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THE PROBLEM OF PUBLIC PRETENSE

Human rights are proclaimed more often than they are observed. Is this proclamation then a pretense, a mere public lip-service to principles privately ignored? Do our leaders seek *to be* just or only to *appear* just?

One problem in answering these questions is that if the pretense, the appearance, is truly well done it is almost indistinguishable from reality. A good pretender, after all, will conform his conduct to his stated principles whenever he is being watched. Yet I think some progress toward answers can be made. A liar's story is not likely to be as consistent as that of someone telling the truth. By looking carefully at what public figures *say* about human rights, we may be able to discern such obvious arbitrariness that we can dismiss their pretensions as pious hypocrisy. On the other hand, if we uncover no inconsistencies (or if the inconsistencies revealed are later rectified) we then cannot know whether rights rule in their hearts.

This essay has three parts. The first sets forth the general problem of pretense, outlined above, in more detail. Through a game-playing analogy, it is argued that self-interest is likely to result in pretense. We have good reason to be wary of public professions of piety.

The significance of arbitrariness in the recognition of human rights as a proof of pretense is then examined. Unless all arbitrariness in the acknowledgement of human rights is condemned, no human rights, including our own, are secure. However, the irony of this argument is also pointed out. For the public censure of arbitrariness may itself be only a pretense arising from the real dangers which such arbitrariness poses for all, rather than a manifestation of a genuine commitment to subordinate oneself to justice even when one could get away with only appearing just to others.

The final section of this essay considers the U. S. Supreme Court's decision in *Roe V. Wade* as a case study in the problem of pretense. It will be argued that, whatever may be the right answer to the abortion question, the Court's complete disregard

of the child before birth is clearly arbitrary and inconsistent with a commitment even to post-natal human rights. Overturning *Roe*, is this in the interest of all human beings—even of those who think they have non-arbitrary grounds, not mentioned by the Court, for approving of abortion ? Yet if *Roe* is opposed only because its non-serious attitude to human rights endangers us personally, then such opposition itself lacks a serious concern for others.

The Danger of Pretense :

Suppose a number of people sitting down to play poker. Would it be difficult for all to agree not to cheat? Of course not. No one would play in the absence of an agreement to abide by the rules. So anyone who wishes the game to be played will promise not to cheat. But are such promises always evidence of a morally serious commitment to the rules? Of course not. Even an amoral and self-interested person would not say openly that he planned to cheat, if he wished to have a chance to cheat. His interest is precisely in saying one thing and doing another, whenever he can get away with it. Therefore, public declarations against cheating are no guarantee of genuine commitment.

In order to focus upon the dignity of the human person, what has just been said should be translated from the language of rules to that of rights: Everyone in a card game would recognize the existence of a right not to be cheated (or more elaborately, a right to gain whatever one can according to the rules). Even someone who planned to cheat secretly would publicly profess to uphold such rights. Moreover, the very motivation, financial gain, which leads him to cheat also leads to his pious talk of rights.

Our would-be cheater knows, of course, that if all acted as he would like to act the game could not go on. But this knowledge cannot motivate him not to cheat when he will not be caught (nor, what amounts to the same thing, when the risks of cheating are outweighed by the benefits to be gained). For what he does secretly will not affect the actions of others.[1] Whether they do or do not cheat is causally entirely unrelated to what he does. Moreover, even if this problem is made public, it is not resolvable. If all the game players are self-interested, they will certainly be able to agree that each must renounce cheating in order for the game to go on, but just as certainly they will be unable to generate a motive for private adherence to the very principle which they all agree to be

necessary. Self-interest can discover what rights should be observed, but it cannot motivate observance.[2] As long as one's cheating remains undetected, it cannot affect what others do, and therefore the desire to have others not cheat cannot motivate one not to cheat in secret. Making this dilemma public cannot lead to taking rights seriously in private, but only to the abandonment of the game altogether.

Why, then, does the game go on? One reason may be that secrecy has been entirely eliminated. If everyone's hands and cards can be constantly observed, appearing not to cheat can be achieved only by not cheating in fact. A watched would-be cheater will act no differently than someone honestly committed to the rights of others.

Yet omniscience may be difficult, and we surely hope that it is unnecessary. We all (both cheaters and non-cheaters) hope that we can rely on the commitment of our fellow-players not to cheat. We hope that our neighbours are motivated by more than self-interest, that their protestations of concern for others' rights are not mere pretense. But is our hope justified? How can we know whether or not we are being fooled, taken in by mere pretense?

As we transpose our dilemma from the card table to the social world, these questions take on new force. The same motivation to pretense exists here on a larger scale. That is, rational and amoral self-interest must lead to a public agreement on certain rights (e.g. life, liberty and property) and to a personal desire not to *appear* to violate these rights. But, once again, such self-interest alone can generate no reason to abide by these principles in secret. And to eliminate all pockets of secrecy in society would be far more difficult and far more repugnantly invasive of our privacy than simply to make sure all hands and cards stay on the table.

Morever, we have been assuming that our cheater wishes to keep playing cards with everyone at the table. It is only on this assumption that watching him makes him conform to the rules. But if he is only pretending to subscribe to these rules, he will not only violate them in secret, but will do so publicly if it becomes in his interest to do so. For example, if one card player is exceptionally rich and weak, the rest may in the end put down their cards and simply take his money— if the benefits of

such a move outweigh the problems it will pose for future relations with him and with each other.

Therefore, insofar as we wish neither to be secretly cheated nor perhaps even to be openly exploited, we want rationally to hope that our fellow-citizens are not just pretending when they claim to care about human rights. Can we so hope?

Proof of Pretense :

Proving the sincerity of others seems impossible. Practical and political problems aside, one can never prove that a given appearance is backed up by reality, because a really good pretender will appear exactly like a non-pretender, except when he is not watched or is ready to abandon the game.

Proving the *in*sincerity of others may be a little easier. That is, although the fact that someone is never caught cheating does not prove that he adheres to a rule against cheating (or even that he has not been cheating all along), the fact that someone *is* caught cheating would seem at first sight to prove that he does not subscribe to a rule against cheating.

But here we encounter the problem of weakness of will. Even a very sincere opponent of cheating may find himself sometimes succumbing to temptation—say, if his debts are great and so is the pot. Such a person is not a pretender, and is not necessarily an untrustworthy game-player—except when the stakes are high. Of course, if someone is so weak of will that he is tempted by even the smallest pot, then he is no different in behavior from the pretender, who lacks only his qualms.[3] Yet, for the most part, weak-willed people would make reasonably good neighbours if they only now and again gave in to strong temptation.

Weak-willed people, unfortunately, may not only act in violation of their principles, they may try to justify their acts. For the sake of public appearance they may become pretenders in part. Their adherence to principle may be genuine, but the alleged exception allowing their behaviour is a pretense. But there now exists a discrepancy between the attempt to appear virtuous and the attempt to be virtuous, which makes the weak-willed person almost as dangerous as the amoral pretender.

This is so because no authoritative system of ideas (e. g., principles of human rights) can permit arbitrary exceptions. This is a matter of definition. No matter how complete and strict a set

of principles may be, if one can carve out arbitrary exceptions, the principles lose all force. To affirm the right to make even one exception without adequate justification is to disaffirm the principle excepted to. Someone who publicly affirms both principle and exception must be only pretending to believe either in the first or the second. Either this person has been all along a mere pretender to principle, or he is committed to principle in his heart but now finds himself dishonestly claiming an exception for his own conduct.

But he has now been "caught in a lie"; that is, he has made claims inconsistent with his prior public principles. What will he do? Will his desire to appear virtuous destory his remaining virtuous, as he is forced by consistency to expand his exception and to allow new ones, to tell more lies in order to cover up the first? Note also that even if the principles he holds retain some force in his own heart, he may have lost all ability critically to respond to another pretender's private or public wrongs. This other pretender can always ask: "How is what I did any different or worse than what you did?", and the weak-willed person will have no answer. That is, he will have no answer unless he somehow summons up the courage to admit that the exception he himself had previously claimed was wrong. But this answer, though possible, seems unlikely in a weak-willed person. Particularly if the original exception was made under relatively non-tempting circumstances, the weak-willed person seems unlikely to recant. We all have some sympathy for the person who does wrong when he has a great deal personally to gain or to lose. But we expect more of a person whose self is little threatened by his decision. If such a person arbitrarily makes exceptions he would mildly prefer, we may rightfully think him so weak as to be no more trustworthy than an amoral pretender.[4]

Therefore, we may conclude that someone is not to trusted who publicly claims to be governed by a set of principles but also claims a right to make one or more exceptions without plausible justification. Either he is a pretender through and through, or he is a weak-willed person who by pretense has boxed himself into a situation where he cannot logically resist the pretensions of others even if he could withstand his own unprincipled desires. In the latter case, particularly if he has been weak in the absence

of great temptation or duress, he cannot be relied on in the future to adhere to or to return to principle.

Suppose that your neighbour at the game table whispers to you the suggestion that the two of you work together to take a third for all he has. You ask in return "How do I know you won't cheat me, too?" Would "Oh, I would never do that." convince you? Of course not, because if your neighbour can arbitrarily exclude a third person from his non-cheating pledge, then he can just as easily exclude you. He is a pretender and is not to be trusted. Would "Hey, I'd never try that. I know you'd beat me up, or your friends would." convince you that he did not believe in cheating you? To say that the weak and friendless are cheatable does not seem a principled exception, and someone making such a statement would have to be watched closely. Would something like this then be convincing "Listen, he's a black man; I'd never cheat a lighter-skinned man"? Here the question is more difficult to answer. If the third person is weak and friendless, as well as black, suspicion is certainly justified. But if on the basis of the rest of your neighbour's speech and conduct he seems consistently to make a moral distinction between the dark and black (or between other universal racial characteristics, if there are any) then perhaps in his mind his promise has a principled basis, and he can be trusted. One could either question him at length, or (as would more likely be in practice) one could decide on the basis of the plausibility of such consistent racism. Such a judgement would no doubt vary with the mores of the times. But what is constant is that someone who affirms arbitrary exceptions to a principle cannot be trusted to abide by the principle in question.

Lest there be some misunderstanding : I am not suggesting that moral integrity requires absolutism, but only that it requires non-arbitrariness. If one believes in given moral principles, one will never simply disregard them. When one acts contrary to them, one will at least have taken them into account before finding them outweighed by other principles. So, for example, a card player is not obviously lying when he whispers that he knows cheating is wrong but that he is going to cheat the other fellow out of revenge for a past insult. Perhaps he sincerely and strongly opposes cheating when no other principle is involved, but simply thinks that a moral demand for retaliation must take priority over a demand not to cheat. In this case he will not claim that

the other has no right not to be cheated. He will acknowledge such a right in general, but argue that it is here outweighted by the right or duty of revenge.

Nor am I suggesting that everyone who is arbitrary is acting out of self-interest. Self-interest (which includes the desire for the praise of others) is a likely motive for pretense, as we have seen, but there may be other motives. Or someone may be simply not morally serious—a happy-go-lucky fellow who pays little attention to what he says or does. When someone who claims to believe in human rights willfully violates them arbitrarily, we know only that his claims are not to be relied on. We do not know for sure why he violated his principles, though we may suspect some self-interest.

Yet even with these qualifications, the non-arbitrariness test here enunciated has enormous analytical and political power. For it means that a *single* willful gap in a system of moral or legal rights is enough to undermine the *entire* system.[5] No one who takes human rights seriously will think it right wholly to ignore them on occasion. Therefore, anyone who does think it permisible now and then to ignore human rights must be only pretending to take them seriously. He cannot be trusted when his hands are under the table, certainly. And he really cannot even be trusted to keep up his public pretense if he should wish another exception in the future. If one arbitrary exception is justified, why not another—as long as no one who can effectively oppose him objects.

This test for pretense is surely well-known and widely used. Why else is the charge of hypocrisy so common in politics ? Everyone can see real or apparent arbitrariness in his opponent's positions, and he attacks these flaws with glee not only because they reveal the opponent to be an untidy fellow, but because they permit the charge of pretense to be explicitly or implicitly levelled. And this charge, if carried, discredits the opponent not only at the arbitrary margins of his position but through and through. Thus the frequency of such charges does not detract from their seriousness. They are common for the same reason that they are telling : because a single knowingly affirmed instance of arbitrariness means that the affirmer is not really bound by the principles he proclaims, and therefore he cannot be trusted.

Alas, our pretender may be too clever for us. He may finally back off from his attempted arbitrariness (perhaps because

of arguments like those made here) and publicly extend his pretense beyond the point which his interests dictate at first sight. So, for example, he may concede the rights of a weak race not because he cares about its members as human beings, but only because he has no plausible rationalizations for discrimination and he does not want people to see through his pretended allegiance to human rights.

Thus our test may succeed only in driving pretense deeper underground, where it cannot be detected as easily. Is there, then, any point to our efforts? I think there is. As long as someone affirms the right to be arbitrary, he cannot be trusted. He is a pretender in whole or in part. Either he is unprincipled or his compromised principles provide no effective protection against further violations of human rights. As long as public arbitrariness reigns, we can have no security in private now, or in public if we should become weak, friendless, or otherwise unable to demand deference. But if pretense is driven underground, at least there remains no public precedent for further violations. And--who knows--perhaps the former pretenders have truly repented, not to increase their own credibility, but because they now have been converted to a belief in human rights. At least we can hope so.

Pretending not to Know Whether Life Exists Before Birth:

The U.S. Supreme Courts' 1973 decision *W Roe v. Wade* provides an exceptionally clear case of the kind of arbitrary dismissal of human rights discussed in the theory developed above. Because it is not compatible with principled consideration of basic rights, it both provides a logical precedent for further rights violations and reveals those who support *Roe's* reasoning (not necessarily those who support abortion itself, as we shall see) to be conscious or unconscious pretenders if they elsewhere affirm life as a human right. Such pretense to principle endangers all human rights and should be opposed even by those who favour abortion on grounds arguably less arbitrary than those advanced by the Court. Let me try to demonstrate these assertions.

Roe v. Wade does not allow the states to protect the fetus except as merely potential human life, even in the last months before birth. In describing the permissible limits of state abortion laws, the Court declares:

> For the stage *subsequent* to viability, the State in promoting its interest in the *potentiality* of human life may, if it chooses, regulate, and even prescribe abortion, except where it is necessary, in appropriate medical judgement, for the preservation of the life or health of the mother.[6] [Emphases added]

In reaching its position, the court states that "[T]here has always been strong support for the view that life does not begin until live birth," that "[i] n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth..." and that even a wrongful death action following still birth "..would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life."[7]

The court clearly speaks and acts as though the existence of actual human life prior to birth were at best uncertain. Indeed, so certain is it of its uncertainty that, without explanation, it *allows* the states to permit abortion for *any* reason right up to birth, and *requires* the states to prefer the health (or simply "well-being")[8] of the mother to the life of the child, even just before birth. The court treats, and requires the states to treat, the viable child before birth as though it were not a living human being whose rights may not be violated without serious justification. In other words, a child born at eight months gestation is presumably actual human life in the eyes of the court, whereas a more developed child at nine months in the womb cannot be said to be a living human being.

Is such position arbitrary? Would someone who consistently held legal or moral principles of human rights, applicable to the newborn, wholly ignore the interests of the child about-to-be-born? Note that our question is not whether allowing late-term abortion is itself arbitrary. We could not reach an answer to the latter question without considering more factors than we have here. Rather, our question is only whether it is arbitrary not to recognize a viable fetus as an actual existing human being, and thus at least as one factor going into a difficult decision.[9]

Now, almost the only difference between the premature newborn and the pre-born is one of location (*ex* or *in utero*). Does our moral practice, in regard to rights and to all other matters,

permit location *per se* to determine the very existence of living humanity? I think not. True, there is also the fact that its pre-birth location *hides* the unborn child from direct view (though not from touch and hearing). But we usually regard the human tendency to ignore those we do not see (e.g., in dropping bombs) as a regrettable failing to be overcome, not a principle to affirm. No one who really cared about infant life would purposely ignore it when hidden. There are, of course, likewise some biological adaptations to the new location which take place at birth—primarily the shift from placental to pulmonary oxygenation. But these, too, do not seem morally decisive. Artificially filtering a kidney patient's blood does not make him non-living; presumably oxigenating it would be no more morally significant, especially if he were quite capable of functioning on his own as soon as necessary.

The only way, I suggest, that birth could be seen to be the beginning of actual human life would be if one of these physically minor changes mentioned above were taken to be metaphysically major. For example, someone might believe in a new scripture stating that God creates a soul when the child's head first emerges from the womb, or when the child takes its first deep breath of air. Such a believer would certainly not be a pretender when he claimed to be committed to human rights only after birth. But the court does not (and perhaps constitutionally could not) claim to hold any such beliefs which could make its disregard of the child seem less arbitrary.[10]

We must conclude, therefore, that the Supreme Court (or, more exactly, those seven members who joined in the *Roe* opinion) does not take the right to life seriously, even after birth. If someone cared at all seriously about the child after birth, he would at least not ignore, and require others to ignore, the very existence of that same child hidden in the womb. He might favor late abortion, but he would take into account the harm done to the child. But here the Court has denied the living human reality of the unborn child. Thus a commitment to the human rights of infants simply has had no observable weight in the *Roe v. Wade* decision.

Of course, we do not know *why* the Court pretends not to know that human life exists prior to birth. Perhaps its entire commitment to the human rights of the weak and unwanted is

a pretense. Or perhaps it is simply weak-willed and gave into peer pressure from those who wanted abortion somehow legitimated. In the latter case, maybe we can still hope that the Court will protect other human rights, as long as its peers do not object. But if the Court's will is this weak, we cannot expcet much. After all, life-tenured judges not subject to review are in about as neutral and untempting a situation as could ever be created. One can easily understand and sympathize with this kind of arbitrary rationalization from a woman who has had a late-term abortion, but not from these neutral males.

Moreover, the precedent of *Roe* has a force of its own which may be stronger than any weak good will remaining in the Court. Since location is not a plausible basis for distinguishing who is or is not alive or human, will there not be a tendency to fasten onto some other criterion to exclude the pre-born from community concern? And who else will fall within this new category? Handicapped newborns? Children below the age of reason? Anyone not intelligent enough to make a reciprocal promise to respect the rights of others? Anyone not strong or wanted enough to matter?[11]

I do not know. But the alternative to one of these additional restrictions on human rights, given *Roe*, is not the protection of everyone, but is the arbitrary protection of some. That is, if *Roe* is not rationalized by expansion, we are in a sense worse off than if it is. As long as we purposely close our eyes to the existence of the child in the womb, while recognizing its existence after birth, we legitimate wholly arbitrary recognition of fundamental human rights. To approve such unjustified arbitrariness is to deny one's commitments to the principle of human dignity everywhere else as well—in secret already and openly whenever self-interest may permit. We thus have good reason to fear that the Court and those who agree with it[12] will not respect even our adult rights to life in private or public if they ever have an interest in violating them. Indeed, anyone who arbitrarily disregards human life can now rightly claim that he is only doing what the Court has done. If he is punished, this can seem to him only an act of power—rather than one of equal justice.

Perhaps, nevertheless, we ourselves will not be harmed. One

cannot predict the future based only upon the structure of ideas. But we can know that even if we remain secure,our safety cannot result from the fact that our law takes human rights seriously, for in *Roe v. Wade* fundamental human rights were arbitrarily disregarded.

Let me hasten to reiterate that this necessary opposition to *Roe* need not result in opposition to all abortion. Much of the world allows abortion to some degree. But to my knowledge nowhere except in the U.S. have lawmakers been ordered to ignore the existence of the child as a living human being prior to birth. For example, a West German Constitutional Court justice wrote, in regard to early abortion, that

> " [T]he life of each individual human being is self-evidently a central value of the legal order. It is *uncontested* that the constitutional duty to protect this life also includes its preliminary stages before birth. " [Emphasis added][13]

Yet this same justice went on to argue that a limited decriminalization of abortion for any reason is constitutionally permissible. Such a person is not obviously pretending. He seems honestly to be weighing in the interests of the child, even though his conclusion is surprising. Thus one need not wish to prohibit abortion in order to agree with the argument of this essay. Even those who support abortion should repudiate *Roe*, because it ignored the unborn without an adequate justification for such disregard. Whatever the right way to treat the very young may be,[14] the thoughtlessness of the Court is not something that can be approved.

Lastly, let us hope that *Roe* will not be repudiated only because it discredits our social commitment to human rights and thus may increase mistrust and insecurity. A repudiation for such a reason is still not a commitment to abide by principle,but is only an attempt to improve the public *appearance* of our commitment to rights. Not only a new public statment, but also a change of heart is needed in the Court and in all those who until now have supported it.

Visiting Professor
Department of Philosophy
University of Poona

Richard Stith

NOTES

1. This statement assumes that neither the particular cheater nor the fact that *anyone* has cheated has been discovered. In a small group, the latter discovery (as a result, e. g., of extra cards found on the floor) would be enough to upset the game, even if the precise culprit could not be located. But in a large group, such as society itself, the individual cheater is harmed only if he personally is caught. The mere fact that one more crime is discovered to have occurred would be most unlikely to affect the interests of the individual criminal.
2. For a solid analysis of the fact that rational sel-interested individuals will *not* act to achieve even unanimously agreed-upon group goals, unless coerced to do so, see Mancour Olson, *The Logic of Collective Action* (Cambridge : Harvard University Press, 1965).

   Many people falsely think that someone who does not act as he would want others to act (or as he himself would like to act as a rule) is irrational, or at least short-sighted. In fact, his failing is often moral rather than narrowly rational--e. g., a violation of the "golden rule." As long as the short and long run consequences of a particular act of cheating are appraised to be of net benefit, a rational self-interested person will cheat. In the absence of a felt moral demand to follow rules, *not* cheating would be irrational.
3. John Farago called my attention to the significance of "neutrality" in realation to weakness of will.
4. There exists, of course, a third possibility besides pretense and adherence to principle : self-deception. The weak-willed person may seem particularly prone to this failing, which might be called "believing whatever one wants to believe." Now, this is logically impossible. How can one knowlngly lie to oneself and be believed? How can one honestly think that some fact or value precedes one's desires and also that it proceeds from one's desires? But such self-trickery obviously often occurs on some literally unthinkable level. A weak-willed person is likely not only to pretend to an exception for himself, but actually to believe in it. However, I have not considered this third possibility in the body of this essay, because it seems to make no behavioral difference. The person who is able sincerely to shape his principles at will is not governed by them anymore than is the pretender without principles.

   In other words, unconscious pretense is just as untrustworthy as is conscious pretense. However, the word "pretense" unpreceded by "unconscious" does imply a purposeful deception of others which I do not wish necessarily to impute to those who are arbitrary in their words or deeds. "Hypocrite" seems better to cover both types of unprincipled person, but it has such a strong connotation or moral condemnation that I have generally avoided it in favor of the milder though perhaps less accurate word "pretender."

   It mignt be noted significantly that, in one way, unconscious pretense or self-deception is much worse than conscious pretense. The person

who makes a worthless public excuse for his conduct may be disarmed in the face of the wrongs of others, but he can still seek privately to live up to his principles. But the person who has deceived himself into an arbitrary exception to his principles now finds his own conscience disarmed, because every attempted return to principle is blocked by the precedent of arbitrary exception.

5. That is, as long as various cases involve the application of a single principle, *e. g.* human dignity, to act self-righteously arbitrary in any one is to abandon the principle. However, if someone claims to adhere to a number of separate principles, the fact that he violates one is not obviously a proof of his insincerity in regard to the others. For example, someone who cheats at cards may still be quite sincere and trustworthy in his refusal to molest children.

6. *Roe v. Wade* 93 S. Ct. 705, 732 (1973)

7. Ibid., pp. 730—731. *Roe* calls the fetus variously "potential life" (pp. 725, 727) "prenatal life" (p. 728), "potential human life" (p. 730) "the potentiality of life" (p. 731), "fetal life" (p. 732), and "the potentiality of human life" (pp. 731, 732). It also states " We need not resolve the difficult question of when life begins." (p. 730), but says "....a legitimate state interest need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth" (p. 725). Putting all this together, one gathers that the Court does not know whether "life" (in the sense of "human life ") exists prior to birth, but its potentiality does -- in the form of "prenatal" or "fetal" life.

8. See the material quoted in the text *supra* for the "health" of the "mother" rule. At page 733, *Roe* refers the reader to the companion case of *Doe v. Bolton* 93 S. Ct. 739 (1973). *Doe* in turn elaborates on the concept of "health" :

> "....[T] he medical judgment may be exercised in the light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient. All these factors may relate to health." (p. 746).

Tnis broad concept of health reasons for abortion was recently reaffirmed by the Court in *Colautti v. Franklin* 47 LW 4094, 4096—4097 (1979).

9. I am not even arguing here that the *Roe* Court was arbitrary (at pp. 728-730) in denying legel personhood (as opposed to actual existence) to unborn human life. The assignment of legal personhood is a conclusion, not a fact, and it could not be criticized without an extensive analysis of all reasons of policy and principle going into this conclusion--although I think there is a very strong argument that every living human being *ought* to be considered a legal person. Similarly,

past legal treatment of the unborn as not "persons in the whole sense" (*Roe*, p. 731) cannot easily be faulted without discussing, e. g., tort policy and evidentiary matters which may have made it difficult for the law to give the fetus full legal recognition.

However, in *Roe* the Court is purporting to discern and limit not the law itself but the factual basis upon which past and future law is to be based. It is nonsense to claim that a car does not actually exist when it is in a garage, even if for purposes of interpreting a city ordinance requiring parking stickers the car might non-arbitrarily be denied legal recognition.

Nor does a legal fiction denying recongnition to a car or to an infant provide evidence of their actual non-existence, any more than the U. S. Constitution's slavery provisions provide some evidence that blacks are three-fifths as tall as whites. The provisions once provided that slaves were to count as three fifth of free persons, for purposes of allocating state representative strength at the national level.)

A non-arbitrary decision on what is real (as opposed simply to what is legal) requires factual arguments. (Or, perhaps more exactly, it requires concepts designed to organize experience rather than to govern legal treatment.) But the Court did not consider such arguments.

10. Again, it will not do to appeal, as the court does, to the conclusions that various ages and religions have reached regarding abortion. These conclusions may have been based upon illusion; what matters is whether the factual reasons for these conclusions are still acceptable to us today. Indeed, the very making of such a conclusory appeal may betray a lack of serious concern for the status of the fetus, a willingness to go along with arbitrary convention. See *Roe*, pp. 715 ff, 730.

11. Proposals moving in these directions have recently been made; Dr. James Watson has suggested that we wait until three days after birth before declaring a child alive. *The National Observer*, Sept. 1, 1973. For an excellent philosophical argument for the irrelevance of birth and in favour of infanticide, see Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs*, 2 (1972), see also Duff and Campbell, "Moral and Ethical Dilemmas in the Special Care Nursery," *The New England Journal of Medicine*, 289 (1973). John A. Robertson, in a thorough analysis of the problem, has suggested that infanticide of defectives is "rapidly gaining status as 'good medical parctice." See "Involuntary Euthanasia of Defective Newborns: A Legal Analysis," *Stanford Law Review*. 27 (1975), p. 214. As long ago as 1968, Joseph Fletcher pointed out that the only difference between the fetus and the infant is that the infant breathes with its lungs" and that this difference is not morally significant. He went on to claim self-awareness and a conscious relationship to others as requirements of humanness, concluding that a Down's syndrome child "is not a person". "The Right to Die", *Atlantic Monthly* 221 (April, 1968) pp. 63-64. (Fletcher, and the others mentioned below, are obviously not using the word

"person" in the legal sense discussed in note 9, *supra*, but in the sense of the prior moral or factual reality which the law should take into account.)

H. Tristam Engelhardt, Jr., a prominent ethicist now with the Kennedy Institute in Washington, D.C., has presented the argument "that we do not have obligations to fetuses, infants, animals, and the very senile in the way that we do to normal adult humans, for only normal adult humans are persons in the strict sense of being necessarily objects of respect," "On the Bounds of Freedom: from the Treatment of Fetuses to Euthanasia", *Connecticut Medicine*, Vol. 40, June 1976, pp. 51-52. Social utility should determine whether or not legal protection should be extended to the very young, since no human rights are at stake.

I myself consider the only intellectually honest alternative to ascribing a pre-birth origin to the living human person to be the claim (towards which the writers mentioned above seen to be moving) that moral or factual personhood is *only* an appearance or experience, rather than a reality which may or may not manifest itself in experience. In other words, one could deny personhood to the unborn by arguing that a human person exists only when he is perceived to exist by himself and /or by someone else. This position avoids locating personhood in an underlying reality containing the "potentiality" of acting like a person, and thus avoids being forced to recognize a person in the toddler, in the fetus, and ultimately in the conceptus—where this potentiality first becomes complete, active, and autonomous.

Such arguments restricting the human community to unfounded appearances are fascinating (indeed, metaphysically mind-boggling), but I do not yet see how they can end in a coherent, principled, and workable concept of the human person. See, for example, the problem of whether a sleeping hermit is a person. However, unlike the *Roe* court, those arguing something like this position do seem to treat the issue of who possesses human rights as a morally serious matter.

12. Those who agree with the court are relatively few. While polls which ask whether or not one favours "the Supreme Court decision making abortions legal up to three months of pregnancy" (Harris, 1973) may show majority approval, more accurate questions do not. For example, only 25% of men and 16% of women in 1973 thought abortion should be allowed at more than five months of pregnancy. And even these respondents do not necessarily support the *reasoning* of the Court that the existence or actual human life prior to birth is uncertain. Again in 1973, only 19% of men and 8% of women thought life began at birth. A majority of women and a plurality of men thought it began at conception. (No one was reported to have though that life begins at some point after birth.) See Gallup polls as reviewed by Judith Blake, *Population and Development Review*, Volume 3, Nos. 1 and 2. (1977) This article also demonstrates that there has been little change in public opinion since 1973 on these matters.

13. "West German Abortion Decision", translated by J. D. Gorby and R. E. Jonas, 9 *John Marshall Journal of Practic and Procedure* 605, 663 (1976).

14. My own position is that the equal dignity of human beings means that the law in principle should permit abortion (at any stage of pregnancy) only to save the life of the mother. However, I do not think that logic or the Constitution requires us to punish abortion in way we would the homicide of an adult. Equal concern for all permits different treatment in different circumstances, as long as every distinction has a compelling rational basis; and pregnancy is a unique human relationship which may call for a special kind of care. Moreover, and more importantly, I do not regard anyone who truly agonizes over leaving human life unprotected to be a hypocrite, even if his moral conclusion sharply diverges from my own. Unlike the Court, such a person seems to be attempting to be faithful to principles of human dignity, although his judgment may seem mistaken.

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