

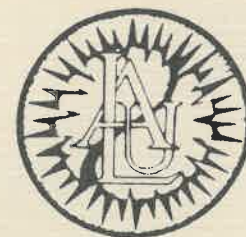
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STUDIES
IN LAW AND MEDICINE

**Abortion:
Some Reflections
On A
"Social Issue"**

by
John P. East
U.S. Senator

*An Educational Publication of
Americans United for Life, Inc.*



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I

I want to commend the members of Americans United for Life on your tenth anniversary. Obviously your numbers are swelling. There is new momentum on behalf of the right-to-life cause. This is because of your untiring efforts and the efforts of others similarly committed.

As a freshman Senator, having had the opportunity to look at the abortion issue from a new perspective, I am convinced the greatest task we face is one of education, of informing the people of this country what it is we are talking about. The task is difficult, and the obstacles numerous.

First, we face a hostile media. This I learned through the baptism of fire on the Separation of Powers hearings on the Human Life Bill. In attacking, the media do not deal with the merits of the issue. Their members use the *ad hominem* attack: When you can't win on the merits, you attack the character of individuals or organizations. For example, we are charged with attempting to impose a harsh morality upon the American people, with being the American version of the Ayatollah Khomeini. The purpose is to frighten the uncommitted into rejecting our case, and I have heard United States Senators, who ought to know better, say the same things. Ridicule is also used. Some make light of the fact that a United States Senator, or the United States Senate, would be dealing with the question of when human life begins. This question is supposedly beyond our capacity to explore, and it is ludicrous that we should try. There is difficulty in a democratic society in getting a fair and intelligent discussion when the media are implacably opposed to your cause.

An additional problem in educating others about the right to life is presented by those who might agree with us on the merits of the issue but are apathetic or indifferent. For example, with many Senators the abortion issue is not a macho one. What are macho

issues?: National defense, foreign policy, balanced budgets, but not abortion. The last is one of the "social issues," which in the terminology of contemporary Washington means it is in a lower category of significance and priority. So the right-to-life issue lacks political appeal. Senators, you see, do not deal with such issues. This is a "woman's issue," one for gynecologists, not for members of Congress.

We must impress upon our listeners that what we are concerned about is an important matter deserving serious discussion and a decision. With the abortion issue, you have to decide either yes or no. You cannot partially abort. King Solomon taught us you cannot cut the child in two; either you save the child or you destroy it. I have found few people supporting abortion. The dividing line is not between those who are for abortion and those who are not. The dividing line is between those who want to do something about it, and those who do not. I congratulate Americans United for Life for being on the side of those wanting to do something about it.

II

In the task of education, there are two general areas to pursue. There is the constitutional question of who ought to be determining abortion policy in the United States, whatever the merits of the issue, and there are the moral considerations of the policy itself. Precipitating the constitutional crisis with the abortion issue was the Supreme Court decision of *Roe v. Wade* (1973).¹ That decision is frequently cited by a wide range of scholars as the most flagrant example of judicial usurpation of legislative function. As Justices Byron White and William Rehnquist point out in dissent, *Roe v. Wade* is an "improvident and extravagant"² use of the power of judicial review.

Judicial review, the power of the Supreme Court and of courts generally to hold acts of legislative bodies unconstitutional, is not mentioned in the Constitution. It was assumed by the Supreme Court in *Marbury v. Madison* (1803).³ The most definitive statement on this power is from the famous *Federalist Papers* which gives the theoretical rationale for the Constitution. In *Federalist No. 78* Alexander Hamilton defined the power of judicial review. He reasoned it would be used only when Congress or another legislative body takes action expressly contrary to the Constitution. The phrase Hamilton used

¹ 410 U.S. 113.

² *Doe v. Bolton*, 410 U.S. 179, 222 (1973).

³ 1 Cranch 137.

was action "contrary to the manifest tenor of the Constitution,"⁴ and he gave two examples: bills of attainder and *ex post facto* laws, both expressly prohibited by the Constitution. Hamilton contended that if Congress enacts a measure expressly forbidden by the Constitution, the Supreme Court would be the appropriate entity to strike it down; nevertheless, Hamilton clearly defines a limited power in that the courts should never simply substitute their will on policy matters for that of the legislative bodies. The courts were to be guardians of the specific, limiting provisions of the Constitution.

This is precisely the Court's position in *Marbury v. Madison*. In the Judiciary Act of 1789 Congress was attempting to expand the original jurisdiction of the Supreme Court beyond the areas expressly provided in Article III. Led by John Marshall and reflecting the *Federalist No. 78* posture, the Court in *Marbury* struck down that attempt. What is the moral? The moral is that it is a long journey from *Marbury v. Madison* to *Roe v. Wade*, for in this latter case the Supreme Court was substituting and imposing its policy judgment contrary to the reasoning found in the *Federalist No. 78* and *Marbury*.

The Constitution does not mention abortion, and certainly the Framers' position would be that to the extent there were to be government involvement in abortion policy this would be fundamentally a function of state legislatures, or possibly of Congress. As a matter of separation of powers, the abortion issue commences as a proper concern of the legislative branch. This is precisely why Congress has become involved. Not Congress, but rather the Court precipitated the crisis. The Court nationalized the issue and adopted an extreme position. The Congress is now trying to remove the constitutional rubble. If they understood the constitutional issue, there are many Americans who would agree that the Supreme Court ought not to be determining abortion policy. Perhaps the Congress should decide such policy, perhaps the states, or perhaps a combination, but for the Court to circumvent the legislatures and preempt the field is the great constitutional flaw in *Roe v. Wade*. Continuing education on this point is imperative.

III

Although the constitutional issues are important, ultimately effective education will turn on the moral issue of the taking of the life of the unborn. I was appalled at some of the arguments heard before

⁴ *The Federalist No. 78* (A. Hamilton), in *Essential Works of the Founding Fathers* 427 (1964).

the Separation of Powers Subcommittee. In particular I was shocked that persons with advanced degrees (maybe that was their problem) would come before the United States Senate and assume the moral positions they did to justify abortion on demand as a form of birth control.

On the moral issue two critical points emerge. Initially one must acknowledge that abortion does in fact involve the willful taking of human life. Secondly, at least in the Western tradition, the concept "sanctity of life" comes into play. Sanctity suggests the sacred character of human life, a basic value of any civilized people, and certainly one deeply embedded in the Western moral and ethical heritage. Precisely because the sanctity of human life is a preeminent value, the pro-abortionist is forced to deny that the fetus is human life and such life begins at conception. It was astounding to hear testimony that human life does not exist prior to birth, that the fetus is not human life. In a saner time, a court of law would not require proof life begins at conception. The court would simply take judicial notice of the fact of life, as it would that fire is hot and the sun affords light.

At the time of conception a new cell is formed. The cell is the beginning of a unique individual member of the human race. That is elementary. I speak as a non-scientist, but I know science acknowledges this elementary truth. This is the difficulty the pro-abortionists have: If they admit that a human life begins at conception, then there is this problem of its sacredness and the obligation to protect it, legally and morally. Their solution is to deny the biological fact of life. It is similar to insisting the earth is flat because one is troubled with the implications of admitting its roundness.

Thus the pro-abortionists deny that an unborn child is human life. What is it then? Who knows? Some call it "potential life" — whatever that means! Others reason that life is merely a cycle — it keeps on going and going; there is no starting or ending point. Certainly this latter explanation is evasive, meaningless, and contrary to the commonsense truth that any man or woman in the street would know. After the first days of hearings on this question, a janitor in the Capitol Building came up to me and said, "Senator, those people don't know what they're talking about. You and I started at conception and our earthly lives will end at death, and that's how simple it is." I replied, "I thought so too, until I came to the United States Senate."

IV

An additional argument I encountered, one of the more morally repugnant ones that has always fascinated me, is: "What do you do with an unwanted child?" This is a specious argument if you probe it to any depth. Certainly one could assume God might want the child. I have difficulty in understanding exactly who does not want the child. The implication is that nobody wants it. What do you do with something nobody wants? Apparently, you destroy it. But I contend God may want it, which presents a difficult moral problem. If that reply probes philosophically too deep, I note that there are many persons who would happily adopt available children. I suspect that for most babies we could find someone who would love it, give it care and attention; in sum, someone who would "want" it.

Let us press the matter further. Allowing, for the sake of argument, we could find no one to accept a particular child, when, in our tradition, did that become the standard by which one judges who shall live or die? Suppose there is someone, somewhere, who really is unwanted — sometimes we see a derelict seeming to have no friends, no relatives, no contacts. Would anyone suggest that because someone appeared to be unwanted we could destroy him? Perhaps the person prefers life for himself, even if no one else does. Perhaps he does not. In any case, human life is sacred. We do not protect it on a standard of "wantedness;" we protect it on a standard of sacredness. The wantedness argument is totally devoid of any serious moral or ethical substance. It may be the weakest and most shallow argument in the whole pro-abortion library.

V

Of equal moral repugnance to the wantedness test is the viability standard to determine the appropriateness of abortion. Viability supposedly means capable of independent existence. To rest a great national policy of such moment and consequence upon the slender thread of viability is the moral Achilles heel of the *Roe v. Wade* rationale. It is basically a naturalistic, materialistic, and Darwinist concept. It embodies survival of the fittest: You are allowed to live if you can show capacity to live independently. Yet to the extent you are dependent upon others, you forfeit the right to life. This is not the law of a civilized, humane, moral, and compassionate people; this is the law of the primitive and barbaric. Supposedly we had moved beyond that law, and even the most ardent evolutionists and naturalists had acquiesced.

Who is truly viable? Is a premature baby? Often he must be placed in an incubator. Would we not protect the life of a child? Of course, and we presume most pro-abortionists would, too. What of a perfectly healthy newborn child; is it viable? Can it exist independently? No, it needs the constant attention of its mother or others. And what about a retarded child, or a physically disabled child? What about the aged, the senile, the weak, and the infirm, and invalids generally? Are they viable? Indeed, I would contend that fundamentally no one is wholly viable. Among the worst things one can do to a person is place him in solitary confinement. In sum, everyone is spiritually, psychologically, or physically dependent upon others from the time of conception to death.

That the right to life should hinge upon some notion of viability is completely alien to Western thought. This perverse notion is modern in origin. Such thinking is absent in the great classical and biblical traditions, and in the humanistic tradition at its best. Viability as a condition for the right to life is a thoroughly naturalistic, materialistic, secularist belief in which people become things and everyone is assumed to live autonomously. This is contrary to all we know about the nature of man and the human condition. There is an appalling ignorance here about the fundamental character of the human being and the moral foundations of the West.

VI

Another definitive concept of *Roe v. Wade* is the right to privacy. The majority of the Court in this case decided the right to privacy takes precedence over the right to life. This is a chilling moral posture reflecting a cardinal weakness of modern thought: the obsession with the notion of right. There is an honored place for rights in a broadly conceived and moral political philosophy; nonetheless, to elevate a useful concept to the level of the premier principle and exclude all else from consideration is to produce a limited and distorted political theory. This has been done in the modern age, for the notion of rights has frequently been elevated to an exclusive first principle. Principally this distortion arises from egoism. It derives from an obsession and preoccupation with the self and facilitates the spawning of a right to privacy wherein convenience becomes the standard by which one determines the life and death of another. The right to privacy, in this abortion matter, has become sufficient justification to take life.

Such thinking is alien to the higher and more ennobling ideals in the Western tradition. One cannot find it in the works of Plato, Cicero, or St. Augustine. In brief, such thought is absent from the classical and biblical traditions. Rather, those traditions invoke notions of duty, service, and obligation; that is, the giving of oneself to others. Certainly, the premier concept in Western thought, coming out of the biblical heritage, is that of love, of giving, of looking beyond the self. Love builds the enduring bond, the tissue of the authentically moral and good society. The society founded upon love would not be preoccupied with rights, for they would inhere in the nature of things. Rights would flow out of the moral foundation of the society; rights, however, would not be viewed as superior to duty growing out of love (for example, the love and duty of a mother toward her child), and certainly the right to life, because of the sanctity of life, would be superior to a right to privacy.

For the Court majority in *Roe v. Wade* to hold the abortion issue turns solely upon the right to privacy is theoretically shallow and morally anemic. The Court's holding neglects the notion of duty rooted in parental love, of giving of oneself, of protecting the helpless and innocent. Assuming abortion policy is a proper matter for the Court to determine, a decision based on this latter perspective would have been an enduring monument and one consistent with the noblest and most enduring ideals of the Western heritage.

CONCLUSION

Unquestionably with the abortion issue we face a considerable task of education. If the proper moral backdrop or foundation were present in the country today, this issue would not be open to question. It would be understood that one does not take innocent life, that one does not destroy the unborn, and that to contemplate doing so would be morally unthinkable. Yet because of certain insidious trends in our time, we find ourselves defending what should not be necessary to defend. In a saner period, which thought more seriously and deeply about its moral foundations, the indiscriminate taking of life of the unborn would not be subject to debate. In an age of intense secularism and disbelief, such notions as sanctity of life and transcendent love, and their accompanying moral imperatives, enjoy little currency.

Ultimately the abortion issue may be resolved favorably for pro-life advocates in the political arena; before that is accomplished, however, the task of education, whether on the constitutional or moral

questions, must continue. Americans United for Life has been in the vanguard of that effort. Along with others, you have been the leaven for good.

I wish to end on a note of optimism lest I appear to judge the modern temper too severely. The great hope of our time concerning abortion is the presence and growth of the leaven of which you are a vital part. For that reason one can be somewhat more sanguine about the potential for success. In addition, we have today, more than previously, a forum in the United States Senate. Before 1981, the forces in favor of abortion blocked legislative consideration of the matter. Frequently, committee and subcommittee chairmen were hostile to right-to-life issues. But with the convening of the ninety-seventh Congress the Senate Judiciary Committee, under new leadership, offers a forum for discussing and a lever for inducing legislative action on the abortion issue.

Notwithstanding these recent advances, pro-life supporters understandably become impatient. It has been a protracted struggle, and there remains a considerable distance to go. For perspective and encouragement I offer an observation by Mother Teresa. In an interview a reporter inquired, "Mother Teresa, are you not discouraged with your work? You're trying to take care of the poorest, the sickest, and the oldest of India, and you're concerned about the young, even the unborn. You're involved with the most intractable and enduring problems, which never seem to end. Don't you become weary of it all?" Her response was brief but of penetrating moral and philosophical substance: "No, for I have been called not to success, but to faithfulness."

With the current momentum if pro-life supporters remain faithful, they may have the best of both worlds. By remaining faithful to what is a noble cause, they may in time enjoy success in the political arena. In any case, faithfulness is the key.