault in the Connecticut laws prohibiting or regulating adultery, homosexuality, and fornication. In any case, Judge White found the state's interest in lowering premarital sex and adultery poorly served by the law.

Eisenstadt v. Baird in 1972 extended the right to use contraception to unmarried people.[20] The court struck down a Massachusetts law that allowed only licensed doctors to prescribe contraception and only to married couples. Now William Baird was convicted of distributing contraceptives without a license; it was not even known whether the person to whom he gave the vaginal foam was single or married. But Justice Brennan really wanted to overturn the law according to which it was forbidden to sell contraceptives to single persons. He referred to *Griswold*, saying that if that decision applied, then obtaining contraceptives was an individual human right and did not depend on being married; and even if it did not apply, the law violated the 14th Amendment that in this case forbade unequal treatment of married and single people.

If there are natural rights, then the right to buy, sell, and use contraceptives is surely one of them. There is no victim, only beneficiaries. When the government punishes Smith for using a contraceptive, it initiates violence against Smith, but no violence was done by Smith toward any Jones. Hence the punishment is unbecoming, disproportionate, and naturally unlawful. In Section 9.3, we will distinguish between a person's duty to the natural law and his duty directly to God. Natural law rules the universe; however, even the law is a mere agent of its own divine Creator, the Author of nature, who exercises ultimate authority. If you don't believe that God exists, feel free to skip that section. I will adduce some arguments to the effect that duties to God may indeed demand that one abstain from using contraception. But in any case, it is hardly the job of the government to enforce such duties.

In the 1967 case *Loving v. Virginia*, the Supreme Court struck down a Virginia law prohibiting interracial marriages by applying the "most rigid scrutiny" and invoking the Equal Protection clause of the 14th Amendment. "The freedom to marry," the judges argued, "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[21] Whatever your opinion on interracial marriage, that was certainly a reasonable point.

Now we come to *Roe v. Wade* decided in 1973.[22] The right to privacy, the court decided, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The court divided a pregnancy into 3 trimesters and set different rules for each. There is a human right to abortion on demand in the first trimester. The judges' reason for this is that abortions at

this early stage had become much safer and "mortality in abortion may be less than mortality in normal childbirth." In the second trimester, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." In the third trimester and in particular at the point of viability, the state may choose to prohibit abortions, "except when it is necessary to preserve the life or health of the mother." The judges listed a number of social reasons for abortions the law was now to respect: "distressful life and future…, psychological harm…, mental and physical health…, the distress associated with the unwanted child… bringing a child into a family already unable, psychologically and otherwise, to care for it…, stigma of unwed motherhood." But these may be reasons for a woman to *desire* an abortion, they are not reasons why abortion is *lawful.*

The ruling was arbitrary and entirely unphilosophical, and the majority admitted as much: "when those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive to any consensus, the judiciary… is not in a position to speculate as to the answer." But if the wise and learned cannot settle the problem definitively, then the matter devolves to the legislature and specifically to state legislatures where a decent compromise can be worked out. The court's reckless decision converted the controversy into a most savage sort of political struggle. The dissenting Justice Douglas stuck to positivism, arguing that the court judges "do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." I don't agree with him; it remains that it is the judges' duty to discover natural law. However, in so doing they had better *do it right*, and if the problem proves too difficult, then they should indeed defer in such a matter to the legislative branch of the government.

The second key abortion case, *Doe v. Bolton*, affirmed doctor-patient privacy.[23] Crucially, it strengthened *Roe* by defining health as well-being. A threat to health would now be understood formally as subjective dissatisfaction or absence of pleasure. This of course annihilated any attempts to regulate abortion even in the third trimester of pregnancy. Mere insistence on the part of the pregnant woman that she feels some – any – dissatisfaction with being pregnant was sufficient to justify abortion in the eyes of the law. Judge Douglas opined that the state cannot "limit the number of reasons for which an abortion may be sought." And that was it: abortion on demand at any time and for any reason has been status quo ever since in the United States.

When then about privacy? Presumably, what goes on deep inside the zerg hive and which Zerglings are being spawned are not the government's

concern. The goings-on in a woman's womb are not anyone's business. Of all people, *men* should want to disclaim any interest in such matters. But when Smith kills adult Jones, Smith, too, wants the murder to be private. He may take active steps to hide the crime and to hide the body. Jones presumably may want, as he looks down at the world from paradise, to be avenged, but so may an aborted fetus. He, too, may curse his mother for not letting him be born, such as if his soul is restored to full competence in the next life as he awaits another incarnation. Again, Jones may want the state to punish murderers generally so that he feels protected from the deterrence effect of the threat of punishment to potential murderers. But the fetus, too, may be an anti-abortionist generally for the selfish reason that this way, he has a better chance of surviving.

Joel Feinberg makes a useful point: "Government could take vigilant steps to protect unborn persons, and many of these would involve intrusions into women's private affairs – requiring monthly pregnancy tests, for example, to determine whether any unborn persons exist in her womb, or requiring registration of all suspected pregnancies."[24] Yes, that's a possibility. Much more oppressive societies have existed and been vigorously defended.

If anti-abortion laws are somehow *unenforceable* because of the natural rights to privacy, then this is a potent reason to allow abortions. If the state cannot possibly detect and capture abortionists, then it's a good idea to let them be. It would be strange for a police detective, for example, to engage in an "investigation" of a suspected abortion. What's he going to do, study the girl's insides with a magnifying glass? But before *Roe v. Wade*, anti-abortion laws existed for a long time and did not cause excessive social problems. It may be that a man's home is his castle, and a woman's body is hers in an even stronger sense, but the police are allowed to enter any "castle" if there is suspicion that its owner murdered someone there. They can also arrest any man in his own home for murder. Perhaps they can react to an abortion in a similar manner. It may be that anti-abortion laws were enforced so poorly or haphazardly that illegal abortions were common but were also enforced well enough to deter medical practice from advancing technically to the stage where abortions could become safe. Again, one solution to this problem may be indeed to legalize abortion, but another is to step up enforcement.

Nature has burdened women with bearing and raising children. Women have revolted against nature, arguing that they should be able to kill their children, unborn and sometimes even born, at will. It's a women's rights issue. This is a private matter between a woman and her doctor. We should trust her with this decision. This, however, proves too much. It could similarly

be argued that men, too, are burdened in marriage with their ball-and-chain wife and kids. They, too, should be able to murder them legally so that they can be free. It's a men's rights issue. This is a private matter between a man and his gun manufacturer. We should trust him with this decision. (Why *should*, by the way, we "trust women"? Are "women" collectively philosophers and sages? That they can *have* abortions does not entail that they *know whether abortions are right or wrong*. Does anyone really think that an average 14-year-old girl, say, knows what she's doing and makes all the right decisions?)

"The right to choose abortion is essential to ensuring a woman can decide for herself if, when, and with whom to start or grow a family," says NARAL Pro-Choice America. By the same logic it can be said that the right to choose to kill one's family is also essential to ensuring a man can decide for himself if, when, and with whom to continue having a family.

"Women will always attempt to obtain abortions, whether or not the abortions are legal," says a group Feminists in Struggle, as though this were an argument. Yes, and men will always attempt to murder their families, whether or not murders are legal. Oftentimes the murder is followed by the husband's suicide. This is very unfortunate. We may as well make such murders safe for the husband by immunizing him from prosecution or any legal consequences of his acts.

If you find these parallels implausible, then what's wrong for the gander may also be wrong for the goose.

On the other hand, John Noonan points out that "abortions were performed not in marital beds but in hospitals," suggesting that one could not take recourse to privacy here.[25] During the Alcohol Prohibition, for example, the state outlawed not consumption but manufacture, sale, and transportation of liquor, that is, acts which *precede* consumption in any economy marked by division of labor and the market. Likewise, the state could go not after women but after doctors and clinics that dared to disobey the law. Anti-abortion laws could then be made somewhat enforceable. Yet if a woman has the natural right to abort, then any interference with production is an indirect violation of her rights, not a government's "economic policy" justified on utilitarian grounds or as a means, via constricting and crippling the market in more and more red tape, to transitioning to socialism step-by-step. If it is lawful to abort in itself, then surely it ought to be lawful to pay a doctor to assist in the abortion. The doctor, far from being some disreputable sinner, is merely an economic tool, a means to an end that happens to be human. If it is naturally lawful to drink alcohol or consume drugs, then it is lawful to manufacture, sell, and transport alcohol and drugs, and wrong for the state to outlaw either.

If what goes on in the womb is private, then so are any woman's negotiations with her doctor. A contract between them for the doctor to assist in the abortion for a price seems to be their own private business. Therefore, the argument against legal abortions that seeking help from doctors makes abortion public is senseless. It is private in the sense of nonpolitical, not involving no humans. Again, a man's home is his castle; why isn't also his place of business? You may of course be a government interventionist who thinks that business dealings need to be arbitrarily regulated by the authorities. But then why not also the relation between a woman and her unborn child? There is no principled way to restrict privacy to abortion decisions.

Again, consuming recreational drugs is as private as it gets. When you do cocaine in your own home, literally no one else is involved, not even a fetus. Yet the law provides severe penalties for this. What can be more private than going to the bathroom, yet the government regulates the water flow in your toilet. Your house is supposed to be owned by you; see what happens when you are late on your property taxes. The choice is between full-blown libertarianism based on absolute property rights and full-blown statism where the state and only the state decides what rights you have. For example, on statism, your alleged right to breathe air is in fact a government privilege revocable on the government's whim. Similarly, all your income in fact belongs to the state; what you keep after taxes is just what the state in its mercy allocates to you.[26] The only reason why you are not in prison right now, being tortured, is that you do not stir the pot, you shut up and pay your tribute, you've been able to blend in with the crowd, and the state hasn't decided to make an example out of you to strike fear into the hearts of other "law-abiding citizens." You want to buy and sell? Get a digital mark of the beast tattooed on your forehead. As Etienne de la Boetie wrote, you "have no wealth, no kin, nor wife nor children, not even life itself that you can call your own."[27] The state gives, and the state takes away. You may feel safe for now, but your time will come, or it will be your children's. Even if you are lucky enough to be looting others through the state, you still have no *rights*, only perhaps *powers* which you will lose anyway when even more powerful looters come on the scene. Soon, in this case, the ancient and savage battle for power, dampened for only a short while by the idea of natural rights, will once again be kindled, and violence and tyranny will once more rule this wretched world. It's up to you to choose your ideology.

In short, if abortion is a crime, then it does not become lawful on account of "privacy"; and if it not a crime, then all government interference with the abortion industry is unjust, and appeals to privacy are a strange way to legislate natural law. The Supreme Court's argumentation in the Abortion

Cases is singularly unhelpful for understanding the problems involved.

The combination of total state and total freedom in these senses may be understood this way: the two great natural foundations for charity as a theological virtue, and therefore for salvation of the soul, are capitalism and the family. The 20th century featured a massive ferocious all-out assault on both. By rejecting natural rights, the Supremes helped to undermine capitalism; by insisting on the right to abortion, they sought to damage the family, too.

NOTES

[1] Dworkin 1986: 163.
[2] 321 F. Supp. 1385 (N.D. Ill. 1971).
[3] Adkins 2005: 535.
[4] Louisiana v. Williams, 46 La. Ann. 922 (1894).
[5] Allgeyer v. Louisiana, 165 U.S. 578 (1897).
[6] Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884).
[7] 198 U.S. 45 (1905).
[8] 208 U.S. 161 (1908).
[9] 236 U.S. 1 (1915).
[10] 261 U.S. 525 (1923).
[11] 291 U.S. 502 (1934).
[12] 300 U.S. 379 (1937).
[13] 317 U.S. 111 (1942).
[14] Jefferson, Thomas. *A Summary View of the Rights of British America*. 1774.
[15] 505 U.S. 833 (1992).
[16] 372 U.S. 726 (1963).
[17] 367 U.S. 497 (1961).
[18] 268 U.S. 510 (1925).
[19] 381 U.S. 479 (1965).
[20] 405 U.S. 438 (1972).
[21] 388 U.S. 1 (1967).
[22] 410 U.S. 113 (1973).
[23] 410 U.S. 179 (1973).
[24] Feinberg 1986: 291.
[25] Noonan 1979: 31.
[26] See Nagel 2002 for a presentation of just this view.
[27] La Boetie 2008: 42.

3. Demand for Abortions

3.1. Incentives

One obvious push for abortion legalization occurred due to improvements in contraception. Abortion could then become a form of birth control that complemented contraception. On its own, abortion could not ensure casual sex; a woman could not reasonably abort every week. The fear of pregnancy not only deterred possible sex but also drained actual sex of much of its fun. But with contraceptives, abortion could be a presumably infrequent second line of defense against pregnancy, so a woman could sleep around freely without consequences.

In this sense, abortion is analogous to liquidating an inconvenient business rival when honest competition with him has not succeeded. The woman's interest in orgasms outweighs the fetus' (presumed) right to life.

To be fair, abortion can be used for limiting the number of children even in marriage. Indeed, birth control is an essential element of civilization. There is only one reliable way of improving the public's standard of living: to increase the amount of capital invested per capita. If the people reproduce indiscriminately, their welfare will be impaired by the extra mouths to feed and extra competitors for existing capital goods on the market. Brute beasts like rats multiply uncontrollably, limited only by predation by other species and the food supply. But man wants more than merely to enjoy sex (though sometimes one has to wonder). He wants to partake of all the sophisticated pleasures the human economy has to offer. In order to do so, he has to deliberately limit the number of his offspring. Mises, following Malthus, called this "moral restraint."[1]

Under Platonic socialism in which children are communally raised, the omnipotent state would be required to regiment and control the citizens' sexual activity. Under capitalism, on the other hand, there is no need for coercion because each family bears the entire cost of raising its own children by itself. Each couple therefore will be careful not to have more children than they can afford. They would not have so many as to diminish their prosperity below what they find acceptable. In an advanced capitalist society, population naturally tends to stabilize or grows slowly which allows general economic progress to take place. The lowering of the fertility rate and mortality rate coincide.

Should rich people therefore tell poor people, "I'd love to help you. Let me show you how to kill your unborn children?" In a certain sense, yes, this is not an altogether bad deed, insofar as children are expensive, and having

them will reduce the parents' prosperity. So not having children, or not too many of them, is a way out of poverty. "The rich get richer" precisely *because* they don't get children and the poor, imprudently, do. In fact, responsible people are smart enough to balance their desire to reproduce with their interest not to imperil their own standard of living and that of their existing children beyond reason. Here supposedly is where abortion comes in.

There are some minorities, it may be objected, who are too stupid and animalistic not to breed like rabbits. But that is an oversimplification. All humans are rational and respond to incentives. Certain groups, having insufficient moral compass, may need greater external restraints. For example, black fathers, in the days of intact black families, were ruthlessly strict with their daughters, and for a good reason. Moreover, since the IQ of blacks is much lower than that of whites, blacks are condemned to remain poor forever. Birth control is therefore especially important for them. As the black family was destroyed by the welfare state and drug war, procreation of blacks, including by very unfit persons by any measure, shifted into high gear.

Elizabeth Fox-Genovese points out: "Planned Parenthood still reminds potential contributors about how much the pregnancies of poor unmarried women cost taxpayers, suggesting that the wide availability of birth control and abortion will reduce the bill."[2] It is true that liberals view the spread of blacks as a natural disaster, like a plague of locusts. So, first, liberals chose to give (other people's) money to women for having illegitimate children out of what they called "compassion." The psychology of the races is such that blacks were encouraged to have many more such children than whites. Mix in the drug war, the black guys' naturally greater violent tendencies especially when fatherless (hey, as Kramer said in *Seinfeld*, mother nature is a mad scientist), and we have our locusts.

The liberals were horrified by this. Of course, coercive "compassion" had to stay. Still, liberals became "concerned about overpopulation by 'poor' and 'minority' children."[3] Since we live in a scientific age (especially in which the government is imagined to be able to successfully manage the economy), their second step was to attempt to find methods to stem the tide of black hordes so that "they" would not supplant "us." There is then a connection between welfare to blacks and abortion for blacks, namely that abortion, both its legalization and government subsidies to it, was meant to check the increase in black population that welfare on the contrary spurred.

Regarding the Pill, *Time* argued: "Many were uncomfortable with the idea of premeditation; 'nice girls' could be swept away by the passion of the moment, but they didn't take precautions. As for those notorious 'fast girls,'

the consensus among both physicians and sociologists is that a girl who is promiscuous on the pill would have been promiscuous without it."[4] This is a dubious argument. All change takes place on the margin, so the Pill turned some nice girls into fast girls, even if the marginal number of such transformations was smaller than the total number of fast girls. In addition, fastness is a matter of degree. Just how fast? The Pill would have increased the fast girls' speed, as it were, that is, it made some girls *more* promiscuous than they were before.

Mary Ann Glendon argues that the baby boom after World War 2 produced a lot of girls, but since women tended to marry men who were a few years older than they, there was in the 60s a definite shortage of eligible men. The increased competition among women created the incentive for them indeed to be "fast" to appeal to the then scarcer men. Perhaps the winners became man-chasers, and the losers became man-haters, thereby giving life to the implausible ideological feminism combining the two attitudes.[5]

At the same time, the link between the spread of contraception and rate of abortion is not self-evident. Suppose that with neither contraception nor abortion, there are 1,000,000 sex acts per year, 10% of which result in the conception of a child, 10% of whom are aborted. There are thus 10,000 abortions overall. With both, there are (let's say) 3,000,000 sex acts since the lower price which is risk of pregnancy results in a higher quantity of intercourse. Only 5% result in a child (thanks to the use of contraception), and 20% are aborted (since legalizing abortion lowers the non-monetary price for the consumers of abortion services and lowers the costs of doing business for the producers, both of which include risk of prosecution and punishment, and increases equilibrium quantity) – there is an increase in abortions. If we substitute 1% for 5%, there is a decline in abortions. It's an empirical relation which will change with time and circumstances.

Another reason for abortion is worth mentioning, though it might not be relevant anymore. Alfred Marshall considered it a priority to free women, especially mothers, from having to work long hours and do hard work:

> General ability depends largely on the surroundings of childhood and youth. In this the first and far the most powerful influence is that of the mother, when she does not abdicate it for the sake of dearly bought wages or for more selfish purposes.[6]
>
> … the degradation of the working-classes varies almost uniformly with the amount of rough work done by women.
>
> The most valuable of all capital is that invested in human beings; and of that capital the most precious part is the result of the care and influence of the mother, so long as she retains her tender and

> unselfish instincts, and has not been hardened by the strain and stress of unfeminine work.[7]

I note in passing that feminists counterproductively seem to want to undo centuries of social and economic progress in this matter by driving women to work, all in the name of "equality." The relevant idea is that women who do hard labor or pursue highly demanding careers may be unfit mothers and ought to, for the good of society, resort to abortions.

Another impetus for legalization was the fear of overpopulation, especially in the 1970s. The remedy for that has always been, including for the "developing" countries, laissez-faire capitalism. Not every patch of land has to as densely populated as New York City or Hong Kong, but it *can* be, if needed, and everyone will flourish regardless. Capitalism will make a city prosperous; socialism will create a famine even on the state's own collective farms.

Environmental fears stoked antinatalism too, and still do. At the very time when man is finally poised to take full control over this world and eventually turn it into a Garden of Eden, numerous voices are calling for the destruction of the industrial civilization in the name of improving climate for billionaires or saving certain especially cute critters. This is self-sabotage of the highest caliber. Even on its own terms, the salvation of the "planet" lies not the past, in primitivism, decivilization, or depopulation, but in the future, in unbridled technological mastery of the earth and economic improvement. We must refine our control over the physical world, not relinquish it.

Improvements in the safety of surgical abortions for women and in medical abortions, that is, abortions performed by using medications, were yet another incentive for legalization. In particular, limiting the right to abortion to situations in which the mother's life was in danger could be justified on the grounds that the abortion itself was a life-threatening operation. The point was presumably to paternalistically protect desperate pregnant women from themselves, lest they submit to a highly dangerous procedure. With technological and therapeutic advances, this reason was no longer valid.

To the extent that abortions remained dangerous, it was argued that legal abortions would be safer than illegal ones. Neither the evidence nor logic supported this claim, however. With antibiotics and improvements in surgical techniques, there are very few abortion-related deaths in either case. In addition, legalization of abortion increases both the demand for and supply of abortions. Even if the percentage of unsafe abortions is smaller under liberty, the total number of abortions is higher. It is an empirical matter whether the overall harm to women from incompetently performed legal abortions is less extensive than this harm from unsafe illegal abortions.

3.2. Feminism

Feminists have further argued that abortion prohibition was instituted by the "patriarchy" to oppress women. On the face of it, this is absurd. For men commit the vast majority of violent crimes. If the prohibition against murder and theft injures so many convicted *male* criminals, are "men" oppressing "themselves"? Another obvious fact is that unenlightened men love legal abortion. It is women who bear all the costs of aborting, for the sake of gratification or social climbing, *Evita*-style; men get to enjoy the benefits of sex without bearing any costs at all. On the contrary, it was *women* who oppressed men by refusing to have sex with them for fear of pregnancy. With legal abortion, sex would become easier to obtain. This benefit to men, namely more sexual fun, is of course a narrow economic argument in favor of legal abortion.

It is possible that the coercive force of the law is deployed unjustly in this case. Whether the illegality of abortion is unjust oppression is precisely at issue. It is irrelevant which *groups* of people allegedly oppressed which, other than perhaps in a political election. The sense of oppression here may be that bearing children is a mark of servitude. "Pregnancy, childbirth, and nursing have been characterized as passive, debilitating, animal-like," says Sidney Callahan.[8] In order for the woman to be equal to men, she must be able to do two things. First, have sex freely and without consequences, like a prostitute. Second, compete with men either fairly or more plausibly assisted by government privileges in the workplace, unburdened by children. The idea is that women will thrive the most when in pursuit of domination, control, and self-assertion. Without the right to abortion a woman could have one of these two – the first in marriage, the second by being chaste and devoting herself to a career – but not both.

Heaven forfend that female sexuality should be "controlled"! But of course control of female sexuality is as crucial to civilization as control of male violence. Just as men are an order of magnitude more physically violent than women, so women are an order of magnitude sexually dirtier than men. It is women themselves who police each other, and they have failed spectacularly in recent times. The "sexual revolution" was, and is, the female equivalent of the French Reign of Terror. There is no romance, conquest and surrender, faithful love, family stability under such a regime. It empowers the state to serve as "husband" for women. I agree with Callahan that it is both possible and desirable to combine what she calls "the idealized Victorian version of the Christian sexual ethic" with the development of women's personalities through education and commerce to the extent their nature allows. Callahan further mentions the "epidemics of venereal disease, infertility, pornography,

sexual abuse, adolescent pregnancy, divorce, displaced older women, and abortion."[9] It's astonishing that people look at these calamities and unjustly blame *men* for them rather than those who in fact deserve the blame, viz., the feminists.

Some feminists claim that there are such things as a special "feminine voice" and even feminine ethics. Most of such feminists' radical sisters, however, reject this thesis. Feminism in fact vindicates the Aristotelian idea that a female is a misbegotten male but adds to it the proposal that women must *become fully* men. Only then will "equality" be achieved; or at least equality is the official goal; the less advertised goal is power, preferably untempered with competence or responsibility. Feminists envy men's "freedom" and petty flaws and covet these goods for themselves.[a] Given this end of transforming women into men, abortion becomes a crucial plank in the feminist platform. Note, in any case, that it is not *men* or "patriarchy" who oppress here; it is nature (if such a thing is capable of "oppression" at all). *Men* are not at fault here at all.

It is this particular feminist understanding that guided the judges in the 1992 Supreme Court case *Planned Parenthood v. Casey*. The social reasons for abortion were now less the plight of poor single mothers than the interests of ambitious career women. It was "society" that had developed its reliance on abortion, said the majority opinion: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[10] It seems obvious that resorting to an abortion is an indication precisely that a woman's life is *out* of control. On the other hand, a high-powered woman who in cold blood aborts her own children probably shouldn't have them in the first place: it would be dysgenic.

The feminist Sally Markowitz even suggests that the alleged fact that women are oppressed in our society requires that they be compensated with various powers, including the permission to kill their unborn children. But why stop there? Let women have a full-featured license to kill, especially men. That ought to balance the "power relations"! She proposes a principle that "it is impermissible to require the oppressed group to make sacrifices that will exacerbate or perpetuate this oppression." But surely, the necessity to abstain from murder and theft especially of the hated men is a definite sacrifice. The transformation of feminists into feminazis for Markowitz is only logical.[11, b]

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[a] Gen 3:17-19 aptly describes this nonexistent freedom.

[b] Markowitz considers, and rejects, the idea that fetuses, too, are oppressed. (201) But under a regime of legal abortion, they are oppressed by virtue of being under constant threat of destruction. They are oppressed, in other words, in the same straightforward sense in which shopkeepers in a bad neighborhood are oppressed by criminals, working under constant threat

Feminism is also deeply collectivist and statist; feminists "demand" things, as though they were hijackers or bank robbers, and most their demands center around obtaining government privileges in education, employment, and family law; the dole; and coercive taxpayer subsidies for their favored goods, such as contraception, abortion, maternity leave, day care, and the like. From the libertarian perspective, feminists are just another gang of looters.

Consider the argument that day care should be run or subsidized by the state in order to free women to work. It's unclear why this is more efficient. First, employment is not a path to self-esteem for women or to some thrill of power; women become factors of production for the sake of satisfying consumer desires. Labor is a means to an end which is production of goods and services, and women-workers are economic tools, nothing more.

Second, this will result in higher taxes, possibly to the working women themselves and certainly to their husbands; of course, taxes harm society quite capably in and of themselves. It also subjugates and oppresses childless people who are forced to pay the taxes yet who receive no benefits.

Third and most important, in day care or kindergartens, the children are unloved. They are anonymous, impersonal, customers. Love is tangible; it can be seen and felt, and children do feel it when they are loved; it's the most beautiful and rare thing in the world. Children in their capacity as consumers of parental care are deeply harmed, rejected, wither through their mothers' selfishness. Fox-Genovese is correct in saying that what "the child above all needs" is to "feel loved and 'at home'."[12] Mises argues that "From the parents the child learns to love, and so comes to possess the forces which enable it to grow up into a healthy human being."[13] But the only way to learn to love is to be loved first.

In short, if you are having children, then you'd better be prepared to sacrifice everything for them, including your very life, *not* vice versa. It is unlikely that you will actually be called upon to do this, but it is beyond the shadow of a doubt that your own ambitions will be scaled down. The idea that you can blithely sacrifice your *kid's* life to further your career is grotesque.

3.3. Abortion "welfare"

Fox-Genovese betrays her allegiance when she claims that "most Americans willingly acknowledged that easily available, publicly funded abortion would deter society from punishing women whose new sexual opportu-

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of being robbed or murdered. (I couldn't resist making this point, though it is of course idiocy to hold that one's *rights* depend on his score in the Oppression Olympics.)

nities led them into a mistake."[14] Publicly funded, is it? Let me use the standard labels for a bit. Liberals claim that conservatives practice repression: they aren't satisfied with just leading righteous lives, as they see it, themselves and avoid abortions; they want to force women who do not subscribe to their moral views also not to have abortions. Yet here we have liberals not only wanting conservatives to endure the sight of dead babies in their midst but also pay for killing them! How are liberals not repressive, the very vice they accuse conservatives of?

In addition, there is a solution to the problem of mistakes due to new sexual opportunities *other than* abortion: the *denial* of those sexual opportunities, such as by a strict moral code.

Government funding of abortion then is a separate injustice, both to the taxpayers in general and to those opposed to abortion on moral grounds. Many libertarians support abortion rights but oppose government financing of them. On the other hand, if you think that taxation is perfectly great, such as so long as the taxes are paid by people who are not you, or so long as the taxes give you an advantage by preventing your competitors from posing a threat to your own business, you may conceivably support abortion financing while opposing full legalization of abortion (such as after viability or the like).

The Hyde amendment passed by Congress in 1976 prohibited the use of federal funds for most abortions. Justice Marshall wrote in 1980 that it was "designed to deprive poor and minority women of the constitutional right to choose abortion."[15] This is of course nonsense, since the bill regards government subsidies, not rights. I have a right to play video games. Must the government and taxpayers pay for my video games, too? If they don't, and if I am a poor or minority gamer, do they deprive me of my constitutional right to choose my fighter in the latest title? Such talk is unhelpful.

NARAL Pro-Choice America proposes that "by forcing low-income women to carry unintended pregnancies to term or spend a large portion of their income to pay for abortion care, Congress creates more barriers to women lifting themselves out of poverty." But not paying for abortions is not an unjust use of force, any more than the fact that other people do not pay for my games means that I am being oppressed and violated. They go on: "Women without abortion coverage are forced to use funds they would spend on necessities such as food and rent to pay for an abortion." Yes, and men without games coverage are "forced" to do the same. So what? Whatever cash one has, he chooses how to allocate it among competing ends. What could be more ordinary than that?

Then there are the conscientious refusal laws that permit doctors and

hospitals not to perform abortions. "It means a Catholic hospital could refuse to provide abortion care for a woman whose health is at risk," NARAL breathlessly tells us. But no one has a right to be served by any private individual. Whether Smith exchanges a good or service for Jones' money depends on *both* Smith's and Jones' *consent*, i.e., their willingness to enter into a contract with each other. If one declines, the transaction will naturally fail to take place. Our lamentable anti-discrimination culture and laws have obscured this obvious natural right and basic justice: the freedom of association and the corollary freedom *not* to associate, in this case the right of any private business or professional to refuse service for *any* reason whatsoever. If this freedom is affirmed, and anyone is free to discriminate as he sees fit, then for a still stronger reason one can refuse service for reasons of "conscience." The idea that "anti-discrimination laws are intended to relieve less powerful people from oppression by the more powerful" is gibberish because it's not people's "powers" (that obviously differ) that matter but their natural rights, and these rights are equal. Anti-discrimination laws infringe on these rights by forcing association where it is not wanted and hence themselves are oppressive. There is then no need for any special religious exemptions; the matter is resolved cleanly by considering the individual rights of self-ownership and to private property.

Finally, there is the argument that abortion prohibition is discriminatory toward the poor. The richer folks will be able to afford illegal abortions, while the poorer segment of the population will not. Of course, the solution to this, if abortion is unlawful, is to deny the liberty to the rich by more stringent enforcement, not extend it to the poor. Alternatively, rich women will be able to travel abroad to obtain abortions, while poor women will not. As Grisez replies, "a wealthy person also can go places where he can legally marry half-a-dozen teenage girls simultaneously, or smoke hashish, or practice racial segregation, but none of these facts shows that our laws against such acts discriminate against the poor."[16] This argument does make some sense on eugenic grounds. Perhaps abortion "had to be extended to the lower classes lest their uncontrolled breeding debase society and culture."[17] A variation on this is to claim that when abortion is outlawed, the rich may have access to safer methods of it than the poor. Again, a different solution is to alleviate poverty, which is admittedly a very long-term goal, not legalize abortion.

I conclude this chapter with an insight by William Lecky as to the general pre-theoretical attitude toward abortion and infanticide:

> The death of an unborn child does not appeal very powerfully to the feeling of compassion, and men who had not yet attained any strong sense of the sanctity of human life, who believed that they might

> regulate their conduct on these matters by utilitarian views, according to the general interest of the community, might very readily conclude that the prevention of birth was in many cases an act of mercy. …
>
> The death of an adult man who is struck down in the midst of his enterprise and his hopes, who is united by ties of love or friendship to multitudes around him, and whose departure causes a perturbation and a pang to the society in which he has moved, excites feelings very different from any produced by the painless extinction of a newborn infant, which, having scarcely touched the earth, has known none of its cares and very little of its love.[18]

Yet we should not indulge in *feelings* when considering this matter. In the next chapter, we'll get to philosophy proper.

NOTES

[1] *HA*: 668.
[2] Fox-Genovese 1996: 65.
[3] Ibid.: 89.
[4] Gibbs, Nancy. "The Pill at 50: Sex, Freedom and Paradox." *Time*. April 22, 2010.
[5] Glendon, Mary. "From Culture Wars to Building a Culture of Life" in Bachiochi 2004: 8.
[6] Marshall 1890: 263.
[7] Ibid.: 592.
[8] Callahan, Sidney. "Abortion and the Sexual Agenda." *Commonweal*. April 25, 1986, pp. 232-38.
[9] Ibid.
[10] 505 U.S. 833 (1992).
[11] Markowitz, Sally. "Abortion and Feminism" in Dwyer 1997: 194-202.
[12] Fox-Genovese 1996: 246.
[13] Mises 1962: 105.
[14] Fox-Genovese 1996: 87-8.
[15] Harris v. McRae, 448 U.S. 297 (1980).
[16] Grisez 1970: 436.
[17] Ibid.: 76.
[18] Lecky 1902, Vol 2: 20-3.

4. Clearing the Air

Before proceeding to the distinctly libertarian take on our subject, it will pay briefly to dispel some philosophical fog regarding abortion more generally.

4.1. An unborn child or fetus is "part of the mother's body"

This idea is easily disposed of via an argument made by Peter Kreeft.[1] Your toe is part of your foot. And your foot, a part of your body. Further, your toe is part of your body. There's then the following uncontroversial transitive relation: if *A* is a material part of *B*, and *B* is part of *C*, then *A* is part of *C*.

Now a fetus has two feet (once they develop). And the mother also appears to have two feet. But if the fetus were a part of the mother's body, then, by transitivity, its feet would be part of her body too, and she would have four feet. Which makes no sense and so is a reductio ad absurdum.

When presented with this proof on a public forum, my interlocutor pressed the issue by saying, "Yes, and a tree has many branches." I replied: So then, when a woman becomes pregnant, she grows two extra feet, a second brain, two extra lungs; in fact, almost every organ in her body is duplicated. But she has no use for those organs, as she does for her own two feet, say. In fact, these organs are a veritable drain on her bodily resources. If the child is male, then she even develops male reproductive organs, thereby evidently becoming a hermaphrodite. What an implausible transformation according to this logic!

In addition, of course, the child's body is a union of both the mother's and the father's essences. It has a unique set of chromosomes. Biologically, it cannot have developed from the mother's body alone as if some cancerous mass. It is its own organism with its own structure, life, and purposes.[2]

It is said that in erotic love, two become one. But for motherly love, it's the reverse: the mother's proper task is to help the child become a fully separate from her being. And that task begins pretty much at conception.

A popular pro-choice slogan is, "My body, my choice." If interpreted as "the fetus is part of my body," the slogan is ludicrous propaganda. The slogan can be salvaged if understood as "the fetus is *in* my body which is my property, and hence a potential trespasser if I no longer want him there."

No, the argument in defense of abortion that claims that a fetus is as much a part of the mother's body as a branch is part of the tree, and therefore can be excised as nonchalantly as a nail or tumor, does not work.

4.2. A FETUS IS A SEPARATE BEING BUT "ONLY" A "CLUMP OF CELLS"

The fetus is some sort of *object*, isn't it? It's separate from the mother, even if attached to and dependent on her. It's information-rich, complex, and specified, and growing more so with every passing hour. We might even say it's "fearfully and wonderfully made."[3] Even if we assume, falsely and contrary to what we have just established, that it is a "part of the mother's body," perhaps some kind of bizarre organ, a kidney is a different organ from the liver. A kidney works in complex, precise, and unique ways. It's integrated tightly with the rest of the body. Some people have devoted their entire careers to studying it. Is it fair to call *that* a mere "clump of cells"?

The proposition that a fetus is a "clump of cells" is a contemptible reduction of a remarkable object to its material cause. It's exactly like saying that a human being "is only" a cloud of atoms or only meat or whatever. Well, yes, he is, but isn't there a little more to it than that? In the movie *Devil's Advocate*, Kevin Lomax asks his devil (or incubus?) father, "What about love?" to which John Milton replies, "Overrated. Biochemically no different than eating large quantities of chocolate." This is really a beautifully depressing sophism, isn't it? For *biochemically*, spiritual love may well be implemented *in the body* in the same or similar way as mere sensual pleasure. But there is more to love than biochemistry. (There is more even to the pleasure of eating chocolate which is a *human subjective experience* than biochemistry.) The "fetus is just a clump of cells" is a similarly demonic half-truth.

In short, there are three other Aristotelian causes that are responsible for an object's existing right now besides the *material* cause, as in (1) "What is it made of?":

2. *efficient* which answers the question, "How does it work?"
3. *final* which resolves "What purpose does it serve?"; and
4. *formal*, supplying information as regards "What is it?"

These four causes are arranged in a hierarchy, with material cause as most primitive and constrained and formal cause as most sophisticated and fluid. E.g., in logic, it is surely true that $A = A$. But not in metaphysics: perhaps A is precisely not "A" but whatever I want it to be. This is especially obvious when considering the final causes of capital goods: the same good can serve multiple purposes and figure differently into different entrepreneurial plans.

For instance, the same manual on car repair may be a capital good to a mechanic who uses to diagnose car problems, a consumer good to someone who uses it as a doorstop at his home, a completely different capital good to a recycling business that manufactures something out of old paper, and an enti-

rely uninteresting item to a person who can neither read nor imagine any other use for the manual. Furthermore, what is a capital good today may not be one tomorrow, and alternatively a thing which today is looked over with indifference may tomorrow turn out to be the hottest thing since sliced bread.

"What a human being is" as his formal cause is not at all the same as "what a human being is made of" as his material cause. A house *is made of* bricks, but a house is not a brick; it *is* a place where human beings live; etc. This elementary confusion or cynical nonsense (like, again, "a human being is 'really' 'just' a fungus colony / waste processing factory / slow computer / etc.") is uncalled for.

Both an elephant and a mosquito are in their material cause indeed a clump of cells, or a teeming mass of atoms, or whatever. Surely, we cannot take this fact to mean that there is no difference between them.

According to this, some alleged "moralities" can be excluded as self-contradictory. For example, refusing to grant that man has or *is* an (embodied) soul can have strange consequences, for how are men then different from machines, and why should these machines, however complex, have a moral standing? Or again, suppose Smith says that human beings are "really" "just" meatbags walking around. A killing is merely a conversion of a meatbag that's occasionally moving into a meatbag that's lying permanently still. There is nothing else to see here. But then it is unclear why Smith is interested in ethics at all, or indeed is reading on the ethics of abortion. This perspective can be dismissed as irrelevant for our purposes: if you are still with me, then you do not adhere to it.

Here is another piece of pointless cynicism: the argument that "God is the biggest abortionist because he allows miscarriages." Well, God also allows people to die in car accidents; must murdering people by running them over with trucks for that reason be permitted? Everyone in fact dies from every conceivable cause, yet murder is still unlawful. This is an irrelevant red herring. It may be a useful theological exercise to ask why God allows evil, or to justify God's ways to men, but it's of no use in law and ethics.

Perhaps what the pro-choicers mean is that a fetus is as *morally irrelevant* as sliced ham in the supermarket sold for $5.99 / lb. – maybe less relevant if the aborted "meat" is burned as biological waste, maybe more if it can be sold for parts. (In the latter case it's not after all a "clump" of cells any more than a car engine is a clump of metal; it has differentiated parts that are valuable on the market precisely because of their super-sophisticated unity.) But they should then come out and say it explicitly and *prove it*. We don't need more ugly philosophy in this already charged debate.

What then is a fetus? How about this: genus: animal; difference: rational; the resulting species: *Homo sapiens*. We can debate whether it is a "person," but it is much more difficult to deny that it is *human*. If it's not human and, as I have shown, is not *merely* a clump of cells, then what is it? Pro-choicers owe it to us to classify this mysterious object scientifically. Now to be rational is to have one's happiness or flourishing consist in various exercises of reason and freedom of the will. To be an animal is to have serious material limitations imposed on those exercises. By placing emphasis on social cooperation among acting humans that yields both material and spiritual prosperity as opposed to pure contemplation, we acknowledge both parts of our nature.

Again, Judith Jarvis Thomson argues as follows:

> We are asked to notice that the development of a human being from conception through birth into childhood is continuous; then it is said that to draw a line, to choose a point in this development and say "before this point the thing is not a person, after this point it is a person" is to make an arbitrary choice, a choice for which in the nature of things no good reason can be given.
>
> It is concluded that the fetus is, or anyway that we had better say it is, a person from the moment of conception. But this conclusion does not follow.
>
> Similar things might be said about the development of an acorn into an oak tree, and it does not follow that acorns are oak trees, or that we had better say they are.[4]

This is a bad analogy. Acorn stands in the same relation to oak tree as child to adult. An acorn indeed "is not" an oak tree, just as a child is not an adult. But both the acorn and the oak are of the same *species*, such as *Quercus ajoensis*, and likewise both the child / fetus and the adult are members of the human race.

Another disanalogy noticed by Grisez is that an acorn is a special inactive or dormant phase in the life of an oak tree. It is a capsule which will not grow but upon the fulfilment of favorable environmental conditions, such as being planted into the ground. But a human fetus is never inactive; it is always developing, from the moment of conception. A fetus should therefore be likened not to an acorn but to a little seedling oak tree that just sprouted.[5]

In Chapter 8, we will consider some theories of *ensoulment* which may posit that a sufficiently early fetus is nonhuman because it does not yet have a rational soul. However, I fully admit that any such theory is speculative and difficult to prove definitively.

But if the fetus is human, then that's his nature, and so he is endowed

with a full set of natural libertarian rights, including the right not to be killed or harmed by another man, or woman, as the case may be.

4.3. A FETUS IS HUMAN BUT NOT A "PERSON"

Person here presumably means "legal person," i.e., one entitled to government protection. More precisely, to aggress against a "person" is naturally unlawful or would make one liable for just punishment by the state.

Now a robber is a person, yet it may be permissible to kill him such as in self-defense; and a dog with an owner is a non-person (at least arguably) yet it is impermissible to kill it insofar as the dog is valued property. Similarly, it may be lawful to kill a fetus even if he is a person, or unlawful to kill him even if he is not (for example by an aggressor against the mother). But establishing personhood does forestall some objections, such as that the mother may kill her own fetus just as the dog owner may kill his own dog.

Personhood exalts a creature, granting it certain rights. So, one would have to specify objective criteria for who is and who is not entitled to the protection of the law. One would have to say, for example: only those who contribute to society are persons; old people, i.e., *geezers*, are useless; therefore, it's permissible to murder them. Or: marijuana smokers or *druggies* have forfeited their depraved lives and do not deserve to live; therefore, they are not persons and may lawfully be shot on sight. Or again: the Japanese, far from being persons, are in fact worthless *gooks*. Nuclear bombs away! Any such dehumanizing definition is bound to be arbitrary and command no common assent. On the natural law theory I am suggesting, all and only human beings are persons with rights. Attempts have been made either to widen personhood or to narrow it in a nonarbitrary manner. This is a subject of some complexity.

4.3.1. NEITHER GODS NOR BEASTS

Consider, for example, angels who, if they exist, are purely intellectual beings who enjoy contemplative life but not active life. Angels are persons in the general sense of having personalities. But do they have rights? No, they do not, because there is no natural foundation for association between humans and angels. A human can neither harm nor benefit an angel, and though angels have the power to affect humans, such as by revealing something to them or on the contrary deceiving them, in their natural state angels would not care about humans at all and would not bother to give us the time of day. We pass like ships in the night. We coexist without cooperating. Hence there is no ethical problem between our kinds; there is no need to ascribe rights to angels. Good angels both love us and are to be loved, of course, but only from divine

grace. Evil angels hate us and seek our destruction, but we cannot attack them, we can only steel ourselves against their attacks; hence no rules of spiritual warfare can be formulated, either; or rather the war is total and without rules at all. In the order of pure nature, we are indifferent to each other.

On the other hand, brute beasts have no rights either, other than in their capacity as some man's property. One must be both rational and animal to generate ethics. For example, Michael Tooley asks: "Suppose that a disease arises that alters the genetic make-up of human beings, so that all future offspring, rather than having the sort of mental life and skills possessed by normal adult human beings today, enjoy a mental life comparable to that of chickens. … would it still be seriously wrong… to kill [them]?"[6] Tooley thinks these chicken-men could be classified as *Homo sapiens* because they would be capable of interbreeding with normal humans. I disagree; they would by nature be animals but not sapient.

If there are intelligent aliens such as from Mars who are capable of social cooperation with humans, then "rational animal" will become a genus rather than a species with *Homo sapiens* and *Martian sapiens* being two species under it. On the other hand, as Rothbard writes, suppose "that the Martians also had the characteristics, the nature, of the legendary vampire, and could only exist by feeding on human blood. In that case, regardless of their intelligence, the Martians would be our deadly enemy and we could not consider that they were entitled to the rights of humanity."[7]

The mere uniqueness and distinctness of our species of course make no moral difference; what matters is the content of our nature: rational mind and will or soul in intimate union with animal base and matter.

4.3.2. No rights for animals

L.W. Sumner (1981) believes that sentience, understood as capacity for feeling pleasure and pain, is the criterion of personhood. Many higher animals are sentient. Do they have moral standing? In the first place, no sane human being seriously pretends to care one whit for any individual wild animal. If one gives any thought to them, it's only to preserve endangered species which possess a sort of possibly important abstract immortality. Wild animals are irrelevant in the scheme of things. The closest creatures that may merit inclusion are pets, but even they have no rights in the order of nature, only in the order of human grace. Pets are chosen as individuals to be companions and uplifted into a kind of humanity. An unsocialized unloved cat will not cuddle, and so on. Even here, the law treats our cats and dogs simply as property and should.

Livestock is even further away from us, but it is capable of a sort of

social cooperation. For example, the right of a cow not to be abused stems from the fact that giving it pain will hurt the quality of its milk; or that whey protein made by well-treated grass-fed cows is best; or that feeding them beer and giving them massages will make their meat delicious; and suchlike. As with all things, animal nature, in order to be commanded, must be obeyed. Man may have a duty not to torture animals for fun or for no good reason, but not for their sake but merely to avoid being brutalized by such actions.

One must prove that if a man wants to kill an animal, he ought not to do so. Man seeks his own ends; he pursues happiness; who is to condemn him for doing what he chooses? We have seen that many animals are of considerable use to man, and that mistreating them is counterproductive and against his own rightly understood interests. It is this natural fact that generates certain limited claims on us by some animals. We ought to respect them for what they are if we want to squeeze the best service out of them. On the other hand, many sentient animals like dangerous beasts of prey or useless mammals that we humans cannot employ for our profit are morally irrelevant and have no such claims.

Animals of course want to live; however, whether they live or die is not for them to determine but for us humans. Animals exist for our sake, and any extension of concern or charity for them is any individual's personal choice. That's not to say there are no rules at all for dealing with animals. It is insane to take pleasure in their suffering, like frying ants with a magnifying glass. Whenever an animal is deliberately killed, there must be some real purpose to it. But let's take the puzzle posed by Robert Nozick[8], which we may cast as something like this. Suppose you have a bat which you want to swing. If you don't swing, you will likely miss a good home run. If you do swing, then a thousand cows will die in some amount of pain. Is it Ok to swing the bat? Suppose that the cows are unowned, so no one's property is hurt. Suppose also that the cows are on a distant planet, so they are not a useful resource that can be homesteaded. Moreover, cows are not endangered, so the species will not be affected. I think under these circumstances, it is permissible to swing the bat.

Humans have duties, at least to each other. If it is to be argued that these duties extend to animals, it must be admitted that humans are morally superior to animals. We are better than wolves because we would protect their "rights," even if wolves entirely neglect our own. In particular, given that animals have no claim on us in our capacity merely as another type of animals, they cannot decide *which* rights they will have. They have no *natural* rights, to be discovered without reference to us humans as right-*givers*.

In other words, there may be an argument to the effect that Smith who homesteaded an object or parcel of land now owns it and has a right to enjoy the item's services. Other people are automatically commanded to respect Smith's claim. But it cannot be argued that a lion's kill belongs to it by natural right, and that humans ought to respect this right and even enforce it in favor of the lion against, say, the hyenas who might want to steal the food. Only humans can meaningfully *own* property including in themselves. If one says, "Bees, too, own their honey, and it is wrong for a man to 'steal' it," then the reply is to demand proof of this proposition. This claim imposes a duty on man that restricts his freedom of action, and freedom is the default position. Of course, no such proof can ever be attempted. On the other hand, if one says, "Man cannot own anything, either; prove that he can," the reply is that property ownership as a legal institution is essential to civilization, the market, increasing standards of living, peace, and human happiness, so the resulting duty to respect property rights is not a burden but precisely a means to both individual freedom and success in the collective striving of man. In Mises' words: "Compliance with the moral rules which the establishment, preservation, and intensification of social cooperation require is not seen as a sacrifice to a mythical entity, but as the recourse to the most efficient methods of action, as a price expended for the attainment of more highly valued returns."[9]

Which rights, if any, are granted to animals, therefore, seems to be entirely up to human choice. Any duty to animals is entirely self-imposed and precisely for that reason, self-disposed, as well. Animals therefore have no natural rights, but they may have positive privileges under some edict of the state. Moreover, rights confer a certain dignity on the right-holder. He obtains a measure of autonomy within which he can act freely. This sphere is "set apart" for him and in this sense is "sacred" or "holy." A man whose rights are known and respected is in a sense revered because of his humanity, that is, solely because of it, and *he knows it*. An animal, however, receives no dignity from any rights conferred upon it by humans because, being stupid, it cannot possibly understand what's going on. It remains a brute, a dumb beast, regardless of any respect that animal rightists force us to show to it. A cow that is being worshipped by a Hindu is entirely oblivious to its "elevated" status. To hark back to the reduction discussed in Section 4.2 which is now reasonable, the cow is "really" "just" a piece of meat, and refusal to eat it is silly fanaticism and superstition.

Mere ability to feel physical pain is not enough to generate moral standing. In humans, rationality adds to the sensitive appetite which shrinks from pain and seeks pleasure also the intellectual appetite which feels joy and

sorrow. These are what matter. The human appetite is thus divided into sensitive and intellectual. The intellectual appetite, also called the will, is the thing that feels emotions. It is precisely rationality, that is, the will united with the intellect and with the body, that generates full-featured human social cooperation and with it, ethics. Tooley suggests that possession of rationality "does not entail the presence of mental states such as desires and emotions."[10] Desires of course are not mental states but spiritual states; they are felt by the heart. And it is impossible for a pure intellect to exist without an intimate connection with the will. There is no reason to think unless thinking is enjoyed either as an end or as a means. Therefore rationality, understood as conscious, purposive action or agency or pursuit of happiness, is crucial for personhood.

If animals have no rights, then it is not sentience that is crucial but intelligence or rationality which is unique to human beings. But not the rationality of an individual but of the species, which is *Homo sapiens* or rational animal. But a fetus belongs to this species and hence is rational from the beginning of his life.

There is an objection to this. It may be that peaches are generally softer than pears, but a given pear may be softer than a given peach. Similarly, humans are rational, while cows are not; but even an adult cow seems more fully endowed than a month-old fetus. Isn't it individual rather than species rationality that we must care about? If Crusoe found a baby on his island, he could not use him for his own profit as he could an adult; must he in addition care for him? An obvious answer is that he does not have to care for him, but he can't kill him either. The baby is still a self-owner and in addition he is not imposing any costs on Crusoe (though costs are subjective). On the other hand, a fetus is usually costly to his mother, so our argument must be different.

It's certainly true that man is a rational animal, but when Aristotle called him that, he had in mind the contemplative life, the life of pure intellect. But ethics belongs not to contemplative but to active life, where a man grapples with the material world and together with his fellows, builds a civilization. Ethics justifies his relations with other men as they go about their lives, hustling and fighting, scratching and biting. We must then define human beings in reference to their active life as creatures capable of mutually beneficial social cooperation with one another. But before a man can be a cooperating adult, he must of necessity pass through the various stages of childhood and fetushood. It would be senseless to grant the right to life to an adult yet withhold this right from a child, when no one can be productive without once having been a helpless babe. Children are indeed our future, and even adults benefit in the longer run when children are protected by the laws.

A child then has a right to life understood as right not to be killed, but no right to life understood as right to be nurtured by a third person. As we'll see, it is not permissible kill a human being before he becomes capable of social cooperation, but it is permissible, at least according to classical libertarianism, to abandon him, under certain conditions, even if he dies as a result.

What matters is not the activity of rationality now but the capacity or power for it. We may identify an *active* power whose exercise is dependent solely on willing the act. Smith can run four miles, if he so decides. A *latent* power in contrast has an external obstacle or impediment to willing. A sleeping or unconscious person has rationality latently or passively. For example, a person whose brain has been damaged but who can recover has the latent power to think provided the only doctor who can fix him up will agree to operate on him. Fear, despair, depression can also suppress a power into its latent form. For example, if Smith believes that he *can't* run four miles, though in fact unbeknownst to him he can, then in a meaningful sense he can't will to run.

Latent powers in merely material objects are called dispositions. An item is fragile in the case that if one were to strike it, it would shatter. Milk powder has a disposition to become milk if water is added to it. A fetus or child has a third kind of power called *potentiality* which can be described in a statement like "if all goes well for him, he will grow up." Potentiality marks living creatures specifically: it connotes a striving to become, an instinctual or willful attempt and flow to improve and flourish and be happier. Actualization of a latent power depends solely on a fortuitous connection of external events. Potentialities add to them an inner drive that is struggling to attain an end. All three of active powers, latent powers, and human potential deserve the respect of the law.

What about a permanently comatose patient? He is as good as dead, since he has neither actual (as a normal adult) nor potential (as a fetus) rationality. But his wishes when he was still rational are to be respected. If he is on life support and other people are paying for it, they have a natural right to cease paying, as no one has a right to be sustained at another's man expense. If the comatose guy has savings and has stipulated perhaps in a living will that he is to be kept alive until the money runs out, then his wishes ought to be honored. When the money does run out, the hospital has no duty to continue providing life support on its own dime and may lawfully pull the plug.

4.3.3. Tooley's defense of infanticide

Michael Tooley (1983), in his defense of abortion and infanticide, focuses on the intellect and personality as two factors that separate men from all

other things, saying that one is a person only when he desires to continue existing as a subject of experiences and other mental states.

He claims that a fetus has no interests, in much the same way as a newspaper has no interest not to be torn up. This is a mistake. A fetus does have an interest which it seeks on his own behalf and for his own sake: to become an adult. "In every living being there works an inexplicable and non-analyzable *Id*," writes Mises. "This *Id* is the impulsion of all impulses, the force that drives man into life and action, the original and ineradicable craving for a fuller and happier existence."[11] This teleological inner drive, a purpose within, can be found even in a fetus – and even in a sperm and egg about to unite.

The intellect serves the will; it represents the will as the seat of happiness and acts for the will's sake. The fetus does not have much of an intellect, but he has an instinct which works adequately and for the time being substitutes for full rationality. That is enough for him to have a well-defined "interest." It follows thus that cows, too, have interests, but interest is merely a necessary condition of having rights, not a sufficient one. Thus, it does not follow from either a cow's or fetus' having interests that it also has rights.

It would of course be grotesque to draw a full equivalence between having interests and having rights: I may have an interest in your sandwich that you are now eating; does it mean I have the right to take your sandwich from you by force? We may define the soul simply as the principle of teleological causation, the subjectivity in every living being that struggles for life and the form of future happiness proper to it. In general, all living things as teleological systems have some interests. The fetus does not have the right to become an adult, this is far too strong, but it may have the weaker right not to be unjustly killed which may enable him to secure his broader interest.

A cat has no right to a university education for two conjoined reasons: (1) a cat has no interest in such education, and (2) a cat cannot be thus educated, and that's in all possible worlds. On the other hand, it is perfectly intelligible to say of a child or indeed fetus: he has the right to a university education (I don't mean *free* education; he has the natural right to contract with someone to educate him). But then for a still stronger reason, he has the libertarian right to life. The cat's nature is incompatible with the good of education, but even a cat's nature is compatible with the good of life; a fortiori, so is the human nature. A fetus demonstrates or reveals in action his interest or preference to live and continue in being by fighting the forces of death and decay and by stubbornly developing according to his own plan and instinct.

Tooley claims that the meaning of "John wants an apple" is that (a) "John wants it to be the case that he is eating an apple in the next few minutes."

And therefore in order to desire anything, one would have to intellectually apprehend a proposition like (a). But a fetus does not believe the proposition "I want to live." Therefore, it has no desires. This is implausible. In wanting an apple, I don't want any proposition to be true; I want a future pleasure. It is perfectly intelligible to say that a cat wants its food and hence to experience a pleasure without implying that cats reason consciously, or even to say that a fetus wants to live. In addition, Tooley seems to understand "interest" as something that promotes a creature's long-term well-being, and "desire" as an immediate urge. Even if a fetus lacks definite conscious desires, it has interests, such as to grow up into fully actualized adult, e.g., it will *profit* him to do so. A temporarily unconscious adult has interests because he will have desires in the future. But the fetus is in the exact same situation. Tooley includes the former in his list of persons; it is arbitrary to exclude the latter. His refutation of the idea that a fetus has rights on the ground that he has no interests therefore fails.

The second part of Tooley's argument is that the fetus or infant is not the same person as an adult into which he will grow; but presumably not because the baby has a *different* personality than the adult, but because he has *no* personality at all. There is therefore no *subject* to continue desiring to persevere, even if we grant that it has interests. It is true that an adult human does not fully preexist in the embryo or fetus earlier in his life: we cannot look at an embryo and predict who he will become or his destiny in adulthood. There are environmental including random influences and a person's own choices that will play a crucial role. But it's a stretch to conclude from these that an embryo is not the same person as the adult. For if the environment and choices destroy continuity, then what unites the personalities of a 40-year-old adult now and him as a child 30 years ago? Him now and him only 1 year earlier? The fetus then is not a person who has a right to life, Tooley is saying, because he has *no* personality. It cannot be described as gregarious or sarcastic or saintly. Regarding this, a fetus is (1) separate, (2) partially defined, and (3) distinct.

"Separate" means numerically or quantitatively different from the mother. "Distinct" means qualitatively different. There are two objects, two human beings, mother and child, as we established in Section 4.1. But a fetus would be separate even if he were not distinct from all other humans, as in the case of twins or cloning. It is our deep appreciation of our uniqueness that makes us want to make a possible exception regarding abortion for pregnancies due to incest. That humans are distinct makes us more valuable to *God*. But even if humans were similar in personality, one's life would still be valuable to *oneself*, and everyone would still have a libertarian right to life.

If an embryo were completely a blank slate that acquired individuality only by receiving an imprint from the outside, then it would be separate but neither defined in itself nor distinct from other embryos. Such a being would be perfectly replaceable. Now there is no such thing as pure potentiality which has zero definition and which can become absolutely anything; it's an abstraction called by medieval theologians "prime matter." Prime matter is just barely away from nonexistence; it's almost, though not completely, nothing. A case for the lawfulness of abortion would be stronger if fetuses were thus completely unformed. But of course they are not unformed. A fetus's "nature" or inborn inherited traits are already fixed, in fact they are fixed from conception. A baby's personality is at least $^1/_3$-actual, the other two parts being nurture and individual agency.

There are two aspects of personality: the self and the character. Character is built, but self is discovered, which means that there is a self to be discovered from the very beginning. Inherited qualities affect character, as well: people differ as to their nurseries of virtues: some are predisposed to have more courage, others more humility, and so on. A man's personality undergoes continuous development throughout his life, but the foundation for it is present from the beginning. Further, as noted by Kaczor (2015), the self is not a purely spiritual but also fully embodied phenomenon. But the child's body exists; hence so does his self. Thus, it's not the case that the self literally does not exist until about two years of age; rather, it exists but is not yet *conscious of itself*. A newborn lives and has a personality even if he does not yet *know* who he is; his life is not yet "examined." An analogy is that cats are born blind, but they still have eyes; the human soul is born blind to itself, but its "third eye" is healthy.

Finally, if a child were not separate, if it really were a part of the mother's body budding off it in asexual reproduction, then the case for the lawfulness of abortion would be strengthened even more.

These three properties, separateness, actuality or definition, and distinctness, contribute to each unborn child's specialness. It's thus true that both personality and intelligence are individual achievements. But a fetus does not completely lack either. We can admit that a fetus or child is not a 100% self-owner, but that is not because he lacks a self but because he is not fully competent to dispose of himself well. In other words, a child continues to *own* himself even if he is unable to *control* himself profitably and requires a guardian. But to deny rights to people who temporarily lack conscious self-control is to go way too far. It is absurd to despise a flower simply on the ground that it has not yet fully blossomed. Abortion and infanticide for the reasons Tooley

proposes are precisely that: a show of contempt for man and his nature.

Tooley asks whether a young child could have the right to an estate, "even though he may not be conceptually capable of wanting the estate." His answer is no, but "he will come to have such a right when he is mature, and… in the meantime no one else has a right to the estate."[12] But in that case the estate is literally unowned and abandoned and for that reason reverts to the state of nature where it can be freely homesteaded by anyone. If it is thus appropriated by some Smith, then it is Smith who will continue to own it even when the child grows up. The child will have no recourse against Smith. If this implausible consequence follows from Tooley's theory, then that theory must be rejected. But if the child can own the estate, why can't he own himself?

4.3.4. FUTURE LIKE OURS

We can follow Don Marquis (1989) in considering a sufficient (though perhaps not necessary) condition for personhood to be having a future *like ours* (FLO). A fetus certainly qualifies and hence is a person. Marquis has in mind the valuable experiences of a reasonably normal life, whatever it is that makes life on the whole worth living. Of course, we rarely know which future life will and which will not have been worth living, but then we must err on the side of caution. Marquis assumes, surely correctly, that it is prima facie wrong to kill *adult* humans. He expresses no opinion as to whether or not it is wrong to kill nonhuman animals, say, rabbits. But the nature of the harm inflicted in a homicide is deprivation of a valuable humanlike future, and the harm suffered is the same for both fetus, child, and adult. He concludes that it is also wrong to kill human *fetuses* (but not therefore rabbit fetuses).[a]

Some kind of harm inflicted on the victim is often a necessary condition for an injustice (though what of, say, attempted murder?), and killing accompanied by deprivation of a future like ours qualifies as harm. But under ordinary circumstances as regards an adult it is also a sufficient condition. It may therefore be sufficient when it comes to abortion. Moreover, the harm we are talking about here is very serious, in fact one of the most serious kinds of harm that can befall a man. Therefore, *if* abortion is wrong, then it is *seriously* wrong, perhaps indeed on par with murder. An objection would be that an abortion, though harming the fetus in this way (by depriving him of a bright future), does not harm him *unjustly*, just as an adult can be killed justly, for example in self-defense. Killing the fetus then, while wrong *prima facie*, would

[a] R.M. Hare (1975) floats a similar idea, talking about a "life like ours" and being glad to have been born.

not necessarily be wrong *all things considered*, and we'll deal with that possibility later.

It is true, as Tooley might have argued, that the fetus has never consciously either valued life or dreaded death. But the conclusion that death is not an evil for him does not follow. Marquis' argument shows why.

We may point to a disanalogy: it is true that *I* anticipate and create my own future. My death would cut short my own projects, hopes, and dreams, something that admittedly would not happen to an aborted fetus. But even I am powerless to foresee what will happen ten years from now; my hopes and dreams do not extend that far. In this regard, an adult and a fetus are in the exact same spot: the future each loses upon being killed is unknown to them but valuable nonetheless. An adult's future will have *some* projects that will *continue*, while *all* the projects in a fetus' future will *newly arise*, but I see no moral difference here. It's true that a fetus does not consciously "look forward" to his future, but then neither does an adult when he is, say, asleep. Yet it would still be wrong to kill the latter; hence it seems wrong to kill the former. It will not do to say that the fetus "will not miss it." If souls go on into the afterlife, then the fetus' soul will surely miss the opportunities for spiritual advancement in this world. If, on the other hand, souls corrupt into nothingness, then the argument proves too much: *adults* who are killed will also not miss it since they will cease to exist, and so now apparently it's Ok to kill adults, too.

An innocent man's past does not count for his moral status, and his present, whether he is a fetus, child, or adult, cannot be taken away from him. Only the future seems to matter in this sense.

The valuable future in question need not be long even if longer future is more valuable than shorter future all things being equal; even a terminally ill person who has only a few days to live may appreciate and look forward to the remainder of his life. An alternative interpretation of Marquis would be to say that the fetus need not be a person in the fullest sense; it is sufficient that he has a future like ours *as* a person, call it p-future. ("P-future" is not a moral term but only a descriptive one.) One starts out with a rudimentary personality defined by his genes and the nature of the infused soul which normally develops gradually into adulthood. This means that one usually keeps his personal identity throughout his life. It is wrong unjustly to deprive an *actual* person of his valuable p-future; for the same reason it is wrong to deprive a *potential* person of his own p-future. But I prefer simply to include into the essence of "person" any human being with non-disastrous prospects in life.

Imagine a group of soldiers retreating from a battle. They realize that they have to move faster in order to escape the enemy. To do so, they have to

let go of the wounded. If they do, the enemy will shortly overtake the wounded and execute them, and in the meantime they will suffer greatly. In this situation it may be permissible for the soldiers themselves to kill the wounded to spare them the pain and dishonor. This is because one sufficient reason to abstain from killing them – they have a future like ours – is absent. Their short future is entirely bleak and has no value. Again, let the medics attending to a wounded soldier think that he cannot survive; or let the rules of triage determine that he be ignored for the sake of others; it may in such situations be permissible to euthanize him. In these cases of mercy killings, he who is killed does not cease to be a person, so FLO is not a necessary condition for personhood.

Perhaps killing destroys less your valuable future than *you*, the person whose future it will be. But then human life consists in living like a human and indeed having valuable experiences, and the former is useless without the latter.

Marquis' view seems to have the implication that because a fetus should be expected to have a longer future like ours than an adult, killing the fetus is to that extent worse. It thus conflicts with the intuition that we tend to deplore the death of an adult as a tragedy, but the death of a fetus or even a small child merely as a waste because not much has yet been invested into him, both by others and by himself, and because he is still to a great extent an enigma. Perhaps this is due simply to the Lecky's (and Sumner's) point that an adult is more irreplaceable to *other people* than a child, and child, more than a fetus.[13] Yet the *primary* victim, the creature that is killed, is the same in all cases. Another reason is that an adult loses fewer *future* goods but more *present* goods, such as his identity, powers, virtues, happiness, wealth accumulated as a result of his *past* development and actions. Calvin of *Calvin and Hobbes* tries to sell his dad a picture by arguing that it is "the result of six years' unrelenting toil."[14] If Hobbes were to eat Calvin, all that struggle would be frustrated and undone. There is still a symmetry here, however, because the present goods of an adult are exactly the future goods of the fetus. The total loss is comparable.[b] Ronald Dworkin (1993) believes that an argument like Marquis' is too simplistic and fails to explain the presumably reasonable common belief that late abortions are worse that early abortions and that the death of a 10-year-old is worse than the death of an infant. He chalks it up to the obscure idea that "conservatives" trust in God more than in man and "liberals," vice versa. On the one pan of the scale we have the life of the fetus which is a *divine* gift though still untou-

[b] Kaczor (2016), though he deems abortion to be a crime, adduces many reasons why it is a lesser crime, and hence possibly deserves lesser punishment, than killing an adult.

ched by human effort; on the other pan we have the "frustration" of the mother's life which is not threatened but which is the result of *human* art. Supposedly these deep "ideological" differences explain how people weigh lives in such balance. It looks like Dworkin imputes to people a sort of utilitarianism within the domain of what he calls "the sacred," except instead of wanting to minimize overall pain, he thinks that people, consciously or not, try to minimize the overall level of "desecration." Whatever there is to this convoluted analysis, our problem is not a matter of personal feelings but of logic of whether abortion is a crime. And here I think Marquis' point is compelling.

Perry Hendricks (2019) proposes what can be taken as a twist on Marquis that grants for the sake of argument that a fetus is not a person. He argues that it is wrong for the mother to drink so much alcohol during pregnancy as to cause fetal alcohol syndrome (FAS) to her child which results in serious impairment in his future life. But abortion is worse than that because it kills rather than merely injures, and death is worse than disability. Therefore, if it is wrong to impair the fetus with FAS, a fortiori, it is wrong to kill him. William Simkulet replies that "risking fetal impairment is wrong because it risks harm to a future person, but if we assume the fetus is not a person, abortion doesn't harm anyone, it merely prevents them from existing." This is true as far as it goes, therefore Hendricks' argument becomes more powerful when combined with Marquis'. For the fetus has prospects, a future life of a certain normal quality and quantity. If it is wrong to impair the *quality* of his future life by causing him to suffer from FAS, it seems at least as wrong to impair its *quantity* by killing him (just as it would be wrong to inject the fetus with a drug that gives him progeria, a rapid aging disease, that kills him at the age of 13).

The difference in status between an unborn child and an adult is not that the former is not a person, but that he is not a citizen. He is not, as common law puts it, under the king's peace. Alternatively, he is not with the jurisdiction of the United States or another country. Instead, he is under the protection of his family only. Does the family have absolute authority to decide his fate? We could, if we wanted to, reinstate this power of the Roman *pater familias*. But that would not solve the *philosophical* problem, as it seems that noncitizens, being human beings and persons, fully retain their natural rights.

You might wonder how my natural-law approach fits with this discussion of personhood. If a woman *wants* to abort her baby, why on earth can't she? If an abortion will make her happier, why not go through with it? Who will be so bold as to yell at her: "You're evil!" Robison Crusoe would not want to kill, enslave, or tax Friday because Friday is most useful to him while remaining a free man. But if a fetus is not useful to anyone, why not get rid of

it? I have argued that a fetus deserves some protection of the law in his capacity as an inescapable stage in becoming a productive adult, and lest social cooperation will come to an end along with the human race. It is possible to show that their mutual usefulness, arising especially out of division of labor, causes men to be *objective goods* for each other, i.e., goods that *ought to be loved*, or at least not hated. This is unlike subjective goods, any of which one can spurn. We can define "person" as an absolute objective good. Insofar as infliction of harm, including on a fetus, is a sign of hatred, it is forbidden by natural morality. One can then abstain from harming persons from self-interest, moral duty, or charity.

On the *Rothbardian* natural-law theory, the fetus would have the libertarian right to life simply by virtue of being a self-owner, though Rothbard himself wavers on this: it seems to him that the fetus "acquires the status of human upon the act of birth."[15] This means that violence inflicted on him, including the sort that results in death, is prima facie an act of aggression, violates his property rights (in himself), and hence is unjust.

This theory seems to have the counterintuitive implication that it is not wrong to kill suicidal people, since if such a person asks you to kill him, he by that fact gives you permission to destroy his body which is his property, and, armed with this permission, you are within your rights to act on it. A reply might be to admit that people are not always rational and that it can be morally wrong and even unlawful to fulfill another man's irrational desires.

4.4. A FETUS MAY HAVE RIGHTS, BUT SOMETIMES IT IS "NATURAL" TO WANT HIM DEAD

Most pro-choicers unfortunately reason very simply: unborn children (and newborns) die quietly; their families are happy to see them die; they have no names; and are forgotten. In other words, abortion is lawful because when you are being aborted, in the womb or even outside, no one can hear you scream.

They think: A woman might not want to ruin her future career or marriage prospects by having a child and caring for him for the next 18 years. She might not want to live with the guilty conscience that she had a baby and gave him up for adoption. (She'd still want to sleep around, of course. No trivial irritating obstacle like pregnancy shall ever come between a woman and her sacred right to prostitute herself.) Far easier and convenient is to kill him when she pleases. To imitate Stalin, when there is an unborn child, there is a problem; when there is no unborn child, there is no problem. And aren't convenience and pleasure what our civilization is all about?

This is really the full extent of the philosophical foundation for the mainstream pro-choice doctrine. Block makes a wonderful point regarding this matter. He quotes Steven Ross:

> What [women] want is not to be saved from the "inconvenience of pregnancy" or "the task of raising a certain (existing) child"; what they want is *not to be parents*, that is, they do not want there to *be* a child they fail or succeed in raising. …
>
> Are these people monsters? Hardly. Certainly anyone who wants the violinist they unplug themselves from, or a full-grown child they abandon, dead *is* incomprehensibly malicious.
>
> But it is precisely because our relationship to the fetus is not like either of these that the desire that it be dead makes sense.[16]

This preference, Ross proposes, is "intelligible to all." I agree that it is; people generally don't want just to make babies as though they were a factory mass-producing metal hinges or whatever, and then shove them into institutions or foster families; they feel that *if* they are to have a baby, then they need to develop a proper personal loving relationship with him. Of course, giving a baby up for adoption is hardly a virtuous or normal act (though it beats killing him). Block, however, penetrates to the heart of the problem:

> Well, it may be intelligible to most of us, at least to all those who have ever wished someone else dead.
>
> But mere intelligibility is hardly sufficient to establish a just legal code. If it were, we would have to repeal the law against murder.
>
> Overall provides a good antidote to the excesses of Ross. She maintains, "This kind of feeling does not justify killing the embryo/fetus."[17]

The fact that I can *understand* that Elmer wanted his grandfather's inheritance and so desired that he died ASAP does not mean that Elmer may legally *murder* his grandfather. I'd even understand that Elmer wanted not to be a grandson; he did not want there to be a grandfather to whom he'd be related. Is Elmer a monster? Assuredly, he is. (I am referring to the curious 1889 New York case *Riggs v. Palmer*[18]). Thus, when a woman is pregnant, she's *already* a parent, just as Elmer was already a grandson. It is therefore impossible for her to bring about the state of affairs "having never been a parent." She can *stop being* a parent by killing her child, but it may be too late for that. Thomson reasons similarly:

> A woman may be utterly devastated by the thought of a child,

> a bit of herself, put out for adoption and never seen or heard of again. She may therefore want not merely that the child be detached from her, but more, that it die. Some opponents of abortion are inclined to regard this as beneath contempt – thereby showing insensitivity to what is surely a powerful source of despair. All the same, I agree that the desire for the child's death is not one which anybody may gratify, should it turn out to be possible to detach the child alive.[19]

What then is the difference between not wanting to be a parent of a fetus vs. of a 10-year-old child, such that desiring the death of the former is legitimate (or at least "intelligible") and of the latter is not? It may be that the fetus simply is not valued by the woman and is considered irrelevant and disposable. But it's unclear how this impinges on her *right* to take his life.

Abortion for eugenic reasons, such as due to fetal deformity, is also understandable. The family wants a healthy child. Why should they be stuck with caring for a person with Down syndrome for the rest of their lives? They want their kid to grow big and smart and to make them proud. They want grandchildren. A defective child will not work for them. In a real way, before birth the child is a consumer good, becoming a beloved member of the family only after. Consider how people adopt babies from foreign countries. They treat this task as a business endeavor: they pay quite a bit of money, inspect the "merchandise" for "defects," and so on. For these people, the child is, at least temporarily, a consumer item to be bought and sold exactly like a TV set.

The parents bear all the costs of raising the child. Why can't they at least pick who to raise? Why, for example, must they be forced to expend valuable resources on rearing a pathetic imbecile, an embarrassment to the family? And who commanded us to fill the world with freaks and retards? "Sanctity of life" sounds great in the abstract, but it's impractical in real life. I concede all this. On the other hand, absence of the bond of charity is irrelevant to the problem. Natural law does not bid one to love his fellow man, only not hate him and abstain from violating his rights. Eugenic abortion is something like the principle "I'm Ok / you're not Ok," with the added proviso that those who are not Ok are to be destroyed. "The earth," the eugenicist says, "is to be cleansed from the 'impure' who fortunately do not include me."

Stella Browne spoke out that legal abortions "would save the racked nerves of thousands of sensitive women and men, and prevent the shipwreck of much mutual joy and affection."[20] But racked nerves seem like an insufficient reason for homicide, if abortion is indeed that, *especially* for sensitive people, and as for joy and affection, an abortion is very frequently precisely the reason for breakups. The woman considers the abortion to be a betrayal, and

the man feels contempt for his unscrupulous partner.

Joel Feinberg argues: a woman "has two choices, both of which are intolerable to her. She can carry the child to term and keep it, thus incurring the very consequences that make her unwilling to remain pregnant, or she can nourish the fetus to full size, go into labor, give birth to her baby, and then have it rudely wrenched away, never to be seen by her again. Let moralistic males imagine what an emotional jolt that must be!"[21] But no one promised any woman a life free of emotional jolts. Again, I understand that a woman might not want to develop the maternal feelings which will make giving up the child for adoption difficult. But that kind of suffering is again no justification for murder.

Rosemarie Long attributes the following argument to Nel Noddings: "The availability of early abortion allows pregnant women to break with their fetuses before they can make significant claims on them. Choosing an abortion means choosing to end a relationship before it has fully begun."[22] But in aborting, a woman does not end a "relationship"; she ends a life. Can she likewise end a budding relationship with her boyfriend by killing the boyfriend?

It's true that there can be substantial psychological costs to abandoning one's child, such as lifelong guilt for being a bad parent; and insofar as many women choose to keep and raise children they did not want, perhaps the costs of motherhood and abandonment are sometimes close to each other. If faced with a choice of being a bad parent and not being a parent at all, a lot of people would choose the latter. Still, everyone undoubtedly has the right "not to be a parent" if by that we mean the right not to reproduce; whether, however, one has the right to cease being a parent by killing the fetus is precisely at issue.

4.5. A FETUS, AS ONLY A POTENTIAL HUMAN, IS NOT *FULLY* A PERSON

There is some truth to the idea that a fetus or even child is a potential person only. But there are obviously multiple criteria that have the power to separate potential from actual persons. There are, after all, all kinds of natural and man-made rites of passage in life that mark important events. (In a primitive tribe, one might "become a man" only upon slaying a lion. My aunt once opined that a person comes into his own only when his parents die. Catholics have the sacrament of confirmation administered after reaching the age of reason. Etc.)

For our purposes, we'll use three such criteria. I already mentioned ensoulment but will postpone my own thoughts on this topic until Chapter 8.

Second is viability or ability of the fetus to survive with proper care outside the womb. This must not be confused with mere dependency since a

child is dependent on his parents and even as an adult on his fellow men within the economy. Heather Gert points out that "given the way we have all been spoiled by life in modern society, most of us may not be viable!"[23] (The difference of course is that a child depends on pure charity, whereas an adult can survive by appealing to other people's self-interest in the market economy.) Viability is physical, dependency is economic. But viability is important for evictionism.

Finally, there is the strikingly clever and refreshing Rothbardian definition that a child becomes an adult essentially when he "runs away from home":

> But when are we to say that this parental trustee jurisdiction over children shall come to an end? Surely any particular age (21, 18, or whatever) can only be completely arbitrary. The clue to the solution of this thorny question lies in the parental property rights in their home.
>
> For the child has his *full* rights of self-ownership *when he demonstrates that he has them in nature* – in short, when he leaves or "runs away" from home.
>
> Regardless of his age, we must grant to every child the absolute right to run away and to find new foster parents who will voluntarily adopt him, or to try to exist on his own. Parents may try to persuade the runaway child to return, but it is totally impermissible enslavement and an aggression upon his right of self-ownership for them to use force to compel him to return. The absolute right to run away is the child's ultimate expression of his right of self-ownership, regardless of age.[24]

For Rothbard, the key to the parents' *custody over the child* is their *ownership over their house*. As long as the child chooses to remain with them, he is subject to the rules of the house and hence to his parents' authority. If the child wants to be taken care of, he must honor the parents' commands and wishes, and that's the implicit contract undergirding all parent-child relations. According to natural law, ultimately the parents exact obedience under threat of eviction; the child asserts his rights under threat of running away.

Be sure to understand this rightly: such property rights relations scarcely exhaust the whole of parent-child interactions but constitute the outer legal foundations for them. Mises puts it this way:

> Beyond the sphere of private property and the market lies the sphere of compulsion and coercion; here are the dams which organized

> society has built for the protection of private property and the market against violence, malice, and fraud.
>
> This is the realm of constraint as distinguished from the realm of freedom. Here are rules discriminating between what is legal and what is illegal, what is permitted and what is prohibited.
>
> And here is a grim machine of arms, prisons, and gallows and the men operating it, ready to crush those who dare to disobey.[25]

Both disowning or evicting a child by the parents and the child's actually running away at an early age are the absolute last resorts when the familial relationship has unfortunately broken down completely. Yet here they are, nonetheless.

Yet whether one is an "actual" or "potential" human according to some criterion, he is human *essentially* and hence enjoys the full complement of natural rights. Therefore, a fetus is less a potential person than a person with potential.

Regarding potentiality, it is important on the one hand to distinguish it from possibility and on the other to link it with living things.

An ovum and sperm cell make it possible for a child to be created. Thus, before fertilization occurs, there is only a possibility of a human life: it does not actually exist, but it's possible that it will come to be, and it's possible that it will not come to be. A fetus, on the contrary, is not a nonexistent though possible human being, but an already existing and at the very least a potential one. He is potential because he has a purpose within to develop, on his own inner drive, into a fully grown adult. A collection of car parts is a possible but not potential car because mere matter has no potential to grow and self-assemble on its own accord. The distinction between possibility and potentiality is, for example, why contraception is fundamentally different from abortion: the former precludes a possibility and is in this sense innocuous; the latter destroys a potentiality and is much more serious. There is an actual victim here.

Take an acorn. It is possible that you plant it, and it is possible that you fail to plant it. Regardless of what you do, the acorn has within itself the potential to become a mighty full-fledged oak tree.

There is a possible world in which a fetus is aborted, and a possible world in which he lives; in both worlds, however, the fetus, even in an early form, has the potential to become a human adult.

A fetus therefore is not a set of blueprints because blueprints are only a possible house, and a fetus is a potential adult. Possibilities are abstract and ghostly and much less relevant to ethics than potentialities. Thus, the situation of a woman who does not have an abortion differs from the situation of one

who does and then has another child. In the first, we have one child. In the second, we have one child plus a possible homicide.

Suppose we argue: any pair of idiots can create a child in about five minutes; if one is aborted, another can be made with trivial effort. But by the same logic, it's Ok for Smith to murder Jones because there's plenty more where Jones came from. 8 billion people minus one is still 8 billion, so murder away! This is hardly satisfactory. At the time of abortion, the replacement child is a mere possibility; the child being aborted is real and at least a potentiality.[c]

Suppose as per Tooley's example there existed a chemical that, if injected into a kitten, would cause it to develop into a cat with fully human psychology who would then be able to think, use language, and so on. Call such a creature *Felis sapiens* or simply Catman. Before a kitten is injected with the chemical, its Catman future is only a possibility, therefore there is no objection to the permissibility of killing it. After it is injected, the kitten as *Felis catus* corrupts (i.e., loses its essence), and a new young Catman is generated (i.e., gains one). This one is a potential rational animal and would have legal protections, (1) assuming it is not a vampire-like natural enemy of humans and (2) subject to libertarian qualifications, against infanticide.

In Section 4.3.4 I mentioned Don Marquis' argument that killing a fetus unjustly deprives him of a valuable future, a future like ours, an occurrence no different from killing an adult. It may be objected that this view of the harm that befalls the fetus also condemns contraception. But that is not so because the individual ovum and sperm *have* no future; they corrupt upon joining, and an entirely new being, indeed a *human* being, is generated. *Before* they unite, the new creature does not exist and therefore cannot be killed, including unjustly. *After* they unite, the cellular materials disappear naturally.

Smith was possibly president as a political candidate, but potentially president as president-elect who has been elected but not yet taken office. There is a further difference between teleological causation and the condition of Smith. We are dealing with a process of spiritual striving actuated by self-love, achieving an end, whether rationally or in this case instinctively. There is a desire to be satisfied in the future, an end to be attained, and the fetus is using means such as his environment and the mother to get there. In the president-elect's case, mere passage of time instantly converts him to president independent of anyone's will. But the fetus is perpetually exerting itself in its pursuit

[c] As an illustration, 2 Sam 11-12 relates that King David had Bathsheba's husband Uriah killed and then took her as a wife and had a child with her. Was the new child a sufficient replacement for Uriah so that nothing untoward had occurred? Not in the opinion of Nathan who accused David of murder and prophesied that this child would die as part of the Lord's punishment.

of happiness. The willful spark within that is restless and dissatisfied yet is seeking fulfillment is what generates the phenomenon of potentiality.

Potentialities are about an unrolling, at the same time orderly and creative, of the future from the present. The future depends on and is constricted by the present; when the future arrives, it becomes what *is*. Possibilities are entirely unconnected with the present, as Middle Earth in Tolkien's *Lord of the Rings* is a possible world for which imagination can run wild.

4.6. Abortion is a grave sin; how can it possibly be lawful?

We may plausibly suppose that many or even all abortions are morally vicious. But political philosophy which is our subject is a subset of morality, dealing with the proper scope of violence in life. Not all vices are crimes; not all sins are to be punished by the state. Gluttony is a sin; but gluttons are not threatened with prison terms (except in New York City).

Further, abortion may be an especially great sin in Christian understanding. But whether abortion ought to be *criminalized by the state* is an issue of secular political philosophy and perhaps economic calculation of costs and benefits of particular laws, areas in which Christians have no inherently greater authority than non-Christians. The Christians' unique divine *grace* confers upon them no special expertise in any *natural* science.

Nor should their rejection of sin cloud their judgment in regard to what should be considered to be violent crimes to be punished by the authorities and how. Unjust or unfitting *government* violence is itself a grievous sin.

Consider the following argument by Peter Kreeft:

> *Socrates*: The statement of mine that seemed offensive to you was that women already have what you call reproductive freedom unless they are raped.
>
> They can freely choose among five alternatives: chastity, contraception, abortion, adoption, or motherhood. All I say is that the third alternative, abortion, is evil, and that one of the other four is always available and always preferable.
>
> *Syke*: Always preferable? But it may involve great suffering. Why is it always preferable?
>
> *Socrates*: Because it is always preferable to suffer evil than to commit it.[26]

But this completely misses the point. It may be true that it is better for a woman to suffer being a mother than to abort. But in this discussion, we are dealing not with the *mother's* choice but with the *state's* or the governing autho-

rities'.

The question is not, "Is abortion a sin?" which I with some qualifications agree it is; it is rather, "Ought the sin of abortion to be criminalized? Is it a violent crime, an injustice that deserves violent retribution?" For an anti-abortion law, in being enforced, precisely inflicts suffering. It should be asked instead, "Is it *always* worse for *us* to suffer sinners than, by empowering the state to punish offenders with fines and prison terms, to make sinners suffer? Who exactly do we condemn and to what extent?" In other words, is it always better to punish one for a sin than to forgive the sin; or less radically, let it go; or even less so, at least not involve the government in it? And *that* question is far from obvious.

The ultimate ends of all law, natural, civil, divine, are, passively, (1) to increase population and (2) to minimize hatred and maximize charity, insofar as the Father's great project is to make children for Himself who are like His Son. The law serves this purpose by implementing justice which itself is a framework for safeguarding *harmony* and *progress* among men. Unfortunately, the mother-fetus relation can be hard to harmonize. It is clear that unjust violence is the principal charity-destroyer and is the main focus of concern for the law. But whether abortion is that still remains to be seen.

NOTES

[1] Kreeft 1983: 45-7.
[2] See Kaczor 2015: 75-6 for additional points.
[3] Ps 139:14.
[4] Thomson 1971: 47.
[55] Grisez 1970: 17.
[6] Tooley 1983: 66.
[7] *EL*: 156.
[8] Nozick 1974: 36.
[9] *HA*: 883.
[10] Tooley 1983: 137.
[11] *HA*: 882.
[12] Tooley 1972: 49n18.
[13] See Sumner 1981: 208.
[14] Watterson, Bill. "Calvin and Hobbes." Comic strip. April 11, 1995.
[15] Sadowsky 1978: 847.
[16] Ross 1982: 238.
[17] Block 2005: 43.
[18] 115 N.Y. 506 (1889).
[19] Thomson 1971: 66.
[20] Quoted in Grisez 1970: 217.
[21] Feinberg 1986: 279.
[22] Long, Rosemarie 1993: 118.

[23] Gert, Heather. "Viability" in Dwyer 1997: 119.
[24] *EL*: 103.
[25] *HA*: 725.
[26] Kreeft 1983: 140.

5. Core Argument

5.1. Natural vs. positive rights

Let us begin by distinguishing between the basic *natural* and the more rigorous *Christian* morality. Natural morality does not impose any positive obligations. To a person in the state of grace, Christianity does – by justice – impose positive obligations, as is obvious from considering the 14 traditional Catholic works of mercy, such as feeding the hungry and instructing the ignorant. In this Christian marketplace "the prospects of grace and heavenly glory are sold in exchange for good works."[1] Where natural morality commands, "You shall not kill," Christian morality says, "You shall give life."

The aim of Christian justice is to foster charity in one's heart; even if charity can only be increased by an infusion of divine grace, performing works of mercy (1) clears away any obstacles in the soul to grace and (2) fulfills the potential that previously given grace has increased in a man. The aim of natural morality, on the other hand, is merely to eliminate violent hatred. You *do not* kill or steal or harm your fellow man. Ideally, you remain disinterested and gladly participate in mutually beneficial social cooperation with other members of society. Charity is not required, but malice is forbidden.

Natural morality then is a sturdy if austere foundation for the beautiful castle of Christian morality, as grace requires and perfects nature. It is impossible to build love on nature corrupted by hatred; only on healthy "natural sentiment" of general benevolence in Hume's words or on "nurseries of virtue" as per St. Thomas.[a] A good start might be, as Richard Weaver puts it, to "separate man out from other beings and regard his destiny as something no member of humankind should be indifferent to." Here we are interested in merely natural not Christian rights and duties simply because human nature is shared by all of us, while grace is not, and I'm not waxing theological.

Self-ownership precludes natural welfare rights and the duty to work for another for free. Such duties would seriously disrupt human harmony. The master would benefit from the servant's work, but the servant may well wish for the master's demise so that he may be freed from his burden. All men are brothers in part because social cooperation under division of labor makes everyone better off, but here the servant is led to hate the master. The libertarian

[a] "… without grace man cannot merit everlasting life; yet he can perform works conducing to a good which is natural to man, as 'to toil in the fields, to drink, to eat, or to have friends,' and the like, as Augustine says…" (*ST*: II-I, 109, 5).

rights are equal and universal; the master's rank is superior to that of the servant. Libertarianism is therefore stable politically; here the servant has an incentive to try to overthrow the master and take his place.

Smith's and Jones' natural rights are harmonious with each other, but welfare rights are not. Smith's alleged positive right to loot Jones conflicts not only with Jones' negative right to be free from unjust violence but, assuming some sort of universality, also with Jones positive right to loot Smith. This is because predators require prey, but not vice versa. If both Smith and Jones are predators, they both starve, there being no one to steal from. In addition, Smith's positive right to loot Jones depends on what Jones has produced at this particular time and place. If Jones has caught 5 fishes, Smith has the right to 3 of them. If Jones has built a power plant, Smith has the right to use it to power his house for free. These are not universal human rights, but particular beastly privileges.

Defects of the body may prevent one from ever fully cooperating. But those are accidental. They may strike before birth as much as after birth. For one, a society in which "useless eaters" are euthanized would be too risky to live in because anyone can suffer a debilitating accident. Your rights would depend on happenstances, on fortune in your own life, and that is absurd. Strange questions like exactly how many hours per week you must work to be considered productive and enjoy a right not to be murdered would arise. Negative human rights, however, do not entail any sort of welfare state. No one can punish you for "evading" voluntary donations to the Church. Killing is to be proscribed, but a disabled person should find volunteers who will support him of their own free will. Only if not a single individual or organization in society is willing to take care of such a person, which is implausible, will that person die, but that is not contrary to natural law. No one has a natural right to live parasitically at another's expense. The disabled persons thus, on libertarianism, are no imposition on anyone, and there is no natural reason to indulge in murder.

So-called positive rights or welfare rights or rights to subsist at other people's expense against their will are properly not rights at all but political powers to suck the blood or lifeforce out of innocent people coercively.

Alison Jaggar argues that the right to life means the right to "a full human life and to whatever means are necessary to achieve this"; it includes the right to "nutritious food, breathable air, warm human companionship, and so on." In a remarkable non sequitur, she then claims that since the state does not protect this "right," and the mother does (does she?), the state is not allowed to punish abortions.[2] This implies in the first place that in any relation

in which Smith is dependent on Jones, Jones has the right to kill Smith. A 10-year-old kid can then be legitimately killed by his parents; the state can liquidate old people to whom it doles out taxpayer money; and so on. In the second place, it follows that since under capitalism the state does not subsidize any Smith, it by that fact cannot punish Jones for robbing Smith at gunpoint. It may be objected that the state has the duty to deter crime for the sake of the taxpayers; Smith is one such, the mother is another, yet the fetus is not; hence the fetus has no rights. Again, empowering the family with total authority to dispose of their dependents as they see fit is a possibility; it may even be a healthy development over the atomistic "welfare" state. But this would merely decentralize enforcement; each household would still need philosophical guidance.

If we treat law as purely positive and aimed at the greatest communal happiness, that is, some form of the (common) good, then it can be divorced from the law that is natural which aims not at the good but at clarifying right and wrong. There is almost no divergence between individual rights and the common good, in fact the latter is secured by means of protecting and enforcing the former. If there is a rare conflict, then natural law would say you may not do what is wrong even if some greater good would be lost as a result. One cannot do unlawful wrong so that good may come out of it. But this is a familiar problem in the endless tension between deontology and consequentialism.

The approach in which we calculate the greatest good for the greatest number of allowing vs. prohibiting abortions depends a great deal on whether we include fetuses into the greatest number over which happiness is to be maximized. For example, do we count the deprivation to each fetus of his valuable future life? How about the pain they feel, at least once sufficiently developed, during the abortion? Since abortion is feticide and we do not compare pleasures but instead weigh lives, the issue is not really utilitarian but more generally consequentialist. For example, the adversity in life that a child would deal with if he had not been aborted need not count as pleasure directly, but overcoming adversity would be a valuable experience. The essence of life is neither happiness nor sorrow but *pursuit* of happiness in spite of numerous obstacles and hardships, so the harm to the fetus is that this pursuit, whether ultimately more or less successful, will not occur for him. So, is the negative consequence of the destruction of an unborn child outweighed by the inconvenience to the woman? I cannot in my capacity as a philosopher answer such questions. I am not God and have no expertise in this form of "divine providence."

A man is an objective good that ought to be, by nature, not hated, and by grace, loved. Of course, some men are objectively better than others and hence ought to be loved more. A good man is better than an innocent child, but a child is better than a wicked man. It follows that a saint ought to be loved more than a sinner. Kin ought to be loved more than strangers, at least because "every living thing loves its own kind, and we all love someone like ourselves"[3]; one both receives more good from and gives more good to family members than to strangers. (A fetus is close kin to the mother, so there's that.) Now a flower is better than a seed as act is generally superior to potency, all other things being equal. So an adult is better, as in more actualized in intellect, personality, and powers, than a child, and a child, more than a fetus. So one ought to love adults more than fetuses, etc. These points are meant to clarify the relation between nature and grace; charity, and its proper degrees, are not our concern here, indeed the natural prohibition against hatred, and hence against injustice, applies perfectly equally to both adults and fetuses, saints and sinners, etc.

5.2. Body as private property

Libertarianism picks up on this important distinction and affirms that natural law enjoins upon man only negative duties of bourgeois noninterference with other people's natural rights, and *no* positive duties.

Therefore, we surmise, there is no such thing as a "right to life" understood as the right to have one's life sustained or nurtured forcibly at another man's expense or effort that he is unwilling to supply. Even in Christian morality, there need not be a duty to save everyone; *whom* to bless with charity, when, and how are one's right to determine. Natural duties are perfect in the Kantian sense: one may never take a break from not stealing; Christian duties are imperfect: one is permitted to quit burying the dead for a while and watch some TV instead. There is a natural right to life only in the sense of the right not to be murdered or assaulted by another man.

Pair this insight with self-ownership, specifically the mother's ownership of her own body. Rothbard concludes:

> Most fetuses are in the mother's womb because the mother consents to this situation, but the fetus is there by the mother's freely-granted consent. But should the mother decide that she does not want the fetus there any longer, then the fetus becomes a parasitic "invader" of her person, and the mother has the perfect right to expel this invader from her domain. Abortion should be looked upon, not as "murder" of a living person, but as the expulsion of an unwanted invader from

> the mother's body. Any laws restricting or prohibiting abortion are therefore invasions of the rights of mothers.

This understanding cannot be impugned even by allowing that a fetus is a person:

> … let us concede, for purposes of the discussion, that fetuses… are… entitled to full human rights. But what *humans*, we may ask, have the right to be coercive parasites within the body of an unwilling human host? Clearly no *born* humans have such a right, and therefore, *a fortiori*, the fetus can have no such right either.[4]

Block feels necessary to add:

> "Parasite" has such a "bad press" in our common lexicon that we hesitate to imply this word to describe the fetus or kidney dependent person. Yet, the appellation fits, fully.
>
> We use it in the hope and expectation that the reader can uncouple the negative pejoratives usually associated with this phase, and concentrate solely on the property rights relationships.[5]

Thomas Johnson (1974) rejects the view that the fetus is a parasite, and he is right from the standpoint of biology. But the relevant kind of parasitism in this case is not biological but social and economic, in the same way that a person on state welfare is a parasite on the body politic. A tax-consumer is a parasite on the taxpayers despite not being "an organism of *one* species living in or on an organism of *another* species," etc. A fetus who consumes the mother's bodily resources by force has the same moral status as a subsidy-taking farmer or mailman (who exploits the public thanks to the monopoly Post Office).

It's not enough that the interests of the woman and fetus be in conflict. The success of my business competitor threatens my livelihood. That does not mean I may lawfully kill the competitor. What is needed is an additional premise that the woman has a property right not to be harmed, that she is either defending herself or is insisting on or enforcing her property rights over her body.

It's true that embodiment is a stronger relation than ownership of property, but in this case the reasoning is only strengthened: if it is permissible for a landlord to evict a tenant, then a fortiori, it is permissible for a woman to evict a fetus. Of course, the fetus did not contract to stay in, but again that only makes the argument more persuasive since a fetus is inside the mother by her grace and not because he paid for it, thereby earning his keep. If he had paid for it, then he might have a right to stay. But mere grace or indulgent

permission may presumably be withdrawn at any time at will.

For example, if humans had much greater self-control, and it were possible for the mother to turn off her body's life support to the fetus at her pleasure, such that the fetus would die in the womb from starvation or suffocation and be flushed out, libertarians argue that it would be lawful for her to do so. This would be an instance not of unjust killing but of permissible withholding aid, and no one has a natural duty to keep anyone alive as his own expense. Both natural and common law allow one to be a bad samaritan. The woman's liberty in such a case would be limited only by the viability of the fetus, in particular by whether it was possible to unlink the baby alive. John Wilcox complains that this view "rejects a central teaching of Jesus with so little fuss."[6] But separating nature and grace is of great importance because the content of natural duties can be established by reason alone while duties of charity follow only from the articles of faith or suchlike, and because natural duties are, and duties of charity are not, enforceable by the state. Jesus did not come to be emperor of Rome, and even if He had, He would not have enacted laws that would have subjected the priest and the Levite who refused to give aid in the story to violent retribution. Even the Good Samaritan did not impose on the innkeeper the duty to care for the victim, he paid him money for it.[7]

The situation, however, is a bit murkier than Rothbard makes it seem. First, a real parasite like a tapeworm is a "natural enemy" of humans. The interests of a biological parasite and its human host are always opposed by nature and its law. It is entirely praiseworthy for us to kill our natural enemies like tapeworms and mosquitoes en masse and with ruthless efficiency. But a fetus, far from being the mother's natural enemy, is rather a natural friend, in fact by nature (in its pure condition) a treasured and loved creature.

For a fetus to go from a precious gift to a disgusting invader-worm is to travel a very long distance solely on his mother's whim. One of the striking features of the portrayals of the mafiosi in the arts is their fiery unpredictable, unmanageable, and psychotic arbitrariness. They will go from generosity to hatred in two seconds: one moment the guy pats you on the shoulder, the next he pumps you full of lead. Is that, for lack of a better term, "natural"? In *StarCraft II*, Zurvan says, "No allegiance but to self. Kill or be killed… you know this!" But humans are by nature precisely not Zerg. Natural law then suggests that the mother cannot *hate* the fetus, even if she might want it gone for reasons of "property rights relationships." This is evidence for the importance of evictionism, to be considered later, since blithely to kill the fetus when it can be evicted alive and reasonably well and then adopted by another

person is malicious and would be forbidden by libertarian law.

This view stresses that natural law extends to feelings as well as actions, in fact the entire point of the negative duty of nonaggression is step by step to purify oneself of savage hatred for fellow man, to squeeze by righteous living every drop of malice from one's heart. Injustice toward another diminishes charity and inflames hatred in the perpetrator, harming his soul. At that point, the *duty* as an objective command of natural law will become otiose since one will abstain from unlawful actions adequately by *desire* alone. Such a consistent desire is the naturally "holy will." Rothbard would probably not have taken it this far, e.g., James Sadowsky makes an eminently plausible point:

> What is wanted in most cases is precisely the death of the child. Most of those seeking abortions would be horrified at the thought that the child might survive his expulsion. Just ask your friends if all they are after is simply a premature birth.[8]

Rothbard replies:

> Here I don't think the intention of the parent makes any difference. If the objective act itself – the ejection of the fetus – is licit and not an act of aggression, then the subjective intentions of the parent make no difference.[9]

Second, *all* humans are friends by nature. Mises puts it this way:

> What makes the existence and the evolution of society possible is precisely the fact that peaceful cooperation under the social division of labor in the long run best serves the selfish concerns of all individuals. The eminence of the market society is that its whole functioning and operation is the consummation of this principle.[10]
>
> The greater productivity of work under the division of labor is a unifying influence. It leads men to regard each other as comrades in a joint struggle for welfare, rather than as competitors in a struggle for existence. It makes friends out of enemies, peace out of war, society out of individuals.[11]

It's true, according to this, that humans are "potential collaborators in the struggle for survival," but not throughout the *entirety* of their lives: they are *not* such collaborators during, let's say, the first and last 15 years of their lives. In those stages, though people are not (yet or any longer) friends to others, they are not enemies, either. Is that enough for rights? Many animals are not man's natural enemies, either, but they have no moral standing; if it is useful to man

to kill them, for example, to make way for cities, he can do this without further thought. Can we conclude that children and old people can be killed at will? I suggest we combine the two criteria for a sufficient condition for having rights: any (1) self-owner who is (2) at least not a natural enemy of humans has rights. We can also deal with this problem on its own terms. The argument in Section 4.3 is that going through childhood is necessary for becoming an adult and thus one has the libertarian right to life in this stage in life. Further, one of the reasons to work as an adult is precisely to provide for old age. It would make no sense to do so if one were to lose rights when actually old, so this would harm industry and general prosperity to everyone's loss. Let's finally look at two special cases. Consider old man Smith who is no longer able to work but who has saved enough money, invested it, and lives on interest. Is he a parasite? Not at all because interest and profit are perfectly legitimate forms of income: Smith keeps production going and improving. Now suppose that Smith has no money and is being supported by his adult children. Then Smith is a dependent, and if he is killed, then it is at least his children's rights that are violated. Natural law is grim but suffices for the most part.

But humans can become enemies by will. Thus, a robber becomes his victim's enemy, incidentally by committing a sin and through that *corrupting* his nature.[b] The victim has the right to defend himself up to and including killing the aggressor. But the fetus is entirely innocent. In coming to inhabit the womb, he commits no injustice and no sin, *even if* the conception was due to a rape. On several occasions, for example, Block calls the fetus' trespassing a *crime* which makes little sense since a crime is a human action marked by malicious intentional contempt for the victim's property rights. But a fetus can neither act purposively nor feel malice in his heart. Crime requires a *mens rea* or at least some culpable negligence, both of which are altogether absent in a fetus. Nor does it make sense to call his eviction a *punishment* which genuine crimes would *deserve* – the fetus is not an evildoer whom to condemn would be to strike a satisfying blow for righteousness and justice. The fetus does not *choose* a life of "parasitism." Hence his trespass is in no wise a crime.

Rothbard, however, would again counter that this distinction makes no difference. It's a matter of property rights. The mother has every right to expel an unwanted fetus (who is leisurely using her body for his own ends) on grounds of self-defense or indeed for any reason whatsoever. After all, even if

[b] E.g., "parasitic predation and robbery violate *not only* the nature of the victim whose self and product are violated, but also the nature of the aggressor himself, who abandons the natural way of production – of using his mind to transform nature and exchange with other producers – for the way of parasitic expropriation of the work and product of others." (*EL*: 50)

Smith invites Jones to his house for a party, Smith is free at any time to end the event and command Jones to leave. Smith is not Jones' keeper.

Contra the first point, then, the mother and fetus *can* be natural enemies, as they both contend for the same scarce resource: the mother's body. This resource is unfortunately *perfectly* scarce, i.e., it cannot be produced, its supply cannot be increased. *Someone* must suffer the deprivation as a result.

Contra the second point, after gaining much from massive sacrifices from his parents, the child will ultimately repay them by putting them in a nursing home. The situation of a mother and her child is not as clearly mutually beneficial as that of participants in the free-market economy in general.

Besides, it's not really killing, it's withdrawing aid, as the fetus, even if he survives the expulsion, will then die from lack of life support; but, since the mother has no positive obligations toward him, that's no skin off her nose.

A consequence of this, however, is that a Proper Rothbardian Abortion would proceed as follows: (a) the child is carefully extracted from the womb, alive and well, placed near the mother, and then more or less slowly dies from exposure and lack of nutrients if he is nonviable or if no one is willing to care for him. But don't actual abortions occur in a different way, viz., (b) the child is killed inside the womb, and the remains are sucked out? Rothbard himself writes that "a parent does not have the right to aggress against his children,"[12] but do not most abortions do exactly that?

Block's answer, on which evictionism depends, is that this is a distinction without a difference. If (a) is permissible on grounds of property rights, then so is (b): the difference is merely that the evicted child lingers in agony outside the womb for a few hours or days. For all we can say, (b) is more humane than (a), inflicting less suffering. By taking this line, however, Block opens himself up to an objection. A pro-lifer will propose a tollens instead: (b), he will say, is unlawful, citing precisely Rothbard in support, and since (a) is almost indistinguishable from (b), it, too, is unjust.

The way to resolve this impasse is to ask which is more plausible considered independently, the justice of (a) or the injustice of (b). Rothbard would say the former: "For the crime of trespassing within a person's body, any means necessary to evict the trespasser should be legitimate," he writes, including apparently a death sentence.[13] We will see that Block prefers to affirm the legal permissibility of (a) also, though for more sophisticated reasons.

5.3. Principle of Double Effect

We may further illustrate this problem with the ethical principle of double effect. Originating in the Catholic tradition, double effect permits an

act that has both a good effect and a bad effect provided:

1. That we do not wish the evil effects, but make all reasonable efforts to avoid them;
2. That the immediate effect be good in itself;
3. That the evil is not made a means to obtain the good effect; for this would be to do evil that good might come of it – a procedure never allowed;
4. That the good effect be at least as important as the evil effect.[14]

This prohibits most abortions but permits those in which the death of the fetus is willed indirectly, as a foreseen but unintended side effect of some essential medical treatment. Thus, a pregnant woman who has contracted uterine cancer may be operated on even if her child dies as a result, since such a death is willed neither as a means to any good nor as an end.

The first point is that double effect is not the only moral principle. It may be used to decide controversial cases where the lawfulness of an act is in question. If we can determine *on other grounds* whether abortion is lawful or not, double effect is irrelevant. We may, if we wish, try to apply it to the case of Elmer killing his grandfather for inheritance money. Since Elmer intends the murder as a means to the money, it is prohibited. We can ask, is the death one causes a source of sorrow or celebration? For Elmer, celebration. He cheers at and rejoices in evil, hence his intent is evil. But the issue is also adequately settled by considering natural rights. The grandfather has a right not to be murdered, and Elmer is violating this right. Double effect is superfluous.

Second, double effect is too subtle for its own good, focusing on intentions. In abortion, what if I wish there was a way to save the fetus? If it could be saved, it would be. Unfortunately, it's technically impossible. I don't rejoice over its death. I grieve that it had to die. Does this attitude permit abortion? If what is desired is eviction not death, then before viability death must follow eviction. Both abortion and eviction have the same consequences, the distinction between them is without a difference. It's only a different method of killing the fetus. But if eviction is permissible on double effect, since death is not intended, and not just for libertarian reasons, then so is abortion.

It may be that the mother secretly wants to kill the fetus but lies and says that she only wishes to evict. This lie could not succeed if the fetus were viable, but it works when he is nonviable. The law cannot plausibly uncover the true motives. Here's what I mean: If a woman, as we discussed in Section 4.4, "does not want to be a parent" and aborts for that reason, then double effect prohibits it because the death of the fetus is at least a means to her end

of being free and unencumbered by a child: she rejoices in his death, saying perhaps, "I am finally rid of that horrible parasite or inconvenient person." On libertarianism, that attitude is also vicious after viability: righteousness demands that a viable child be evicted safely and adopted if anyone wishes to care for him. Before viability, sin or no sin, abortion would be lawful. However, the law cannot concern itself with such matters of the heart.

There are clear limits to the double effect principle. For example, it permits what is prohibited. Suppose that my grandfather is tied up and suspended on a contraption over the edge of a cliff, and the only thing keeping him from falling is a bag of money resting on a lever. If I pick the bag up and run, I am causing my grandfather's death, but neither as an end nor as a means but indeed as an unfortunate side effect. Yet it's clearly wrong. It also prohibits what it ought to permit, such as in cases of genuine human conflicts. If my business rival is producing mousetraps, and I outcompete him by producing a better mousetrap, thereby putting him out of business, I indeed both harm him and am heedless of his welfare. His failure is crucial to my success, and I rejoice in both. Yet my action is surely lawful because my rival has no property right to his customers, and even praiseworthy for having driven economic progress.

Here's another argument why double effect is not the primary moral principle. Philippa Foot presents the following case for our consideration:

> Suppose… that there are 5 patients in a hospital whose lives could be saved by the manufacture of a certain gas, but this inevitably releases lethal fumes into the room of another patient whom for some reason we are unable to move. His death, being of no use to us, is clearly a side effect, and not directly intended. Why then is the case different…? The relatives of the gassed patient would presumably be successful if they sued the hospital and the whole story came out.[15]

I agree, it is morally different. Consider then another, my own, case. 6 men are trapped in two adjacent rooms, 1 man in room *A*, 5 in room *B*, and are in the process of being rescued. There is only a certain amount of air in both rooms. If I do nothing, the 5 men will surely suffocate from lack of oxygen in *B*, while the 1 man in *A* will survive. However, I have the option of activating an air pump that will pull oxygen from *A* into *B*, and carbon dioxide from *B* into *A*. This will kill the 1 man in *A* but allow the 5 men in *B* to hold out until they are saved. Is it moral to start the pump? Let's call the Foot's case "Gas" and my case, "Air." As we can easily see, Gas is Air in several ways. In both cases, saving the 5 is better than saving the 1, and the death of the 1 is a second foreseen but unintended effect. Yet our intuitions want to condemn the act to

save the 5 in Gas and approve of it in Air. What's the difference?

I suggest that it lies in the men's relevant property rights. In Gas, the patient rents air from the hospital and is entitled to continue to enjoy its services. We might try a kind of Kantian reasoning here: if a prospective patient were informed that the hospital reserved the right to flood his room with poison gas whenever it felt it was for the "greater good," then he would not go to this hospital in the first place. And if this practice became widespread, people would refuse to put themselves in situations in which this dilemma would arise. So, Gas is self-defeating: if everyone were aware of how I made my decisions, there would be no circumstances under which I'd ever make one.

In Air, on the contrary, there is no presumption that either the 5 men or the 1 man own the air around them. I am therefore free to follow the principles of triage as I see fit, including rationing the scarce supply of breathable air to maximize the number of survivors. If that means sacrificing the man in *A*, then so be it. Here the Kantian reasoning leads to the opposite conclusion: if fully informed of my policy, any Smith would be happy to entrust himself to my tender mercies since if Air actually occurred when I was in control, the probability of Smith ending up in *B* and surviving is 5 times the probability of him ending up in *A* and dying.

As a result, we can formulate a sufficient condition for when an action of weighing lives is moral:

1. The good outweighs the evil, such as in our formulaic examples because $5 > 1$.
2. The deaths of the fewer number are not intended though perhaps are foreseen.
3. No one's libertarian natural rights are violated.

Gas is (1) and (2) without (3) and is therefore suspect. Here is an example with (1) and (3) without (2): I stand and watch 1 man die when I could easily save him in order to harvest his organs so as to save 5 men. This seems immoral, and part of the reason is that double effect is violated. Yet immoral or not, it is not a violation of natural law which shows that (3) is more important than (2).

5.4. Some objections

Sadowsky proposes another objection. We have seen that the fetus is innocent of any "crime." What's more,

> to say that *x* is trespassing is to say that he is somewhere where he ought not to be. But where should a fetus be if not in its mother's

> womb? This is its *natural* habitat. Surely people have a right to the means of life that nature gives them?[16]

This rhetorical question fails to have its intended effect. To use Sadowsky's own terms, as soon as the fetus is no longer desired, he "ought to be" *anywhere but* in his mother's womb. Maybe he ought to be in another person's custody. Maybe he ought to be dead and buried. But it's no longer any of the mother's concern. (Remember that we are discussing legal issues, not the morally lamentable failure of mother love in this case.) The mother is not a parcel of land that the fetus is homesteading; she is a human being, and no homesteading or mixing labor by the fetus with her takes place. On the contrary, it is the mother who partially homesteads the fetus. In addition, this proves too much because there is no rigorous distinction between natural and artificial means to life. If a premature baby is being kept alive in an expensive incubator, the parents surely have a right to refuse to pay for his upkeep. If no other guardian chooses to pick up custody, the baby will die. But there is no politico-ethical injustice in that. Neither therefore is there an inherent injustice in an expulsion.

To illustrate this further, consider a somewhat fanciful scenario, namely, the Biblical story of the Garden of Eden literally taken. Since God expelled the first couple from the Garden, the Garden must've "belonged" to God as perhaps a sort of "pleasure park" for Himself. Adam did not homestead the Garden. He was like the *Gladiator* giraffe, walking around eating ("from any of the trees of the garden") and not mating. But suppose that Adam had not fallen but remained in the state of innocence and eventually had children with Eve. (I don't think he would have, but this is not the place to discuss this.) If some of his descendants conspired to throw him out of the Garden, would that not have been unjust? If Adam had a right to stay in the Garden and enjoy its amenities despite mixing no labor with it, then why doesn't the fetus have a right to use the bodily resources of his mother?

This example, however, proves only that a fetus' *evil twin* has no right to push his brother out, not that the *mother* has no such right. Quite the contrary. God created both Adam and the Garden. The mother creates both the child and her own body (almost literally – she has built up her body by herself being born and growing up). But God had few compunctions about evicting Adam and committed no injustice in so doing. Yet the Garden was indeed man's "natural habitat," while the outside world was cursed with toil and death. Neither then does the mother commit an injustice by evicting a fetus.

At least God *contracted* with Adam in a manner of speaking to let him stay in exchange for his obedience. There is no contract of any kind between the mother and fetus. Jakub Wisniewski states the contrary opinion:

> It seems only natural to think of the moment at which it comes into existence – i.e., conception – as the moment at which the mother, who voluntarily invites a new potential human being into her womb (i.e., voluntarily allows it to appear there), makes an implicit contract with it.[17]

But what are the *terms* of this implicit contract? According to Wisniewski, the woman immediately acquires a duty to take adequate care of the fetus. But what is the fetus obligated to do in return? Grow up to be a good person who will honor his parents and make them proud, perhaps a libertarian? There may be an understanding of this kind, later in life, between parents and children, but it is hardly a contract. Since a contract requires a mutual quid pro quo, there is no contract here at all, implicit or anything else. It may be that God is *better* than an abortion-seeking woman and would never have expelled Adam but on account of the latter's transgression – or not, for who knows such things? The point, however, is that God surely always had a "right" to expel him for any reason and upon His own counsel. It may be illogical, foolish, and vicious to conceive a child only to kill him, but as always here we are concerned with rights, not with the morality or even rationality of exercising those rights.

Sadowsky's final objection is more interesting, and it is that which gives rise to evictionism:

> Let us grant for the moment that the child is indeed a trespasser. Does this *of itself* justify the draconian response that Murray and Walter permit? Does the mere fact that a man is a stowaway justify our throwing him out of the aircraft? Ought we not in the absence of overriding reasons to wait until the aircraft lands? Both traditional natural law theory and the common law have it that our response to aggression should be proportionate to our need to resist and the nature of the attack. Suppose that the inflicting of a lethal wound is the only way to recover a stolen nickel. Is that enough to justify such an act? …
>
> Does mere annoyance, the loss of comfort justify such an attack on a trespasser? I think not.[18]

Rothbard replies:

> Jim Sadowsky is worried about ejecting a stowaway on an airplane. Yes, I suppose that that would be "overkill," to coin a pun. But the point here is that, just as an assault on someone's body is a more heinous crime than the theft of his property, so the trespassing on or within a person's body is a far more heinous trespass that merely

> strolling on his land or stowing away on an aircraft.
>
> For the crime of trespassing within a person's body, any means necessary to evict the trespasser should be legitimate.[19]

Block is dissatisfied with the crude bluntness of such a reply. Let us see what he's come up with to soften Rothbard's intransigence.

NOTES

[1] Aquinas 1937: 8.
[2] Jaggar, Alison. "Abortion and a Woman's Right to Decide" in Baker 1975: 324-37.
[3] Ben Sira 13:15.
[4] *EL*: 98.
[5] Block 2005: 38n186.
[6] Wilcox, John. "Nature As Demonic in Thomson's Defense of Abortion" in Baird 2001: 259.
[7] See Lk 10:25-37.
[8] Sadowsky 1978 in Rothbard 2006: 846.
[9] Ibid.: 847.
[10] *HA*: 845.
[11] Mises 1962: 294.
[12] *EL*: 100.
[13] Sadowsky 1978: 847.
[14] *CE*: "Abortion."
[15] Foot 2002: "The Problem of Abortion and the Doctrine of Double Effect," 29.
[16] Sadowsky 1978: 847.
[17] Wisniewski 2011: 4.
[18] Sadowsky 1978: 846-7.
[19] Ibid.: 847.

6. Evictionism

6.1. Child abandonment

We will define *abortion* to require the death of the fetus, and *eviction* as expulsion of the fetus from the mother's body. If the fetus is nonviable, then there is no distinction between the two. In that case, Block says, abortion, whether consisting of expulsion followed by (inevitable) death, or death followed by expulsion, is permissible. (Again, I agree that there is scarcely any real difference between these two *methods* of abortion.) If the fetus is viable, the issue will depend on whether there is a prospective foster guardian willing to take custody. If there is such an adoptive parent, then the evicted baby must be delivered to his care without delay. If there is not, then the fetus will still die, but that, too, is Ok even if unfortunate. Says Rothbard:

> … a parent does not have the right to aggress against his children, *but also* the parent should not have a *legal obligation* to feed, clothe, or educate his children, since such obligations would entail positive acts coerced upon the parent and depriving the parent of his rights.
>
> The parent therefore may not murder or mutilate his child, and the law properly outlaws a parent from doing so. But the parent should have the legal right *not* to feed the child, i.e., to allow it to die.[1]

Rothbard then is in favor of passive infanticide. Joel Feinberg (1986) argues that some humans including deformed fetuses and comatose vegetables ought to be put out of their misery. This is not a difficult problem for the libertarian who would say that it is permissible to abandon *any* fetus, whether deformed or not. Then, if no one adopts even a normal fetus, the fetus will die, but the natural law would be respected regardless. On the other hand, if someone *is* willing to care for a deformed fetus, the baby must be delivered alive and preserved, and custody of him given to the new caretaker.

Block makes an important refinement to Rothbard on this subject in general as regards child abandonment. He asks, "does the mother who abandons her baby have the positive obligation to at least place it 'on the church steps,' e.g., notify all other potential care givers of the fact that unless one of them comes forward with an offer to take in the infant, it will die?"[2] In other words, if parents have no positive obligations to their small children, may the parents lead a kid into a dark forest and leave him there to be devoured by wild beasts? Or even hide him in the house until he starves to death? Block does not think so because, he argues, abandoning custody is at least as labor-

intensive an affair as abandoning any property whatsoever.

In general, "abandonment" is a human action, not merely a mental state; to succeed, there must be a physical execution of the plan to abandon. It is a clear absurdity for Smith to abandon ownership of a parcel of land, say, without notifying the whole world of this through some established means. The property would be objectively up for grabs, but if people falsely thought that Smith still owned it, then no one would be able to homestead it. A useful to society resource would then for all intents and purposes be destroyed.

We do not step beyond the bounds of logic when we say that abandoning property *by its very meaning* entails following some customary formal procedure according to which the world at large is reliably apprised of the fact that the property is now unowned and can be once more homesteaded appropriately.

Similarly, abandoning a child entails the duty to notify a willing new guardian, an established charity, or if all else fails, at least the local authorities, so that the parents will not be accused of murder. The point is to *let everyone know* that the guardianship rights have indeed been relinquished and to grant other people some time and opportunity to "homestead" the now unguarded child. Since a small child is a "perishable good," it is unclear how long the parents must wait before throwing a child out while the parental rights are being sorted out, but the solution to this problem, too, can be left to custom.

Block goes on:

> Would it ever be possible, under libertarian law, for a baby to be abandoned by its parents, for there to be no other adult willing to care and feed it, and the baby be relegated to death? Yes.
>
> However, this could occur only under the condition where the entire world in effect was notified of this homesteading opportunity, no roadblocks were placed against new adoptive parents taking over, but not a single solitary adult stepped forward to take on this responsibility.[3]

In other words, suppose that no replacement guardian has been found yet all the legal formalities pertaining to abandonment, fulfilled. Then it is permissible to let the baby die. It would certainly be a savage society in which something like this were allowed to happen, but no natural law would still have been broken.

Mary Anne Warren dislikes infanticide solely because a baby can be a "potential source of pleasure to some family," rejecting the view that he is a person and has any right to life. But she notes that the mother "might prefer

that the child die."[4] I do not see how we're supposed to balance the interests of the mother who wants to kill her child and the interests of prospective adopters. On the Blockian libertarian view, and contra Warren, infanticide *is* straightforwardly murder, but only when marked with deliberate violence or with concealment of the infant from his salvation by other people. If properly abandoned, an infant is not killed but let die, which is permissible.

Heather Gert is even more explicitly evictionist, saying that "a woman seeking to have her pregnancy aborted should consent to allowing the fetus to be removed in such a way as to preserve its life. … others should be permitted to care for the fetus, if they choose to do so."[5] Under libertarianism, a woman would not be asked to *consent* to an eviction; she and her physician would be *required by law* to make every reasonable effort to evict alive and well.

The 1974 Pennsylvania Abortion Control Act was evictionist. It required the abortionist to determine whether a fetus was viable; he then must "exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born alive and must use the abortion technique providing the best opportunity for the fetus to be aborted alive." The Supreme Court in the 1979 case *Colautti v. Franklin* invalidated this law on grounds of vagueness.[6] Whatever the technicalities, I fail to see what is so vague about viability. The newborn baby will either live given decent care, or he will not. It is not vague to distinguish between life and death.

We need not therefore hold that it is somehow proper for a child rejected by his mother to die. We are human beings, not chimpanzees. Surely, we can do better.

Is notifying the world of a pending abandonment / eviction a positive obligation? If it is, then one argument is that it is so reasonable and undemanding that libertarianism can be at peace with it. But perhaps *it is not even that.*

First, on general grounds: an obligation or duty is a command of natural law, but the thing doing the commanding in this case is the desire to abandon. Notifying others is an essential means to it. It's a *hypothetical* imperative conditional on an end to be attained, not a *categorical* one that every man *has to* do whether he likes it or not. These are as different as "make a sandwich *if* you're hungry" and "you shall not kill, no ifs about it."

Second, Block writes:

> With regard to children, the intermediate case, one may not own them outright…; but here, all one owns is the right to continue this process. Once the support of children (whether in the womb or not) ceases, however, any rights of parenthood cease. One may abandon a child, but if so, gives up all rights pertaining thereto. There is no

> such thing as an absentee parent; once parental duties are relinquished, parental rights vanish.[7]

The moment the parents in their own minds make a decision not to care for the child (*unlike* a landlord who decides to neglect his property), they lose their custody. At that point the guardianship rights over the child are unowned and for the taking. Then, Block goes on in a crucial passage:

> One of the key elements of libertarian homesteading theory is that no square inch of terrain remain unowned, as long as people wish to claim it. To wit, the pattern of settlement *must* be such that no one is allowed to lay claim to land in a bagel or donut format, for to do so would leave the inner bit of land (the hole in the bagel) unowned, but under the control of the forestalling homesteader.
>
> Would-be settlers on this land would be precluded from entering, since the forestaller owns all the surrounding land. …
>
> This pattern of land ownership is illicit, according to libertarian theory. It would not be a *positive obligation* on the part of the forestaller to allow others access to, and egress from, this inner lying land, so that they could homestead it. Rather, this is part and parcel of what proper homesteading *means*, at least in the libertarian version thereof. …
>
> But, suppose a person comes to own these guardianship rights, legitimately, but then no longer wants to continue to feed and clothe her baby. May she hide this child from others, who would be glad to be its guardian? No more than may anyone homestead land in the bagel format. For, to do so would be to forestall others from adopting that child. … libertarian theory rejects the person who kills a fetus when there are others who would gladly have adopted it.[8]

The difference between Rothbard and Block now becomes clearer. Block argues that the mother never has the right to destroy a viable fetus but only to "abandon" it or at least try to. These have different consequences when it comes to abortion. As far as Block is concerned, the ejection of the fetus is licit only when every effort is made to allow the fetus to be picked up by any willing stepparent (even if no such picking up actually occurs and the fetus will die from lack of care). It's not only the deliberate hiding that is unjust; since a fetus is very perishable, failure to take active steps *not* to hide and to *reveal* instead by explicitly notifying the neighbors, etc. is wrong, too.

6.2. Enforcing rights gently

It follows that if the parents fail to advertise the impending abortion

publicly (some days ahead of time, perhaps?), even take some "reasonable" steps to finding a new guardian, and follow through all the formalities laid down by their community regarding legal abandonment of property titles or, in our case, guardianship rights over children or fetuses, then the parents, in aborting, are, as per Block's logic, committing murder.

An interesting question is what happens if the fetus is on our definition viable, but the technology to evict safely is unavailable. In such a case perhaps the law should classify the fetus as nonviable after all.

The secret "subjective intentions" of the parent may make no difference if by that we mean that the parent may in the privacy of her mind want the fetus to die, but her behavior will be very different for Block than for Rothbard. Rothbard would permit all abortions on grounds of self-defense; Block would permit only evictions that are self-consciously styled as abandonments of the parent's guardianship over the fetus, and as long as the parents jump through all the legal hoops to impart their neighbors with a genuine opportunity "easily" to "homestead" the fetus.

Let me comment on a few subtleties pertaining to this. Block asks the question, "Suppose eviction costs more than abortion; who pays?" and answers: "If it costs more to engage in this technology, there is no positive obligation for the mother to pay the extra amount. This should be done by the Church or a group called the Friends of Babies or some pro-life type of group specifically set up for, and devoted to, this very purpose." What's the logic behind this? If it costs more to escort a trespasser onto a public road than to blow him up with a bazooka, must some charity really compensate the owner? There can be costs to avoiding murder, but surely ethics demands that these costs be borne by each of us, including the mother. Only if she literally has no money to pay for eviction will there be a need for charitable relief.

Similar reasoning applies to the next question considered in Block's paper, "Suppose eviction is more dangerous than abortion, should the mother be forced to undergo the former procedure?"[9] Ending the guy may well be safer than leading him out, as there is always a chance that he will put up a fight. But the mere possibility of this is not enough to justify reaching for the bazooka right away. Regarding abortion, I am sure there a point at which changes in degree can translate into changes in kind: if there is a 99% chance of death for the woman in eviction but only 1% in abortion (this is empirically false), then the law should probably be adjusted to reflect the difference. So, the answer to Block's question is "a definite maybe."

Then there is the following point: promoting natural births, defending natural families, and desiring to save lives of unborn babies may all be legiti-

mate good causes, but they are entirely separate and if good, then good for different reasons:

> There is simply no reason why pro-lifers should prefer the traditional means of giving birth. They must of course oppose abortion, but for them eviction should be a perfect substitute even for normal births. All that should matter is that the fetus be safely born.
>
> If this is done the natural way, well and good. But if this goal is achieved in *any other* way (e.g., surrogacy, etc.), it should be a matter of complete indifference to advocates of the pro-life position. Life is life is life; where it occurs is only a matter of housing.[10]

It is entirely reasonable for a person to choose which of the numerous worthy causes to champion. He is not required by logic to support all of these; he can focus on one at the cost of neglecting the others.

We have seen that Rothbard treats abortion as pure self-defense; so drastic is the aggression in his opinion that if death of the fetus results regardless of the circumstances, all is still just. But now we are bound to ask, what if the fetus is viable and can be, upon a more gentle removal (such as via a C-section), nursed to full health willingly by the hospital and later also willingly adopted by a stepparent? What if there is a great demand for babies in this manner; might not a woman find it worth her while to be paid by the prospective adopters to evict without aborting?[a] If that is eminently reasonable, might not a woman be *required by natural law* to evict the baby without aborting, provided that two conditions are met: (1) the baby is viable and (2) someone is willing to care for him, *even if* she is not paid at all? This subtle limitation, that the eviction must be in the "gentlest manner possible," is Block's second commendable innovation in the libertarian abortion debate.

What justifies it? Proportionality in self-defense. I note in passing that even Block does not fully distinguish between self-defense and punishment. Rothbard may have originated this lamentable confusion in libertarian circles by writing carelessly that "*all* rights of punishment derive from the victim's right of self-defense."[11] For example, regarding "government protection," he asks, "*how* is the government to decide *how much* protection to provide and how much taxes to levy? … Indeed, 'protection' could conceivably imply anything

[a] Michael Tooley suggests that a woman may be compensated for not aborting, while a fetus cannot be compensated for dying. However, if the woman has a *right* to abort, then she can refuse compensation regardless of how high. In addition, paying women not for giving up their babies for adoption (which may indeed become a business practice in a libertarian society) but simply for not aborting would incentivize extortion and is to that extent impractical.

from one policeman for an entire country, to supplying an armed bodyguard and a tank for every citizen – a proposition which would bankrupt the society posthaste."[12] But the government does not provide "protection" at all. There is no economic case whatsoever for supplying locks, password encryption, and indeed bodyguards and tanks by the state. In fact, the courts have ruled many times – and *correctly so* – that cops have no legal duty to protect anyone. The police are not one's *protectors* while a violent crime is taking place, such as while a store owner is being robbed; they are only *agents of punishment* of condemned criminals much later, viz., when a trial has concluded and a sentence for the crime, issued by a judge. Cops, therefore, far from being "first responders," are in fact precisely last responders. They "respond" possibly months after you are shot dead by forcibly taking possession of the murderer and carting him off to prison. They are glorified delivery boys. Their social role is to act only as a general deterrent to crime by having the fear of punishment for evildoing permeate society as a whole. Self-defense is entirely in the hands of private citizens and the market; punishment must most plausibly be administered by the state.

Consider that when you shoot a mugger while he is robbing you with a gun pointed at you, that's self-defense and justified or even laudable, but when he's running away with your money, then shooting him in the back is considered punishment (because the danger to your life has passed) and is (1) disproportionate – it is too much to kill for stealing, and (2) not your job, anyway – only the state is authorized to punish with violence.

Cops are not heroic defenders who will take a bullet for you; quite the contrary, they are the most cowardly of all people, feeling safe only in large groups, in full armor, and staying back until they are completely sure they can overpower a criminal with sheer numbers. They'll happily shoot an innocent man or let a school massacre continue unimpeded and be excused simply because they "feared for their safety." Yet they are indispensable for all that.

(The answer to Rothbard's query is now evident: the taxes should be in the amount both necessary and sufficient to finance the minimal overwhelming police force, i.e., the weakest enforcement agency that is nonetheless capable of crushing any individual or private organization in a city.)

This distinction is what makes "gun control," so that "only the police shall have guns," a particularly idiotic statist policy. The police do need guns to force submission during *punishment*, but each citizen also needs guns – and possibly lots of them, and big ones – for *self-defense* (including indeed from the police or tyrannical state). These are two entirely non-overlapping magisteria, as it were.

Since we have established that the fetus is innocent and therefore does not deserve to be punished (without trial, by the mother acting as judge, jury, and executioner to boot), when talking about proportionality we mean as regards self-defense.

Thus, Block writes: "If a trespasser is on your lawn and you have a bazooka, you are not entitled to blow him away – not as a first step in any case."[13] Further:

> In Wisniewski's view, allowing the mother to evict the fetus when this results in the death of the latter "is tantamount precisely to blowing the trespasser away with a bazooka when there exist no other ways of removing him from one's lawn." Well, yes, it is.
>
> Where W and I part company is that he thinks that under these circumstances it would *not* be justified for the property owner to kill the trespasser, while I maintain that it would.
>
> After all, if we are to accurately employ the libertarian legal nostrum, "gentlest manner possible consistent *with stopping the crime*," then that trespasser *must* be stopped.[14]

After taking some pains to distinguish between punishment and self-defense, let me draw a similarity: both can be *ratcheted up*, though in different ways.

First, for illustration purposes, punishment. Consider a basic civil dispute. Unlike a criminal case, there is genuine uncertainty as to which party is in the right. Smith the tenant claims that Jones the landlord owes him his security deposit. Jones disagrees. They go before a judge who rules in Smith's favor. Yet Jones refuses to pay. The civil case has now transmogrified into a criminal case where Jones with malicious intent has stolen Smith's money. Another judge orders that Jones be fined. Jones ignores it. Judge #3 issues a warrant for Jones' arrest. And so on the sanctions are ratcheted up, until the cops physically restrain Jones and *punish* him somehow for his increasingly perverse defiance. (Hence there must be a single communal authority endowed with an irresistible power to punish offenders, and that is what all men call the "state.")

Second, self-defense. Suppose you are trying to remove the trespasser. You tell him to leave. He refuses. You put your hand on his shoulder firmly to escort him out. He throws it off roughly. You punch him in the gut. He goes for his gun. You grab yours quicker and shoot him. Nothing unlibertarian on your part has occurred.

Of course, aborting a nonviable or viable but unadopted fetus does not involve any such ratcheting; it's instakill. Block will argue that it *is* the

gentlest possible way to deal with the situation in *this* case; for example, the fetus can be killed but humanely, as it were, or cannot be tortured in addition. To that Wisniewski replies (note the continued mistake of speaking of "crimes"):

> Yes, we need not act as gently as possible if gentleness will get us nowhere with respect to stopping the crime, but this applies only to the cases where, by not being gentle, we do not commit an even greater crime. …
>
> It is one thing to be decisive or even brutal in evicting a recalcitrant trespasser from one's premises, but it is quite a different thing to deprive him of life. Violating the property rights in one's life is always a greater contravention of the NAP than violating one's property rights in land.[15]

I'd say *not so* if we are permitted to ratchet up. The rule "trespassers will be shot" is eminently reasonable if we interpret it as "incorrigible, recalcitrant trespassers" who refuse to leave even after being "brutally" treated.

But such a fetus is precisely that, even if vacuously, i.e., because it *cannot* listen to reason, and the only way to evict him is to kill him.

6.3. THOMSON'S VIOLINIST

Judith Jarvis Thomson's famous essay (1971) will further illustrate.

Suppose then you've been kidnapped by the Society of Music Lovers as a last resort measure to save a famous violinist whose kidneys have failed and who is lying unconscious in a hospital bed. You wake up next to him, your body hooked up to his, such that your own kidneys are keeping him alive. Is it lawful for you to unplug yourself and run away?

I imagine you lie in some *Matrix*-like cradle with wires coming out of your body to sustain the violinist. In this situation, I'll be damned if I let this continue. To hell with the violinist; I'm ripping the wires off and getting out of there!

Let's strengthen the case: suppose that it's not a single violinist who is hooked up to your kidneys but 1,000,000 children who will surely die if you detach yourself. We have already made the crucial distinction between natural and Christian morality. But as per natural morality I'm not required to keep these million children alive. For who are they to me? Did I give them birth? They have no claims on me; I'm just a stranger minding my own business. What is it to me whether they live or die? I wash my hands of this entire affair. Up I get, cut the wires, and walk out into my own independent life. I leave

these people to their fate, whatever it is. Yes, nature can be cruel, but it is what it is.

Block, however, in light of evictionism bites the bullet on this:

> Are there any positive obligations incumbent upon the kidney host person in the Thompson example? He cannot stab the kidney dependent violinist, but can he unhook the connection without so much as a by your leave? …
>
> Would he be guilty of murder if he did so (without giving even so much as a five-minute warning to the violinist)? Our answer is that he would be guilty of murder. He would be doing far more than acting in mere self-defense. He would not be removing the (innocent) predator in the gentlest manner possible.[16]

Instead, you would be required to make a good-faith effort to find a new host or dialysis machine. Only if no other solution were available would it be permissible to disconnect yourself.[17] There is a bit of a problem here. We saw the argument in Section 6.2 that it is permissible to violently destroy the fetus if that is the gentlest way of detaching him. By the same logic, if disconnecting oneself from the violinist required tearing him limb from limb, that, too, would be Ok. But we've just seen that Block believes that one "cannot stab the kidney dependent violinist." Perhaps he means that one cannot stab *if* he can unhook, and one cannot unhook if a still gentler method is available.

There is, however, a disanalogy between the cases of the violinist and abortion. The mother has *natural custody* over the fetus, while I have no custody over the violinist. This legalism is conferred on her literally on conception.[b] If the mother wants to get rid of her custody, this action must be self-consciously styled as an explicit abandonment (if it is at all possible) which logically entails notifying others and waiting a bit of time for her guardianship rights to be duly transferred. I, on the other hand, have neither special rights nor obligations toward the violinist. There is nothing to abandon. Can I therefore simply tear out the wires and go home, leaving him to fend for himself or die, without fault? If not, this is because the Abandonment argument and the Gentle Removal argument are distinct though complementary. After all, your small child in the next room is not a predator at all, though he has a claim on you such that to renounce it you have to formally abandon the child. *Both* the mother and father must agree to abandon in order for the custody to revert to the state

[b] "… even from birth, the parental ownership is not absolute but of a 'trustee' or guardianship kind." (*EL*: 100)

of nature. Gentle removal regards the fetus in the womb and only the mother: a viable fetus must be gently removed first, and then the parents will be able to abandon him (though they don't have to – maybe all they seek is a premature birth).

It seems to me, however, that cutting the connection is quite gentle – you don't even touch the guy, and so evictionism is needed for abortion but not for the violinist, and Block's concession is unnecessary.

If you and the violinist are in the position in which you are sustaining *each other*, then *each* of you has the right to disconnect himself, forsaking both the benefits and the costs. If the fetus was somehow helping the mother but wanted out, he would have the right to leave and to discontinue bestowing the benefit on her. Contra Kaczor then, there is no "consistency objection."[18]

If I had *voluntarily contracted* to sustain the violinist and am paid money for my services, then of course I am obligated to stay plugged in. But then it's a contractual duty not a natural one. And as we have seen, there is no contract of any kind between the mother and fetus. An interesting case is when a number of the violinist's fans are vying for a chance to save him by getting plugged in not for money but out of overabundance of charity. Smith is picked and promises to stick around for 9 months. If he changes his mind, can he unplug himself? First, there is the promise which, though not a legal contract, still generates some moral duties. More important, if Smith *had not* agreed, then some other fan Jones would have who would have kept the promise. If replacing Smith with Jones in midstream is impossible, Smith may be on the hook to stay plugged in. Smith made the violinist worse off than he would have been if Smith had not volunteered at all, since then Jones would have served adequately.[19] However, the connection of this case to abortion is tenuous. For one, there is neither contract nor promise. If the child's soul had a choice to be united to any new body, then conception followed by a threat of abortion made the soul worse off; if this to-be-aborted body had not been conceived, the soul would have animated a luckier fetus of a different woman.[c] I'm not sure if this rather bold bit of theological speculation can ground the law. A similar argument can be made for in vitro fertilization, though it is unlikely that the embryo would have been implanted into anyone other than the biological mother.

We have seen that the mother cannot abort a viable fetus for whom

[c] Without this device of preexistence of the soul the argument would be unintelligible, since conception, while possibly a good thing from God's point of view, is not a good thing *for the child*, since it cannot be said that the child would be worse off if he never existed. In such a possible world, there is no "he" to be worse off or better off.

adoption or care is a distinct possibility; nay, she must strive to *arrange* for such care or be guilty of murder according to natural law. Eviction must be followed by formal abandonment. But what of nonviable fetuses or viable ones for whom no stepparent has been located? Block argues that abortion *then* is permissible.

After viability, if reasonably safe for the mother eviction is possible, abortion is permitted only if no one *actually* is willing to assume custody of the fetus that will be expelled and even then only if every good-faith effort has been made to find, though unsuccessfully, a new guardian for the unborn child.

Before viability, abortion is permitted at all times since it is almost entirely identical to eviction in that the fetus reliably dies either way. Thus, a Proper Blockian Abortion can have three outcomes:

a. the aborted fetus is nonviable, cannot be saved, and dies;
b. the (gently) evicted fetus is viable, someone chooses to adopt him, and he lives;
c. the evicted / aborted fetus is viable, but no one wants to care for him, and he dies.

Block argues "progressively," i.e., by appealing to future improvements in economic conditions to generate consensus, that all of these are inherently lawful, but –

- as *society* advances *technologically*, cases like (a) will become increasingly less frequent, and
- as *individuals* advance *morally*, cases like (c) will become increasingly less frequent.

Hence, "in 100 years, libertarians will be considered to be 100% pro-life."

Note finally how this doctrine accommodates eugenic concerns, provided that this is the sort of thing people value. If society is interested in the "purity of the race," then defective fetuses and babies will be abandoned and die because no adult will want to care for them. If, on the other hand, people consider all human life to be sacred, then they will have pity even on such children. Both of these outcomes are Ok as far as natural law is concerned.

NOTES

[1] *EL*: 100.
[2] Block 2004: 276.
[3] Ibid.: 281.
[4] Warren, Mary Anne. "On the Moral and Legal Status of Abortion" in Dwyer 1997: 72.
[5] Gert, Heather. "Viability" in Dwyer 1997: 122.

[6] 439 U.S. 379 (1979).
[7] Block 2005: 37.
[8] Block 2011b: 7.
[9] Block 2005: 33.
[10] Ibid.: 31.
[11] *EL*: 90.
[12] *EL*: 180-1.
[13] Block 2005: 21-2.
[14] Block 2011a: 4.
[15] Wisniewski 2011: 1-2.
[16] Block 2005: 38.
[17] Gert makes a similar point in "Viability" in Dwyer 1997: 122.
[18] Kaczor 2015: 160-3.
[19] This example is from Davis 1983.

7. Challenges to Evictionism

7.1. Causality

Now we enter more complex territory. Let's begin by considering causality in the act of abortion. Doris Gordon, taking a pro-life position, argues:

> Let's compare unwanted pregnancy to a case of a car crash in which one car crashes into a second car, propelling it into a third.
>
> As it turns out, the owner of the third car also owns and drove the car that started the chain reaction. Being the owner of both cars, she can fault only herself. Of course, the owner of the car in the middle can fault her, too.
>
> Now, let's call a pregnant woman *A* (or one-half *A*, the father being the other half), the child *B*, and the mother's body *C*. *A* conceives *B*, thus causing *B* to inhabit *C*.
>
> Plainly, *C* is *A*, the mother. The child, *B*, the one caught in the middle (no pun intended), is innocent. The mother has no just reason to evict, let alone kill, her child.[1]

Gordon may be thinking that the mother harms herself and hence has no right to complain. But suppose that she instead drinks some bad water and as a result gets a real biological parasite. It does not follow that she may not *now* remedy the situation by expelling or killing the parasite. Donald Regan offers another interpretation: "there may be no privilege to defend oneself against an innocent attacker if one has provoked or invited the attack," and there may be something to it. I say "may" because I am hard put to think of another realistic case in which this principle would apply. Here is an unrealistic case: drugs in the water supply have caused all the men in a city to lose their minds at night and wander the streets looking for women to rape. The men regain their sanity during the day. Women of course have the right to go out at night. But it may be that a woman cannot use this right as a pretext to kill men by venturing into the streets and risking rape and "defending" herself when men attack her. I have little patience, however, for the idea that "there is no privilege to defend a third person against an innocent attacker, since that involves choosing between two innocents without being impelled by the desire for self-preservation."[2] Surely, a bodyguard can defend his client against an innocent attacker. But a doctor is just another hired hand who sells his services to all comers. The doctor should be thought of not as a moral agent who impermissibly weighs lives in the balance but as a deputy of the woman, a tool, a

means to an end. If it is not unjust for the woman to abort, then it cannot be unjust for her to pay someone else to assist her in the abortion.

A more felicitous idea is to consider *A*, *B*, and *C* to be acts: *A* would be sexual intercourse; *B*, conception; and *C*, abortion.

Suppose Smith is standing outside a building smoking. I am on the roof holding a heavy anvil on a contraption which I then let go. After Smith goes squish, and I am charged with murder, I counter: "As soon as I dropped the anvil, it was no longer 'me' who killed Smith but 'gravity.' It was not killing, it was withholding aid, and libertarianism permits the latter." Clearly, this defense will not fly in any court because my choice physically caused a necessary chain reaction. In this case *A'* is my letting go of the anvil, *B'* is the anvil falling down, and *C'* is Smith's death. However, abortion differs from such a case in several ways.

First, *A'* is fully voluntary, while *A* may not be in the case of rape.

Second, *A'* results in *B'* with pretty much 100% efficiency, while *A* may often fail to result in *B*. If proper precautions were taken such that *A* was not expected to yield *B*, is the woman still responsible?

Third, unlike *C'* and *B'*, *C* is not a necessary consequence of *B*. It's a separate human action, powered by free choice. Abortion need not follow conception; it may or may not. Here I'll focus on this point.

Consider therefore what is probably the most damning scenario, call it Crazy Mother: a woman agrees to conceive *knowing* that the child is inevitably going to die according to *physical* causation, such as because her body is bound soon by some illness to reject the fetus, i.e., naturally to miscarry, or because the fetus would ineluctably have genetic defects that would kill it. Or suppose she takes an "evening-before" pill that will reliably cause abortion the morning after. This nullifies the third difference. There is no doubt that this is a seriously depraved method of "birth control" especially if resorted to habitually. But according to Block, since a 1-day-old fetus, if evicted, cannot (at present) be saved, abortion is permissible. And if it is permissible on one occasion, it is permissible on a hundred. Therefore, it is permissible even by using this technique.

Besides this Blockian property rights argument, there is a Rothbardian self-defense argument. If I were to booby trap my house into which you were to walk in and be killed even while trespassing (while I was absent), I'd probably be liable for damages, even be guilty of a crime (since I could not claim self-defense, and defense of mere property does not, on some opinions, justify homicide). Things would, I think, be different if a woman were to booby trap her womb such that any child she conceived would be reliably killed. This is

because she would then be defending her life or at least bodily health or integrity.

In anything other than such a contrived situation abortion does not happen by physical causation but by *teleological* causation: it's a choice to perform an action for the sake of an end or future expected utility. There is no necessity (I leave aside the question of whether and how free will is compatible with determinism) either in aborting the baby or in keeping him.

Here is the next most awful case, Evil Mother: Suppose (in the actual world) there existed witches who conceived children with the express purpose of sacrificing them to a demon. At week 10, say, the fetus is removed and let die on Baal's altar. Perhaps the wicked witch desired power or to prolong her life, and that was the price. Is that lawful? Religious freedom permits demon worship[a]; evictionism permits abortions of nonviable fetuses; what then is the problem? The connection now is not physical, but the overall plan makes sense only with both conception and abortion taking place together. This is (literally) a diabolical conspiracy, but again Block would disclaim any injustice.

Attend now to the final most down-to-earth nightmare, Irresponsible Mother: a woman is having sex and out of very high time preference thinks, "If I now get pregnant, which I probably will, I'll just abort." This, too, is a sick and callous attitude. But here I suggest that the third distinction remains and makes some difference. She may reconsider later, for example.

Most generally, a plan from the beginning to conceive and then kill is illogical, but not necessarily a plan to conceive followed by a change of mind later that the fetus is no longer wanted, or an honest mistake. Human beings are not omni-prudent. To be sure, legal abortion encourages foolhardiness and "irresponsibility," but if abortion is naturally lawful, then this unfortunate side effect is in itself irrelevant to the problem. Again, general prosperity may encourage gluttony among the populace; that does not mean that wealth and a progressing economy are bad. We'll briefly discuss for the sake of completeness some utilitarian aspects of legalized vs. outlawed abortion in Chapter 9.

In cases less wanton than the first two, which are the sorts of abortion under discussion, since abortion does not follow conception automatically, conception cannot be considered a first step in a crime inevitably set in motion. Therefore, the anvil analogy fails even on its own terms.

Gordon's other argument is that parents must not put the child in

[a] Since demons are our implacable enemies, worshipping them is against natural law. Whether this practice deserves punishment, however, may depend on whether sorcery of this sort "works" and in so doing violates other people's rights.

danger. "To withhold their support is to endanger the child. Parents owe support because they have no right to use their control to cause danger and then let the harm happen." This world is indeed a dangerous place. Now the parents did not cause the danger; the hostile natural environment did. The question is whether "Smith exists, and Jones creates danger for Smith" is relevantly the same as "danger exists, and Jones creates Smith." In both cases, the overall state of affairs Smith-in-danger is caused by Jones. A reply might be to ask why, given that my parents endangered me by giving me life, and the universe continues to threaten me, they aren't obligated to support me even now. Further, Gordon herself writes: "Conception is not, in itself, endangerment or a threat of harm; it is a normal, natural fact of life. Pregnancy automatically protects the child against the possible dangers of an unsupportive environment."[3] It is only withdrawal of life support that endangers, but pro-choicers fully admit not only that but also that eviction often results in the death of the fetus. Yet they argue that such death is not unlawful; neither therefore is mere endangerment.

On the other hand, Joel Feinberg makes the following argument: "A late-arriving bystander at the seaside has no duty to risk life or limb to save a drowning swimmer. If the swimmer is in danger only because the bystander erroneously informed him that there was no danger, then the bystander has a duty to make some effort at rescue (though not a suicidal one), dangerous as it may be. If the swimmer is in the water only because the 'bystander' has pushed him out of a boat, however, then the bystander has a duty to attempt rescue at any cost to personal safety, since the bystander's own voluntary action was the whole cause of the swimmer's plight."[4] It seems that even if the bystander, instead of pushing an existing guy out of the boat, *created* a new person out of nothing *already in* the water, he would still have a duty to rescue him. This point is irrelevant in cases of abortions before viability since it's impossible then to rescue the evicted child, and since ought implies can, the woman has no duty to do so. But it is relevant for evictions after viability when no third-party adopter has been found. The mother created the child only to endanger him; hence she may still be on the hook legally even if creation (in a safe place) and eviction (to a dangerous place) are separate events unconnected by necessity as in Crazy Mother or by a master plan as in Evil Mother. But if this argument were accepted, then it would apply also to normal births, since the child would be "endangered" and in need of care even then. It would be grounds for a general duty to the parents to care for their children. And libertarians deny that there is a legal natural-law duty of this sort.

Another version of the endangerment thesis is as follows: again, by

conceiving, the woman creates a fetus in the state of danger and then immediately after begins to render aid to him. If she withdraws aid later by aborting, won't she neglect her duty to save a person she by her own actions put in peril? If such a duty exists, it comes into force only when the person who endangers makes the one endangered worse off than before; he then may have to make amends by a kind of restitution. But in some perhaps not entirely coherent sense, conception was an act of making the fetus better off or at least no worse off. Therefore, on this argument no good-samaritan restitution seems warranted.

7.2. Killing vs. letting die

The question now becomes whether eviction as such is never an injustice.

Of some importance here is the distinction between killing and letting die or commission and omission or action and inaction. Mises seems to deny that there is any essential *praxeological* difference: "For to do nothing and to be idle are also action, they too determine the course of events. Wherever the conditions for human interference are present, man acts no matter whether he interferes or refrains from interfering."[5] Is therefore evicting a fetus and letting him die just as bad as killing him from this point of view?

Now to act is to constrain possibilities: to bring about future *A* while forsaking and setting aside futures *B* through *Z*. To *refrain* from acting is to forsake and set aside *A* while *permitting* any *B*-*Z*. At a coffee shop, if I choose to buy coffee, I thereby deprive myself of every other drink. But if I choose *not* to buy coffee, I still have an opportunity to *get* any other drink.

In killing, *A* is death, while *B*-*Z* are probably life. In letting die, *A* is life, while *B*-*Z* can be anything and may well too be life. The contrast is clear: killing creates more responsibility and so is more blameworthy than letting die.

Only if in letting die, *B* thru *Z* are definite death, will there be some parity between the cases. If I am travelling through a desert in comfort and meet a man dying of thirst, I might be under some moral obligation to save him since it's unlikely that anyone else will meet him. However, saving him will be an act of charity not justice; thus, for example, even if I just left him there to die, the state could not prosecute me for a crime.

Again, a nonviable fetus cannot be saved even if evicted rather than aborted outright, so there is no duty to rescue him. Or perhaps the only way to rescue is *not to evict in the first place* but to bear the child at least until indeed viability. But according to this logic, if no one adopts an evicted viable fetus, is the mother morally required to care for him, since she's the closest stranger

(she's a stranger because she's already rejected him) who can execute the rescue?

One disanalogy is that saving the man in the desert is presumably easy, while this kind of rescue and for that matter supporting the violinist are costly to the woman. In other words, a rescue is a one-time act. Once rescued from a life-threatening situation, a person will go on to live his own life; he is not to be put on any permanent welfare. But a baby requires many years of care before he matures. Note that costs matter even for not killing. If Crusoe meets Friday who seems aggressive and wild, Crusoe will need to weigh the benefits of cooperating with Friday against the dangers of letting him live.

There are of course special moral (though on libertarianism not legal) obligations of a parent toward his children. A woman who neglects her duties is blameworthy. But *once* she (viciously) abandons her child, in the case when all the neighbors were given an opportunity to adopt yet no one volunteered, the mother (now as just a stranger) does not seem to be morally any worse than everyone else who failed to offer to care for the child. She's not obligated to step forward in *that* capacity. In any case, even if the "rescue" is morally required, it cannot be legally required, and letting die is not a violation of natural law.

7.3. Stowaway and other cases

Recall James Sadowsky's point that it seems too much to throw a stowaway off your airplane. Let's strengthen the Stowaway case. You are flying a medium-sized plane while participating in a race which is important for your career. You're pretty confident you can win. For some reason, the plane feels sluggish. You turn around and see a stowaway, a fat guy just sitting there staring at you. You realize that with this bastard on board, you're going to lose. Worse, when you question him, it turns out that the guy was maliciously sneaked into your airplane by a competitor upon a deliberate design of sabotage. Yet it seems that despite both the high costs that the stowaway imposes on you and his undoubted legal culpability (an actual crime not just an accidental trespass), you still can't get rid of him. This suggests that a woman cannot lawfully evict a fetus even if it was a product of a violent rape.

(To go back to a distinction already drawn, maybe an appropriate *punishment* to the stowaway and his handler for ruining your career unjustly is a year in prison long after the fact. The question, however, is what are you allowed to do to him in *self-defense* during the commission of the crime?)

Suppose the flight will last for 9 hours. What if lasted for 9 years? Or until the pilot died of old age? Could the answer be different? Suppose that

instead of 9 hours on a plane, the stowaway hid on a futuristic spaceship flying to a nearby star indeed over a period of 9 years. If the captain did throw the guy out of the airlock, I as a judge might well not object.

Block points out bitterly in a similar scenario:

> So, there is a storm. It is a deadly one. If you stay outside, you will die. I invite you inside my house. I thus make you a "trespasser." A month goes by. A year goes by. Ten years go by. The storm persists.
>
> If ever I disinvite you, if ever I ask you to leave my abode (I have been feeding and clothing you all this time), I will be guilty of murder, according to Wisniewski, because I have made you "a 'trespasser' in the first place."
>
> Suppose I board, house and feed you for five years, whereupon I turn you out into the storm, and to your death. I am a murderer. I get no credit for keeping you alive for five years, according to Wisniewski.[6]

Yet Block does *not* consider the duration or cost to be relevant:

> … we are talking *principle* here. It matters not one whit how long a duration we are talking about. If the fetus has a positive right to squat on what would ordinarily be considered the mother's private property (her womb), then the nine months could be turned to nine or even ninety years, without any change in principle whatsoever.[7]

Suppose finally that I can call upon another airplane which can hook up with my own, and the stowaway can be transferred onto it. I do just that and go on to win the race. Surely, this is not only permissible but praiseworthy as ingenious problem-solving. If such a maneuver is possible, then I am duty-bound to utilize it, according to the "principle of gentleness," i.e., that if you want to remove a trespasser, then you must use the least unpleasant means (though you can ratchet up the force in case of resistance). But what if it's not possible? It is not immediately obvious to me that I may kill the stowaway.

Yet I may kill him by Block's logic because the stowaway is "nonviable"; hence his own argument applies perfectly: "aborting," i.e., killing him on the airplane has the same consequences as "evicting" him, i.e., throwing him out alive. He dies either way; only the methods of execution differ. Moreover, if it is lawful to kill the stowaway and throw out his dead body, it is surely lawful to kill him and *not* throw out the body. But eviction is justified on grounds of libertarian property rights. Therefore, so is outright killing.

In addition, Stowaway is too strong to be a proper analogy to abortion.

In the original example, there is criminal intent, rights violation, and the stowaway made *himself* worse off than he would have been safe on the ground. He is perversely counting on your forbearance, exploiting your moral scruples. In fact, you invited (indeed *dragged* as Wisniewski points out) him on board, as a woman invites the fetus into her womb. Surely, you cannot revoke his permission to remain on the airplane in midflight and demand that he jump out. Block argues that this is because there is at least an implicit contract between the two of you which would be violated by such a demand. The guest would never have agreed to join you if he had known he would be treated so atrociously. But there is no contract between the mother and child. So not throwing out the guest is a contractual not natural duty. But it is both. If you promised to fly me to Houston but delivered me to Los Angeles instead, that would be *just* a breach of contract. But it seems like a more serious matter if you pushed me out of the plane at 30,000 feet in the air. My relatives would be able to do more than just ask for my money back. Suppose you took a 2-year-old boy with you on the plane. He is still too young to sign any contracts. Yet you cannot kill him in this manner despite that. Of course, in this case you take the boy out of a safe place (indeed *kidnap* him as Block retorts) and place him in danger, making him worse off. You are then reasonably obligated to protect him. But by creating a fetus, even in a dangerous place, you make him better off. You are under no such obligation. An intermediate case is possible, such as when you invite someone into your house, and then, unbeknownst to either of you, there is a storm. Maybe the guest is better off if he would have been stuck in the storm otherwise, maybe he's worse off if he would have ended up in his own house, but you did not deliberately cause his current predicament. Is it still permissible to evict? These distinctions may be able to ground abortion rights.

Consider now case #2, Perimeter Defense. Smith was shipwrecked on a small desert island which over the years he has thoroughly homesteaded. Then Jones gets shipwrecked near the island, swims ashore, and is greeted by Smith who tells him: "This is my island. You are trespassing on private property. Go back where you came from. Go swim in the ocean." (Smith is a mean SOB this way.) Does Smith have the right to do that, or is it murder?

This is not, by the way, a "lifeboat situation," in which a wooden plank can support only one man in the water, such that if two try to hold on to it, both will drown. Again, it is permissible for the lucky people in an overfilled lifeboat to stop another survivor from climbing on board if as a result the entire boat will sink under the extra weight. So, if the island resources are so scarce as to be able to support only one man, then Smith may be justified in

keeping Jones out. But in Perimeter Defense we'll assume that Smith might be at the most inconvenienced but will not perish due to Jones' presence.

Case #3, Blue Lagoon. A couple gets shipwrecked on a desert island; they fall in love (or not), have sex, and have a child who reaches the age of two. Can they, upon a change of heart, lawfully stop feeding and caring for the child, even (and especially) if there is no one else to homestead him? If so, at least under libertarianism, then a fortiori they can expel and let die a fetus or even, owing to identical consequences, kill it in the womb and then expel.

Rothbard may have had the clue to solving these conundrums all along. Recall his reply to Sadowsky:

> … just as an assault on someone's body is a more heinous crime than the theft of his property, so the trespassing on or within a person's body is a far more heinous trespass that merely strolling on his land or stowing away on an aircraft.
>
> For the crime of trespassing within a person's body, any means necessary to evict the trespasser should be legitimate.

He thereby postulates a difference in degree which in the particular case of abortion becomes a difference in kind.

This move permits us to argue that in Stowaway, you must endure the fat guy and lose the race; and in Perimeter Defense, Smith must allow Jones on the island; yet a woman is allowed by natural law to abort, consistent with evictionism. Yet if we take this route, then we are also permitted to *disagree* with Rothbard and say that the fetus' trespass is precisely *not* heinous enough. So, which is it? For example, if Smith, instead of walking on Jones' land, was a demon who tried to possess Jones' body, then Jones would surely be justified in killing the demon. But is pregnancy really to be likened to demon possession? Perhaps pregnancy due to a violent rape may have this aspect which may justify abortions in such cases. Regan proposes that even in cases of pregnancies from consensual sex "the burdens of pregnancy and childbirth can be assimilated either to serious bodily harm or to rape… (1) What a woman suffers from pregnancy is a protracted impairment of function of her body as a whole." Regan then proceeds to argue that an unwanted pregnancy is also like (2) rape with the fetus being the (innocent) rapist.[8] Roderick Long follows him on this, writing that "the notion of an enforceable obligation to let one's body be used by a rapist is a moral obscenity; and the same holds for the notion of an enforceable obligation to let one's body be used as an incubator by a fetus…"[9] If so, then the law should allow the woman the use of deadly force against the fetus in defending herself. An objection to this might run as

follows. We saw in Chapter 1 the opinions of those who think that a woman is morally obligated to love her children. If she does not, she's a moral monster, "slays all human love," etc. If she can't manage *that*, what good is she for *anything*? Now on the contrary no woman is naturally obligated to love her sexual partner. If that partner is objectively a rapist, then she can hate him. But a fetus becomes a rapist on this understanding solely by the woman's arbitrary act of subjectively coming to hate him. But if she is not allowed by law to hate the fetus, neither can she lawfully consider him a rapist. A reply might be that a woman ought to love her *born* children but not her fetus, because that's difficult if not impossible, such as because a fetus isn't seen, isn't cute, etc.

7.4. Departurism

Let us now look at one more challenge to evictionism proposed by Sean Parr (2011) which he dubs "departurism." It's an ingenious argument.

If abandoning custody entails notifying the authorities, then the length of the waiting period is arbitrary: the custom may call for a 1-day wait, 9-day wait, or 18-day wait, whatever is "reasonable." (The custom is basically positive or civil law that implements natural law.) But allowing time for *departure* is also arbitrary and a positive custom. Suppose *A* sleeps with *B* in a one-night stand and upon waking up in the morning, demands that she, *B*, get out ASAP. Call this case "Casual Sex." What is the "reasonable" amount of time for *A* to wait for *B* to get dressed, pick up her stuff, and leave? 90 minutes? 9 minutes? What if *A* gets impatient and decides that 9 seconds is the most he can stand *B*'s presence in his apartment? After the 9 seconds expire, he then throws *B* (and her stuff – *A* is no thief) out the window. Isn't that murder?

Parr then considers the maturing fetus to be perpetually *in the state of departing*, except the time it takes for him (inevitably and reliably) to leave his mother's body happens to be 9 months. Call this case "Birth." If in Casual Sex, 9 seconds of the time allotted for departure is unreasonably short, and 90 minutes seems plenty, then why can't we state by fiat that in Birth, 9 days departure time is unreasonable, while 9 months is just right? If the custom in Casual Sex is somewhat arbitrary, why isn't it arbitrary in Birth, in which case we qua libertarians should be indifferent as to the exact rules the custom, having been perhaps diligently contemplated and discussed to yield some happily utilitarian results, specifies in any particular community?

Since the fetus will inevitably exit, and at an almost perfectly well-defined time, it seems that he is respecting the mother's property rights; it's just that he needs some extra time to execute the departure properly. Why rip him out of the womb while he is already trying to leave? Surely, every unborn child

is eager to be born at least by instinct if not conscious desire; he has not occupied his mother's body indefinitely, proclaiming himself overlord and her a slave bound to serve him in perpetuity. If he could get out early, he gladly would, but natural law sets strict constraints on how new human beings come to be.

Now a thief is different from the state in that his robbery of you lacks any element of permanent relationship. He mugs you randomly and sporadically and runs away, and you need never see him again. The state, on the other hand, is looting you on a permanent basis. You are eternally a tax-serf bound to labor the sake of the tax-lord. You are freed only in death, and so are your children. But a fetus is not imposing a permanent unjust bond on the mother. Nor is this similar to some compulsory and limited in time military service because such service is due to the state's positive law. The positive law can be abolished, while the natural law cannot be. It's an iron necessity, and there is nothing that can be done about it. Block might parry that the costs to the mother are too great, but that's not a deontological or rights-based argument. Another reply is simply to agree with the distinction between the permanent exploiting state and a private criminal but point out that the thief, too, is doing something unlawful. A fetus then has no right to the resources of the mother's body even for the amount of time necessary for him to mature and depart.

To illustrate, let's say you find a guy standing in the middle of your lawn. You tell him to leave. He proceeds to do just that. However, he *walks* rather than runs toward a public street. "Impudent dog," you think. "How dare he fail to exhibit the requisite zeal at respecting my property rights?" Getting impatient, you reach for the bazooka and blow him away, anyway. Surely, that's unlawful.

Gentleness seems to require an adequate or reasonable amount of time given to the trespasser to leave the property. In Birth, that time may well be 9 months.

We might say that in Casual Sex, *B* should make a good-faith effort to leave quickly. But the fetus is also trying as hard as he can. He cannot be blamed for tarrying or overstaying his welcome which is set by natural law.

If the fetus is viable, then perhaps it is permissible to speed up his departure, just as the parents might throw out a 14-year-old kid out of the house to fend for himself *even without* notifying anyone of the abandonment of their custody. But in the case of a nonviable fetus, the departurist argument provides a reason for the natural unlawfulness of such an early abortion.

Departure requires time to be executed since people cannot move at infinite speed. Allowing a trespasser enough time is no more a positive obli-

gation than notifying willing stepparents of abandonment. In saying that the trespasser ought to be given a reasonable amount of time to cease and desist in his offense, all we do is pay respect to logic, or physics perhaps.

There is a parity then: for a small child or viable fetus, abandonment logically requires notification with the resulting imposition of waiting time (due to the child's perishability in the meantime) before an eviction. For a nonviable fetus, eviction coupled with the gentleness principle logically requires enduring the period of departure with the resulting imposition of waiting time for the fetus to mature until it can be safely expelled. Therefore, neither abortion nor eviction are permissible for a nonviable fetus, unless it is somehow foreseen that homesteading will not happen later in any case.

Thus, for a Proper Parrian Abortion to take place, a nonviable fetus must first be allowed to become viable outside the womb. This will take some time. Then (or earlier) the mother will notify the authorities of a pending abandonment. She will wait some more time to give some new guardian an opportunity to come forward and homestead the baby to be evicted. Finally, if no such guardian has volunteered, she may lawfully abort.

Block replies that this makes departurism identical to the extreme pro-life position, but this isn't 100% right because it obliges the mother to keep the fetus not until birth but merely until viability at which point it becomes permissible to evict him. Moreover, abortion remains just even before viability if it is reasonably guaranteed that no new caretaker will be forthcoming, anyway.

He goes on to argue that the fetus is not "trying to leave" because he is incapable of forming a conscious intention to leave. True, but we can impute respect for the mother's property rights to the fetus based on his unconscious biological disposition. He's doing everything he can to get out as fast as fetusly possible.

Nevertheless, weighty objections can be brought to bear against the departurist thesis. In Casual Sex, there is an implicit contract between *A* and *B*: presumably, if *B* had known that she'd endure such harsh treatment at *A*'s hands, she would never have consented to have sex with *A* in his apartment. But there is no contract of any kind between a woman and her fetus; I think it is literal gibberish to say that "if the fetus had known that he would be aborted, he would never have agreed to be conceived," since a nonexistent creature cannot know anything or reason at all, and since it is not even clear that one would definitely prefer never existing to life, regardless of how brief, anyway.

Further, a departurist argument can be made for the violinist. He's healing as fast as he can while being hooked up to you. It's also a natural law

that the improvement in his condition cannot be sped up. Therefore, he is entitled to 9 months of this to complete his recovery. Departurism looks like a trick that seems plausible only for very short time periods and fails otherwise. The reason is that in Casual Sex, *A* is bearing what is essentially a *transaction cost*, too small to merit consideration. But the mother (or the donor for the violinist) is not, instead she's being conscripted into onerous service.

Departurism also seems to prohibit abandonment even of the Blockian kind. After all, a child is still dependent on his parents even after birth. He is "departing" toward adulthood. Must the parents take care of him for the next 18 years?

Block finally suggests that there is a big difference between 9 minutes allotted for departure and 9 months from conception until birth (or let's say 6 months until viability). The general principle is certainly correct: where there is a continuum, there are hard cases, but that does not mean there are no easy cases. 9 minutes in Casual Sex seems like an easy case in which the law need not "take into account trifles"; is 6 months in Birth an easy case on the other side of the continuum? Is it an undue burden? It still requires the woman to be a not just good but great samaritan. One cannot even argue that the Good Samaritan's saving the victim of the robbery was required by natural law just because it did not take him a long time. But 6 months of pregnancy and the sacrifices involved in it seem especially excessive. (What, however, if a woman is already 4 months into her pregnancy and wants to abort then? Within 1 week of the fetus' viability?) You must judge this matter for yourself.

NOTES

[1] Gordon 1999a.
[2] Regan 1979: 1612.
[3] Gordon 1999b.
[4] Feinberg 1986: 285.
[5] *HA*: 13.
[6] Block 2010: 6.
[7] Block 2011a: 11.
[8] Regan 1979: 1613-8.
[9] Long, Roderick 1993: 190.

8. A Theory of Ensoulment

8.1. Introduction

In our shallowly irreligious age, theorizing about such problems as how a developing fetus acquires a soul is deemed hopelessly passé. I beg to differ: it may make a key difference in understanding abortion. As I pointed out earlier, it seems indubitable that a fetus belongs to the species *Homo sapiens*. Its nature is "rational animal." But perhaps this view can be challenged after all.

I want to stay philosophical and assume as little of special revelation as possible, though I will use it for the sake of illustration. Hence, we'll allow, as Christian theological tradition has generally refused to do, such things as preexistence of the soul and even metempsychosis / reincarnation.

In addition, there is a problem in Christianity concerning the status on the one hand of the souls of the righteous who died before Christ, and on the other of the souls of departed infants and indeed fetuses. As regards the first, we can resort to postulating the *Limbo of the Fathers*; presumably both Abraham and Socrates slept there (e.g., Lk 16:22). Prophet Samuel was certainly not in hell, as 1 Sam 28 attests. Moses and Elijah appeared with Jesus during the Transfiguration (Mt 17). Etc. The pagan Greek underworld and Jewish Sheol had the right view of things *at the time*: the insubstantial shadows drifting in the Hades' dark kingdom are simply the dreaming souls in the Limbo of the Fathers in an unredeemed world. (In *Odyssey*, Achilles' shade tells Odysseus: "I would rather be a paid servant in a poor man's house and be above ground than king of kings among the dead." And Ps 6:6 reports, "For in death there is no remembrance of you. Who praises you in Sheol?") One of the changes in the cosmic order of things wrought by the Incarnation was precisely that these souls were awakened and brought into a conscious afterlife, and the Limbo was closed forever: those who die now in the state of grace go to heaven.

But there is a similar difficult problem with respect to young children. They are born innocent and must become good as they grow up. Good men go to heaven; wicked men, to hell; but what of the innocents? In an attempt at a solution, Catholic theologians have hypothesized the *Limbo of the Children* as a kind of highest level of hell, an eternal celestial nursery, a place not of union with God in supernatural glory but of simple natural happiness, where the souls of infants and small children who are innocent but who have not proven themselves worthy in spiritual combat go upon death.

There is also the fact that large numbers of people are neither excep-

tionally good nor particularly evil; hence they *cannot* go to heaven yet *will* not go to hell. Yet as the Catholic Encyclopedia informs us, "in the present economy exclusion from heaven means for adults practically the same thing as damnation. A middle state, a merely natural happiness, does not exist."[1] This is a serious issue because no man whose nature is pure can be lawfully condemned. There are *indeed* three states: corrupted nature; pure nature; and state of grace with its theological virtues that is built on top of pure nature. A man who has scrupulously obeyed the natural law in life but received no grace and is without charity cannot reasonably be made to suffer the eternal horror.

We must then postulate two kinds of hell: one is for the corrupt where there will be weeping (inconceivable pain) and gnashing of teeth (absolute hatred) as Jesus taught; the other is for the pure yet ungraced which is simply separation from God and indeed some sort of natural happiness.

If, however, natural happiness is not permitted – every man *must* somehow make a final and irreversible choice between true heaven and true hell, then reincarnation follows naturally. For if this choice is very often not made in a single lifetime, then more than one lifetime will be required.

The problem is not well-solved by positing purgatory. In his account of a near-death experience, Arthur Yensen asked his heavenly friends: "Then what becomes of the old grouches?" They replied:

> If they are too bad, they go to a realm of lower vibrations where their kind of thoughts can live. If they came here, the Master-Vibration would annihilate them. After death people gravitate into homogeneous groups according to the rate of their soul's vibrations. If the percent of discord in a person is small, it can be eliminated by the Master-Vibration; then the remaining good can live on here.
>
> For example, if a person were 70% good and 30% bad, the bad could be eliminated by the Master-Vibration and the remaining good welcomed into heaven. However, if the percentage of bad were too high, this couldn't be done, and the person would have to gravitate to a lower level and live with people of his own kind.
>
> In the hereafter each person lives in the kind of a heaven or hell that he prepared for himself while on Earth.[2]

Adapting this to the more traditional understanding, a saint (sort of) who is 70% good and 30% evil can have the cancer of evil burned out of him in the purgatory fire (which St. Thomas teaches is the exact same fire with which the damned are tormented in hell) and remain reasonably human. A sinner, even if forgiven and spared hell, who has rather 30% good and 70% evil in him will,

upon purification, lose his entire identity. At best, he'll become a simple child running around underfoot whom the better saints will treat will benign indifference. At worst, his intellect will be destroyed, and he'll end up literally a dumb plant, a flower growing somewhere in paradise. (Yes, it's all quite terrifying.) Given that the vast majority are sinners, God ends up ruling a kingdom of half-wits, pitiful hollow subhumans. And this is grotesque.

Noah Millman tells the following parable:

> The dead approach the Garden, housed in the body of their life, their deeds made flesh, and face the angel and the sword.
>
> And with a burning stroke, he cuts out the blemishes of their transgressions, and leaves their flesh gaping. For we are told, that none with a blemish may approach the Lord…, and none with a blemish may be offered…
>
> But their flesh gapes, for there is no Experience in the Garden, no way for souls to heal the gashes made by holy flame.
>
> And this, perhaps, is what the four saw there: the maimed and crippled souls stumbling in Paradise.
>
> The tongues that gossiped, the lips that spoke falsely, the eyes that coveted – cut out.
>
> The hands that struck in anger, the fingers that stole, the legs that ran to do evil – lopped off.
>
> And the poor souls who huddled in the dark, who buried themselves in their caves, so fearful of evil that they hesitated to do good; pale souls who pass almost unnoticed through the byways of the Garden, they live in the poor houses that their deeds built while they lived.
>
> One in four? There is not one in a thousand who would not die, go mad, or lose his faith, gazing on the cauterized stumps of the saved.[3]

C.S. Lewis argued:

> Your soul has a curious shape because it is a hollow made to fit a particular swelling in the infinite contours of the divine substance, or a key to unlock one of the doors in the house with many mansions.
>
> Your place in heaven will seem to be made for you and you alone, because you were made for it – made for it stitch by stitch as a glove is made for a hand.[4]

The body, as it ages, becomes disgusting, but where is the guarantee that our souls become beautiful during the same process? In reality, in battling our-

selves, and the flesh, the world, and the devil, as it were, do we not become irreparably weird, freaks? Of what use to God are these twisted pathetic excuses for rational animals? Is heaven a menagerie of curious oddities, fantastic aberrations? If the key is so misshapen, what of the lock?

Again, if progress and improvement belong to this life only, and all the realms between heaven and hell are ultimately impermanent, then reincarnation seems inevitable.

As a result, I find Limbo of the Fathers eminently plausible, but Limbo of the Children a problematic doctrine.

8.2. Quickening as a criterion

Returning to our main interest, following St. Thomas, we can construct a fast and loose "spiritual" hierarchy of life-forms.

At the bottom are single-celled organisms that merely "live."

On the next level are plants who possess only the "nutritive" or "vegetative" soul; they "grow." Moreover, such organisms are multicellular and sport different organs.

Then there are animals like oysters that have senses but are immobile.

Then we have higher animals who "transcend space," i.e., who can move about, like parrots and lions.

Up at the very top, we have humans who as rational animals transcend both space and time, i.e., are four-dimensional, operating in all four periods, past, present, future (in action), and timelessness (in contemplation).

I will call these souls in this order living, vegetative, sensitive, self-moving, and rational. It's a Tower of Hanoi sort of setup, whereby each more sophisticated part of the soul rests upon all the more primitive ones. I mean this quite literally: the soul is not anything abstract (like the "form of the body") but indeed like a flower made out of spiritual light "within" the body. One can get a picture of it by looking at the Eastern chakra model of the soul. The living soul corresponds to the red chakra, the orange to sensitive, etc. (This is no New Age gibberish; this stuff is real and astonishingly consequential.)

Lower creatures have some but not all of these. There are at this point several possibilities. First, a full-featured soul may be created by God or descend from heaven immediately upon conception. The body's stage of development determines how severely the soul is handicapped in its powers. This opinion has problems. For one, a human soul cannot be joined with, for example, a computer or donkey; those are inappropriate bodies for it. Neither does it seem that a young fetus is capable of "hosting" the rational soul.

One way to avoid this conclusion is to argue that just as a soul can exist

fully outside the body, so it can also exist partially outside it. The fully connected chakra-stem is created at the moment of conception, but only the red chakra is "inside" the body; the rest of the soul hovers above it. With time, each chakra is progressively integrated into the body. This is possible, though it entails that the lower 3 chakras are created rather than develop on their own. Another theory is that at conception the chakras are fused into a single undifferentiated ball of white light and separate into their spectrum later on. In this case this ball, by virtue of containing the potential for the full-fledged soul, is a *human* soul. In other words, both the body and soul are undeveloped but fully human for all that.

Still, if a miscarriage occurs sufficiently early during gestation, a frequent enough affair, then the soul will have to go back to heaven empty-handed, or without useful experiences, in vain. The idea of such objectionably masturbatory trips back and forth seems sufficiently comical not to be taken seriously. In addition, it makes especially embarrassing the problem of the Limbo of the Children by causing it to be populated mostly with embryos.[a]

The second possibility is that God uploads *each* faculty into the body as it gestates step by step. This too is unsatisfactory. Now the fertilized egg is alive and so has a living soul at the outset. If all further faculties, vegetative, sensitive, etc., are forged and infused by God, then God would also have to control the prenatal growth of all plants and animals. A plant produces a seed, and suddenly God must supervise the seed's "spiritual" development. Two porcupines have sex, and God immediately has to concern Himself with their offspring, timing their soul developments perfectly. And this is absurd.

Third, perhaps the entire soul of any creature develops naturally, including through the stages described, along with the body. This has some attraction but still is no cigar because the rational faculty is far too mighty a power simply to up and arise. One and one's soul are either rational or not; the gulf between the two is unbridgeable. And there is another major difference in kind: a rational soul is naturally immortal (once it exists) and is slated for heaven, while a non-rational soul is naturally corruptible and is indeed like a "puff of smoke that appears briefly and then disappears."[5]

In addition, this solution is incompatible with reincarnation, hence it depends on the fairly controversial premise that reincarnation is not a thing.

Therefore, we must assert that the vegetative, sensitive, and self-

[a] Monozygotic twinning of an embryo poses no problem for this view, however. *Whenever* an individual organism begins to exist, whether at conception or at twinning, its soul is joined to it then.

moving spiritual human faculties develop on their own accord along with the body of the embryo / fetus, while the rational faculty is either created by God or comes down from heaven, snapping securely into place in the fullness of time. The rational part completes the human soul's development as though a crown were placed on the king's head. (Again, this does not entail that the fetus can now think; rather, it *would be able* to think but for the primitiveness of the body which at this point shuts off most of the soul's powers.)

For example, only a few days after fertilization, cellular differentiation begins, thus endowing the embryo with the dignity of a plant and its vegetative "growing" soul. Unlike the conferring of the rational soul, this seems to require no divine action.

Even if a pre-quickening fetus is not human by virtue of lacking a rational soul, doesn't it still have a future like ours (see Section 4.3.4)? Perhaps it's the soul that has this future, and it does not exist yet or, given preexistence, is still in heaven. The organism has a future but is not rational, the soul is rational but is not yet guaranteed a future. With the two separate, it may be permissible to abort. In other words, the pre-quickening fetus corrupts upon ensoulment, and a new being is generated, perhaps by a miraculous act of God. So, "the fetus has a future like ours" is false because in fact *it* does not; it is destroyed in the second trimester. One objection is that corruption would seem to be a violent thing: you have a clay statue, and then you smash it to bits with a sledgehammer, and it corrupts. But here "corruption" is a technical term meaning loss of essence, and the fetus does seem to lose its essence as an irrational animal and acquire a new one as a human being.

Regarding Virgin Mary's immaculate conception, the falsity of delayed ensoulment does not follow, as even the merely living, vegetative, etc. souls may be infected with original sin. For animal suffering, in Catholic understanding, is ultimately too due to the fall of man. For example, God may have created the world full of animal and even plant strife, foreseeing that much later on, when man comes onto the scene, he would fall from innocence. Mary's rational soul might descend later, and it too would be clean.

The benefits of this understanding are many. First, it neither precludes nor requires reincarnation.

Second, it postpones the creation of the rational faculty considerably, into the second trimester, thus preventing numerous apparently superfluous and frustrating journeys of a soul from heaven to earth and back; even without admitting reincarnation it makes somewhat less offensive the ugly artifice of the Limbo. Before its acquisition of the rational soul, the embryo's soul is not at all immortal and simply corrupts if the embryo dies, e.g., it is somehow

absorbed into God or dissipated with no consequences.

Third, it lays down the foundation for a compromise, suggesting that early abortions are not immoral, with 21 weeks at *quickening* being the upper limit on permissible abortion. The correct cutoff age could of course be even earlier; thus, during weeks 13 to 16, the fetus makes active movements and sucking motions are made with the mouth; and even during weeks 10 to 12, the fetus can make a fist with his fingers. It appears that the power of self-motion develops fairly early during pregnancy, at which point the rational soul can be finally infused. Once the soul is completed, aborting the unborn child is a major sin.

Abortion for the child's own good can be justified on this account of ensoulment since before quickening the fetus is merely a vessel for the rational soul. If the vessel is defective, it is permissible to destroy it, so that the soul could in the future find a better place to live, but only before it is ensouled. Then, barring additional considerations, abortion is morally wrong because it kills a human being.

Quickening then is a sign that the rational soul is about to be infused into the fetus, at which point the child becomes fully human and immortal.

If the fetus is nonhuman before quickening, then abortion *then* is unproblematic – it is not immoral and a fortiori ought not to be illegal, and libertarians have nothing to add to the discussion. But our arguments still become relevant with respect to fetuses after quickening. If quickening precedes viability, then the evictionist arguments are unaffected; if in the future it comes to follow viability, then abortion will also be permissible *between* these two events.[b]

NOTES

[1] *CE*: "Predestination."
[2] Yensen, Arthur. *I Saw Heaven*. 1955.
[3] Millman, Noah. "This Thing of Darkness I Acknowledge Mine." *The American Conservative*. October 2, 2014.
[4] Lewis 1940: "Heaven."
[5] Jm 4:14.

[b] If you find all this reasoning unconvincing, then I suggest that you should err on the side of life and *assume* immediate full ensoulment at the moment of conception.

9. Final Considerations

9.1. Plotting and planning

If libertarians have not proven beyond reasonable doubt that abortion is a natural right, then perhaps we can look at the consequences of legally prohibiting it.

The result will surely be (1) aborting fewer and (2) conceiving fewer.

Now first, the pro-choicers argue that prohibiting abortions will lead to women self-inducing abortions in the back alley using dangerous methods ("coat hangers"). This is definitely a social *cost*. But it is also very likely that the number of illegal abortions committed in this way will be smaller than the number of *legal* abortions committed now. Isn't that a desirable social goal? How much smaller, no one can tell, so why not experiment to find out? Let's repeal *Roe v. Wade*, let states handle abortion decisions, and do a thorough study a few years afterward to see by how much abortions have declined.

Suppose that N women under prohibition die from incompetently performed black-market abortions, while M are thus harmed under liberty, and $N > M$. The difference is a cost. But $N - M$ must be compared with the number of unborn children aborted under liberty minus this number under prohibition, admitting for the sake of argument that such unborn children are fully human, persons, and so on. If a thousand extra women die under prohibition, but ten thousand extra babies die under liberty, it may be that the costs of liberty outweigh the benefits.

Is it even the case that fewer maternal deaths due to abortions is a bad thing? We don't consider it a happy end when a mass shooter escapes after murdering a dozen people. We say he *deserves* to die. That he dies either from his victims' self-defense or from the state's punishment is a positive good, a manifestation of holy justice. Similarly, if abortion is a violent crime, then it is just that its perpetrator, the woman, should suffer. If she suffers from being prosecuted and punished, great. And if she suffers from an injury by an incompetent abortionist, so much the better: it is a deliciously ironic retribution, as though a mass shooter, while carrying out his wicked operation, accidentally shot himself. (Yes, it's a cold-blooded argument, but here it is for your pleasure.)

Second, it will encourage more responsible sexual behavior. People will be more careful if they know that the cost of conceiving is having to bring the baby to term and be a parent or at least, if the baby is given for adoption, bear the burden of knowing that you have a child whom you were meant to rear

and whom you will, however, never see. Again it is very hard to predict by how much the number of abortions will drop, but drop it surely will.

For example, suppose that when abortion is legal, every year 10 million children are conceived, and of those 10 million, 5 million are deliberately aborted. After the prohibition is in place, we should expect something like the following: 2 million children are never conceived in the first place due to the new incentives, so only 8 million are conceived; furthermore, of those 8 million, not 4 million but only 1 million are aborted.

In short, the most notable consequence of prohibition will be to promote female chastity, and hence on certain views virtue, by raising the costs of promiscuity and premarital sex to women, *not* to "save lives." This is because ideally the children who under liberty are aborted will under prohibition never be conceived in the first place, as women, facing the new incentives, abstain from whoring themselves. It may be true that young women eager to jump into any guy's bed are "stupid," but then so are criminals, but that does not mean there is no deterrence effect of threats of punishment. Some of this effect will consist in greater parental guidance for young women, such that the girls' "stupidity" is counteracted by greater parental strictness toward them.

The upshot will be to make women somewhat more chaste and hence better marriage partners rather than the semi-prostitutes who have ruined their own capacity to fall in love. Let's face it: no man really wants to have a wedding where the bride has slept with most of the guests.

A cost associated with this consequence is less sexual fun for the people, but then again perhaps free love is neither in the first place.

If abortion itself, though not a crime, is a sin, then prohibition will to some extent (paternalistically) serve to discourage sin and promote virtue. A further benefit might be that some abortion doctors will find a less disreputable occupation.

These considerations should be weighed against two things:

i. the harm to undeterred women and doctors from the punishments inflicted by the authorities; and
ii. the extra costs to the taxpayers of additional law enforcement.

Again, from the deontological standpoint we don't care about such economic matters. The legality of business advertisement *might* channel some resources into apparently wasteful arms races between firms; that possible effect does not justify government prohibition of advertisement. If abortion is lawful and a natural right, then any individual abortion is at the most a sin, and vices are not crimes and ought not to be suppressed by government violence.

A cost of the prohibition then is the suffering of the women who still have abortions and are caught and punished. In addition, the situation resembles the drug war in that even though, *unlike* drugs, there is a victim, the fetus, *like* drugs, the victim will not complain. Disrupting the "mutually beneficial" in the narrow economic sense illegal abortions between women and doctors will be a serious pain to all concerned. Society will still further become infested with rats and informers; police corruption will assuredly rise; some women are bound to die or be physically harmed from incompetently performed black market abortions; and so on. If there is empirically much defiance of the law, punishments will have to be ratcheted up, and I am not sure juries will be prepared to send a woman to prison for 15 years for an abortion.

Another utilitarian question is whether legal abortion brutalizes people. Brutalization occurs as a result of doing something that is not itself wrong but that may inure one to doing wrong things in the future. For example, beating a humanlike robot with a baseball bat or torturing small animals need not be wrong, but it can brutalize a man. Abortion might not brutalize, at least not too much; it does not obviously result in more wars and more murders, as abortionists, grown cynical and vicious by their contempt for human life, commit other atrocities. The general culture of death may of course corrode morals. But it may be that abortion is not a threat to the peace, security, and safety of the whole society. In such a case we have a reason to treat it leniently.

9.2. Odds and Ends

Joel Feinberg denies that fetuses and infants are persons or have a right not to be killed. Instead, killing them may be proscribed for "utilitarian" reasons: as he puts it, "considerations of what is called 'social utility,' 'the common good,' 'the public interest,' and the like."[1] There are problems here. For one, it is unclear why non-persons should be included in the society whose utility is to be maximized, or why they should count among the public whose interest is to be promoted. Second, if the utilitarian thing is for the *state* to outlaw infanticide as a sort of public policy, then it is not morally wrong for a woman to kill her child: it is not wrong in itself or malum in se, but wrong only because prohibited or malum prohibitum. We might say it is risky for a woman to indulge in killings since she might get caught and punished; if she can get away with it, however, there is nothing to object to. But Feinberg accepts that infanticide is malum in se, though not because a baby is a person: "It would be seriously wrong for a mother to kill her physically normal infant," he concedes.

If, on the other hand, the utilitarian thing is for each individual *personally* to promote social utility, the common good, and the public interest, then

utilitarianism is absurd. See Chernikov 2021 for a discussion of this problem.

As regards reasons for abortion, in old statutes abortion to save the life of the mother was permitted because it meant induced premature birth, not destruction of the child to save the mother. Grisez wrote in 1970: "hardly any condition is generally admitted to require abortion for the protection of the mother's life and health."[2] This is certainly much truer today given the medical progress made in more than 50 years since then. Let's consider this reason in a bit more detail. Let's say you're a husband whose wife's life is threatened by the pregnancy, and you can save either the woman or the child. Who would you prefer shall live? Most men would choose the wife, and I think rightly so.

Weighing the child's life over the mother's does not strip the former of all value or even of any value. It merely assigns to it less value than the value attached to the mother. Choices have to be made, and this is one of them. One might argue that the values are equal. But this condemns man indeed to take "recourse" to "divine providence," in other words, to do exactly nothing since, like the Buridan's ass, he cannot choose among two *equally* good things. The very act of choosing subordinates the thing set aside to the thing chosen. But this kind of indifference seems inhuman. For example, is the husband allowed to pray to God to let the fetus die and save his wife? If so, and if prayer is in one sense a kind of technology, then the husband is choosing nonetheless. Is he allowed so much as to root for the woman? Can he say, "I wish that fetus would just up and die!" or would that indicate an evil intent? Or must he implausibly be perfectly content and passive in his resignation?

In the situation in which an abortion will save the mother's life and if an abortion is not performed, then both the mother and child will die, a strict moralist might argue that two deaths are better than one murder. This is certainly a hard teaching, but if it is true that a mortal sin like murder kills the soul, then it is better that there are two physical deaths than one physical and one spiritual. Better to go to heaven with a ruined body than to hell in full health.[3] Of course, whether such abortions are murder is precisely at issue. But in principle, if the purpose of morality is not only to affirm human life and individual happiness but also to enhance charity, this claim may be less fanatical than it seems.

Social reasons for abortion include economic distress, the interference of pregnancy with women's careers, illegitimacy, unsatisfactory family situation (for example, an irresponsible father), family size disproportionate to income, and public welfare costs. If Smith wishes to murder Jones, utilitarians, or at least act utilitarians, must balance the benefit to Smith versus harm to Jones. They must likewise maximize total (or average) "happiness" for abortion. I

have little to offer on how this problem can be solved in actual practice.

Dorothy Thurtle proposed that "abortion should be available to back up contraception whenever birth *prevention* rather than mere *spacing* was desired."[4] But this subordinates the law to hidden intentions of the woman. Even as a guide to personal morality it is useless since intentions of this sort are indeterminate and changeable on a whim. The law, being a much cruder instrument, cannot possibly observe such distinctions: the woman may simply lie to the authorities and claim she was seeking prevention, when in fact her aim was spacing.

Small restrictive measures have often been used, such as parental notification laws for minors, spousal notification laws, women's "right to know" laws, waiting periods, and bans on partial-birth abortion. Regarding the last of these, the ban had only one effect: to incentivize abortion techniques in which the fetus is killed inside the womb. Because of that ban, there are few abortion survivors.

Many states have enacted targeted regulation of abortion providers or TRAP laws, essentially regulating clinics out of existence. NARAL Pro-Choice America writes: "Some, for example, dictate the size of janitors' closets or parking spaces. There are even TRAP laws that require health centers to keep the grass outside cut to a certain height." Conservatives have learned well from left-liberal "progressives" how to destroy the free market step by step, one regulation after another. "The goal of TRAP laws is simple: to close abortion clinics by imposing on them excessive, unnecessary and costly regulations," NARAL goes on. No court could possibly contend with the thousands of pages of regulations smothering the industry in red tape. It could not possibly pronounce any or all socialistic "industrial policy" unconstitutional.

Mises argued that the bureaucracy made Congress irrelevant:

> Parliamentary procedures are an adequate method for dealing with the framing of laws needed by a community based on private ownership of the means of production, free enterprise, and consumers' sovereignty. They are essentially inappropriate for the conduct of affairs under government omnipotence.
>
> The makers of the Constitution never dreamed of a system of government under which the authorities would have to determine the prices of pepper and of oranges, of photographic cameras and of razor blades, of neckties and of paper napkins.
>
> But if such a contingency had occurred to them, they surely would have considered as insignificant the question whether such regulations should be issued by Congress or by a bureaucratic agency.[5]

Similarly, it made the courts irrelevant. It would be absurd for the judges to delve deep into the federal register or its state equivalents and ask which minute regulations are to be invalidated. The legislature can use any pretext, deceptive or not, to justify TRAP laws: health, safety, environment, interstate commerce, general welfare, morality, national security, international treaties, paternalism, economic efficiency, human rights, etc. Judges are entirely powerless to counteract such interventionism. If a court found that one had a constitutional right not to be regulated by the bureaucracy, it would sweep away the entire interventionist state. It would affirm economic liberty in general and not just for abortion clinics throughout the land. And that it would do so is implausible. Therefore, NARAL's condemnation of TRAP laws rings hollow and, as long as the people cling to their statist ideology, also futile.

9.3. Duty to God?

As we saw in Section 3.1, family planning generally in the form of limiting the number of children a person will have is an inescapable feature of civilization. Assume that abortion is not contrary to natural law for individuals. There is still the issue of the species as a whole. It is good for the human race to endure and for future generations to be born. But now these future people do not exist and cannot protect their own interests. Before 1977 I did not exist but somehow may have had an "interest" in coming to exist in the future. Presumably, it is God who protects these most vulnerable people.

Even if a woman owes no duty to the moral law, the law is merely the vice-regent of the world. God, a theistic not necessarily for our purposes the Christian God, remains ultimate ruler. Do women owe any duty to God directly to have kids or at least to forswear abortion?

There are two general reasons why people have children. First, as a natural biproduct of sex. This is checked by contraception and abortion. Second, because they desire children. But children are expensive and require great sacrifices from the parents; narrow self-interest may rule that one should not have children. One can thus avoid children and both not have to sacrifice sex and gain the pleasures that money can buy. As a result, the soul controls the body so well that there are no future generations. Under pure self-interest aided by technology, it may be that the human race is unstable and will in time be reliably extinguished. Contraception and abortion are aspects of the culture of death, though it must be rightly understood as the death not of any individual, which does not occur under contraception and which we have assumed is permissible or not unjust under abortion, but of the human race as a whole.

In other words, people are naturally eager to seek their own happiness.

Maintaining the human species is something quite different from that. It requires distinct sacrifices of purely individualistic pleasures. Children are flowers on our graves. Too much egoistic self-regard, and there may not be a next generation at all. Hence, it seems that procreation cannot be fully under exclusive human control but is something that is in part managed by God.

Hence to avoid this ultimate destruction, women and men owe duties not to the law but directly to God not to take advantage of these forms of birth control. For contraception, they must at least not come to dislike children.

NOTES

[1] Feinberg 1986: 271.
[2] Grisez 1970: 73.
[3] See Mt 5:29-30.
[4] Quoted in Grisez 1970: 224.
[5] Mises 1946: 8.

Conclusion

The final status of our investigation as inconclusive may be a sign of a certain inherent incompatibility of sex and reproduction with "human nature" where man is taken to mean some sort of "rational self-owner." Our lower animal and higher rational natures pull in different directions, and the moral law is in this case ambivalent about which in various cases should prevail. But the problem goes as far back, we might say, as the Garden of Eden.

The U.S. federal government has legalized abortion in one fell swoop for the entire country. This has introduced a great deal of strife and discord into the body politic, as abortion remains a controversial problem. A reasonable solution is to decentralize this issue to the states. Under such a regime there will be states (and localities) that permit abortion and states that ban it. This alone will satisfy more people than under federal tyranny. In the longer run, people will tend to move from states whose policies they dislike to those whose policies they approve of, increasing overall happiness. Let, in other words, the Democrats move to blue states, and Republicans to red states.

We saw in Chapter 2 that libertarians tend to favor decentralization insofar as competition between states and localities restrains (and sometimes empowers, e.g., if being tough on crime works) governments. The federal Constitution defines only two crimes: treason and counterfeiting money. Every other aspect of criminal law, including abortion, is properly the domain of states which are tasked with enforcing basic law and order. This is an argument not so much against federal legalization of abortion as in favor of federalism generally. Accordingly, even if a state wanted to curtail free speech or outlaw gun ownership, the federal government ought not to interfere with state laws. If you agree with that, then a fortiori the feds should have no say regarding abortion.

To that effect, I propose the following Constitutional amendment adapted from John Noonan (1979):

> Congress shall make no law restricting, nor shall any federal judge abridge, the power of the people of each state to legislate the protection of unborn human life at every stage of biological development, irrespective of age, health, or condition of dependency.

It is only humane to let each community decide for itself whether to allow or limit abortion.

In the meantime, the libertarian analysis of the legality of abortion has

much to teach us and has important practical policy implications. The insights of Rothbard, Block, et al. deserve a far wider hearing.

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