

# THE HISTORICAL ROOTS OF THE PRO-LIFE MOVEMENT: ASSESSING THE PRO-CHOICE ACCOUNT

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History is a crucial arena for many social movements which attempt to use the past to legitimize themselves to cast their opponents into disrepute and to give an air of inevitability to the victory of their cause. They can do this by fraud, whether by a deliberate misstatement of the record or by a consciously selective reading of events. But while professional historians often share the convictions and goals of these movements, they are by training less likely to distort the historical record by baldly lying or suppressing contrary testimony. Nonetheless, they do frame questions in a fashion congenial to their interests and presuppositions — usually without being conscious of doing so — and the road to historical insight is often found not in new "facts" but in the clash of different sets of questions and concerns. In the words of a recent book which attempts to assess the nature of historical knowledge in the light of the challenges presented by postmodernism,

Criticism fosters objectivity and thereby enhances reasoned inquiry. Objectivity is not a stance arrived at by sheer willpower, nor is it the way most people, most of the time, make their daily inquiries. Instead it is the result of the clash of social interests, ideologies, and social conventions within the framework of object-oriented and disciplined knowledge-seeking.<sup>1</sup>

The abortion battle is a particularly interesting case of clashing ideologies producing sharply different accounts of the historical record. But we do not need in despair to conclude with the cynic that "history is a pack of tricks

the living play upon the dead" and that historical truth is a chimera. It is possible to answer questions about the topic in a fashion which respects scholarly standards, provided that these are framed in a fashion which encourages clarity rather than confusion.

The pro-life movement has always claimed to be the heir to a solid and long-standing tradition of opposition to the practice of abortion, an opposition based on respect for the sanctity of human life, and thus to have been in the mainstream, if not of contemporary societal attitudes, then of the deeper currents of our civilization.

Is this true? Pro-lifers have long believed that they represent the continued defense, in John Noonan's famous phrase, of "an almost absolute value in history."<sup>iii</sup> But pro-lifers should be aware that a substantial body of material, both popular and scholarly, asserts the contrary. Is the pro-life claim valid? Through an examination of the counter-claims of the movement's opponents we can arrive at some estimate of the accuracy of the pro-life assertions. We should be careful, however, to make clear just exactly what is being asked. It is *not whether abortion was almost unknown before the 20th century, or whether abortion was always opposed from the start of pregnancy only or primarily because of the defense of human life, or whether exceptions were ever made for abortion where another life was in danger*. Rather, the point in question is *whether until quite recent times abortion was regarded as wrong when it was known with reasonable certainty that a human life was present, and regarded as wrong because it involved the destruction of a human life*. In answering that question, what is at issue is often not the historical facts, but the emphasis placed on them, and the inferences drawn from them.

In assessing the historical record it is useful to break it into four broad areas: pre-literate and ancient societies;

the traditions of Judaism and the Christian Church, up to the 19<sup>th</sup> century; the treatment of abortion in English common law and in the American colonies; and finally the changes which occurred in the 19<sup>th</sup> century. In each case an attempt will be made to make clear the various claims being advanced. After presenting the pro-choice account of each period, I will review some of the pro-life literature on the topic to see if it suggests any significant revision of that account. This paper is not based on research in the sources, but is a broad review of some of the accounts the topic, accompanied by an examination of some of the historical events discussed in that literature, in an attempt to appraise the validity of the assertions being made. There is a need for a comprehensive treatment of the history of abortion laws, attitudes and practices, but this account is not it. To reiterate, this paper simply asks one question: can the present day pro-life movement plausibly assert a valid claim to be the continuation of a long and respected tradition, which for over one and a half millennia was the predominant one in the Western world?

To its enemies the right-to-life movement does not represent a defense of traditional values but is rather, in Michael A. Cavanaugh's phrase, "a non traditional traditionalism." Accepting the pro-choice account of the historical record at face value Cavanaugh argues that

The contemporary position with the best traditional pedigree is not unqualified opposition to abortion. Rather it is the liberty to elect abortion. Traditionally abortion was medically available, legally permissible, and carried on below the threshold of moral awareness.<sup>iii</sup>

To begin, it is useful to examine the frequently made claim that abortion has been practiced by all cultures, and that by implication it is an acceptable institution with

little stigma attaching to it. Consultation of the work of George Devereux, who reviewed attitudes to abortion in a wide range of pre-literate cultures, leads to a somewhat different conclusion. While some societies feel no repugnance, others condemn it; thus, he reports, a Cherokee "had trouble `understanding' what the anthropologist meant by abortion. When he finally `understood,' he was horrified, exclaiming that one might as well cut off the head of a five-year-old child, and that it was outright murder. After this conversation his regard for whites appears to have decreased."<sup>iv</sup> Abortion may indeed be widely practiced, but it is also frequently disapproved of, and often for reasons clearly consistent with the views of the pro-life movement.

In the pagan culture of the ancient Mediterranean world abortion was well known, and medical texts from the period describe methods of performing it.<sup>v</sup> Both Plato and Aristotle saw abortion as an appropriate instrument for population control and contemplated compulsory abortion in certain cases for the good of the state.<sup>vi</sup> Aristotle's influential work in biology transmitted the view that has often been invoked in the subsequent history of the controversy over abortion, that after conception there was a succession of souls: first the "nutritive" or "vegetative" soul, then the "sensitive" soul, and then the "rational" soul. This final stage, when true human life was present, occurred when distinct organs were formed: for males this was at 40 days; for females at 90 days. This final stage corresponded, he claimed, with the first movements of the fetus.<sup>vii</sup> These limits were to be incorporated into some of the subsequent penal treatment of abortion as a way to determine the severity of sentences.

But there is also some evidence of anti-abortion sentiment in ancient society, most notably in the Hippocratic Oath (*circa* 400 B.C.) with its promise "I will

not give to a woman a pessary to cause abortion." The degree to which this oath actually regulated conduct is, however, obscure.<sup>viii</sup> A society which allowed the exposure of some newborn infants had little inclination to reject abortion. One Greek philosophical school worth mentioning is that of the Stoics. While a first century Stoic text by Musonius Rufus opposes abortion, it most likely does so because its widespread practice would be detrimental to the family and to the state, not because of a belief in the inherent value of fetal life: the Stoics did not believe that the child was human until it had drawn its first breath.<sup>ix</sup>

Abortion was practiced in ancient Rome, but disapproved of when it was performed without the permission of the father, the *paterfamilias*, and when it endangered the life of the mother. There were some countervailing trends: Con-nerly sees a growing tendency "to attribute more and more rights to the fetus"<sup>x</sup> and by the second century legislation against abortion first appeared. Yet the Romans never considered the fetus a human person.<sup>xi</sup>

Pro-choice accounts of the history of attitudes to abortion tends to minimize Jewish opposition to the practice by stressing the lack of specific reference to it in Scripture other than the somewhat ambiguous mention in Exodus 21: 22-23. In that passage there is discussion of an abortion caused by an accidental blow to a woman in the course of a struggle between two men. In the Hebrew text a fine is assessed if the fetus dies; if the woman dies the penalty is death. In the Septuagint a key word *'ason* is translated as "form," not "harm," thus introducing the notion that the degree of penalty was dependent on the state of development of the fetus: a fine if it was "unformed", death if it was "formed." While Scripture provides little direct clue to

attitudes to abortion, its general emphasis on the beauty and value of life as a gift from the Creator, and its celebration of large families certainly indicates an anti-abortion orientation.

The Talmud deals with the issue more clearly. The fetus was not considered "a separate entity but part of the mother until it is born."<sup>xii</sup> This does not mean, however, that the fetus was held to have no value, but that it had less value than the mother. Hence, therapeutic abortion was allowed, but there is no reason to believe that there was any acceptance of abortion as a right or as a frequently practiced operation. The fact the Talmud in one instance gives permission for a therapeutic abortion, specifying that "her life takes precedence over its life," seems to indicate that ordinarily abortion was forbidden,<sup>xiii</sup> for if abortion was unrestricted, it would hardly be necessary to specifically approve of it in such compelling circumstances. The Septuagint translation, with its echoes of the Aristotelian view of human development, became the basis of the Alexandrian school of Jewish thought on the subject: after "formation" the fetus was treated as a full human being. It is clear in this tradition that abortion, at least the abortion a "formed" fetus, was not only wrong but a form of homicide. Thus Philo, a first century Jewish philosopher argued that the accidental aborting of a formed fetus was akin to the destruction of a completed sculpture which had not yet left the artist's workshop. It should be stressed that this tradition does not regard the unformed fetus as of no value - its destruction, though not a homicide, is still an offense against life, for, in Connery's words, it prevents "nature from bringing into existence a human life."<sup>xiv</sup> The Hebrew text, which stressed the "harm" done to the mother, was used in the Palestinian Jewish approach to the topic, which did not see the fetus as a person but as part of

the mother. Some saw conception as the time of ensoulment, others saw "formation" and others believed that this took place at birth. It should be stressed, however, that while several schools of thought on abortion and the nature of the fetus developed in Jewish thought, there is no sign that abortion was envisioned for anything other than very serious reasons, most notably threats to the life of the mother.<sup>xv</sup> In the words of a distinguished contemporary Jewish scholar,

The destruction of an unborn child, let alone of an embryo in the earliest stages of gestation, does not constitute murder, since the unqualified entitlement to life — equal to the claim to inviolability of any other human being — sets in only at birth. Nevertheless, the germinating product of conception enjoys a very sacred title to life which may be set aside by deliberate destruction or abortion only in the most exceptional cases of medical urgency, notably to save the life of the mother if this would otherwise be at risk.<sup>xvi</sup>

While the pro-life movement does not find a position identical to its own in this part of the Jewish tradition, it can discern here an appreciation of the fetus's "sacred title to life" and an aversion to abortion for anything other than a threat to the mother's life. It is certainly the case that the pro-choice opinion has little support in this tradition, while the pro-life position can see in it a kindred viewpoint.

How is the pro-choice case argued with respect to the history of Christianity? Dallas Blanchard's recent pro-choice account, written for popular consumption, *The Anti-Abortion Movement and the Rise of the Religious Right: From Polite to Fiery Protest*, contains a short history of abortion. He claims that "some" of the "early church elders condemned the practice of abortion" but that "between 450 and 1450, church doctrine allowed abortion only before quickening." Until the 19<sup>th</sup> century

most theologians believed that ensoulment occurred at the time of quickening. Thus the practices of women and the positions of the church, as well as the later common law, usually coincided.... Between 1450 and 1750 church teaching generally held to the allowance of abortion before quickening and also allowed it after to save the woman's life.... Pope Gregory XIII, who led the church from 1572 to 1585 allowed it in the first 40 days of pregnancy and for single women under extenuating circumstances.<sup>xvii</sup>

Remarkably Blanchard cites as his source for these statements the works of John Noonan, the very scholar who proclaimed opposition to abortion an "almost absolute value" in history and who makes no statements even remotely resembling those for which he is cited as an authority.<sup>xviii</sup> Something like this account can be found in a number of popular writings.

A more moderate statement of similar views is given in Kristin Luker's widely used *Abortion and the Politics of Motherhood*, which argues that church councils outlined penalties only for women who committed abortion after a sexual crime and that early Christian thought was divided as to whether early abortion was murder. She asserts that "different sources of church teachings and laws simply did not agree on the penalties for abortion or whether early abortion is wrong."<sup>xix</sup> Angus McLaren, a prominent historian of contraception and abortion, stresses another theme. Christian opposition to abortion did not arise from a concern for fetal life: "Catholic historians such as John Noonan, who defend contraception but oppose abortion, have argued that early Christians, like their 20<sup>th</sup> century counterparts, condemned abortion because it entailed the killing of a live fetus. But this was not quite the case. Early abortion and contraception were regarded by some early Christians not as different but as very much the same thing — attempts to enjoy sexual pleasure without

bearing children."<sup>xx</sup> This position is echoed by Daniel Dombrowski in his analysis of Augustine's reasons for opposition to abortion. Dombrowski suggests that such interpreters as Noonan, Connery and Gorman are in error in ascribing to Augustine any concern for the protection of human life in his rejection of early abortion.

Rather Augustine opposed these abortions because of his rejection of any sexual activity which was not procreative.<sup>xxi</sup> Another direct attack on Noonan's position is found in Dunstan's writings, particularly "The Human Embryo in the Western Moral Tradition." He writes that "the claim to absolute protection for the human embryo 'from the beginning' is a novelty in the Western, Christian and specifically Roman Catholic moral traditions. It is virtually a creation of the late 19<sup>th</sup> century, a little over a century ago; and that is a novelty as traditions go."<sup>xxii</sup> Dunstan bases this claim on a review of the long-standing distinction between "formed" and "unformed" fetuses and the differential penalties which attached to the destruction of the being in the woman's womb depending on its state of development.

What can be said in response to these claims? In reviewing Christian attitudes to abortion, we should note that there is no explicit discussion of the subject in the New Testament: the reference in Galatians 3:1-6 to *pharmakeia* is possibly to abortifacient drugs, among others, but it is not very explicit.

Proof of Christian repugnance to abortion is found very early, however. The *Didache*, from the second century (and possibly earlier) explicitly condemns abortion: "You shall not kill the fetus by abortion or destroy the infant already born." A nearly identical condemnation is found in the *Epistle of Pseudo-Barnabas*. Connery suggests that the reason why abortion is directly condemned in the early Christian writings, but not in Jewish writings, is that the Christian documents "were addressed to

gentiles, people coming from a culture where both abortion and infanticide were practiced with frequency.... For the most part the New Testament was addressed to a Jewish audience who did not have this practice or tradition."<sup>xxiii</sup>

That abortion was condemned as an attack on life, and not only as an ancillary to sexual sins is clear from the *Plea for Christians* by Athenagoras in the second century. He defends Christians from the pagan claim that they were cannibals (a claim based on a false understanding of the Eucharist) by pointing out that Christians are opposed to all killing - including infanticide and abortion.

Other texts from this era could be cited, but a final example will be taken from Tertullian, who also defended Christians from the charge of child sacrifice, by pointing out that the Romans practiced infanticide — which Christians condemned, along with abortion. He sees abortion as an anticipated homicide.<sup>xxiv</sup> Though in another work he indicated that the fetus is not a man until it is formed (he appealed here to the Septuagint distinction), there is no reason to believe that he approves of abortion before the fetus is "formed."<sup>xxv</sup> What is reflected here is rather an ignorance of biological processes and the resulting uncertainty about when abortion becomes homicide rather than another kind of sin against life.

One such controversial passage from Tertullian has been read as approving therapeutic abortion where a difficult birth imperils the woman's life. In fact the main point of the passage is to prove that the fetus is alive — contrary to the Stoic claim that birth is the crucial dividing line — since otherwise it would not be necessary to kill the child. Whether he really believes the abortion "necessary" in the sense of justified is

dubious in view of the negative phrases he uses in conjunction with it.<sup>xxvi</sup>

The first church legislation dealing with abortion comes from the Council of Elvira in 305. In canons 63 and 68 women who have abortions to conceal adultery are subject to severe penance. Some pro-choice authors have interpreted this as a sign that what is really being condemned is the sexual sin, and that abortion was abhorred because of it, not because it represented an attack on human life. A separate canon dealt with adultery alone, and it prescribed a far less severe sentence; thus it would be reasonable to conclude that the attack on life simply compounded the offense.

The Council of Ancyra in 314 modified the severe penalties of Elvira: it seems most likely that this was a pastoral judgment related to recognition of the pressures on a pregnant woman, not the result of a more tolerant view of abortion.

The writings of Basil the Great later in the fourth century contain a condemnation of abortion which equated it with homicide. Significantly, he rejects the distinction between the formed and unformed fetus.<sup>xxvii</sup> For other writers, however, this distinction becomes an important one, and yet no clear agreement about the time of "animation" emerged. Jerome, although a consistent and clear opponent of abortion, is unclear about the time of animation. The issues here are complex and involve a tangled debate about the nature of the soul and its relation to the body.<sup>xxviii</sup>

Augustine's writings on abortion are numerous and influential. The section of his *Marriage and Concupiscence* known to posterity as *Aliquando* condemns those married who "procure poisons of sterility, and if they do not work, they extinguish the fetus in some way in the womb, preferring that their off-

spring die before it lives, or if it is already alive in the womb, to kill it before it was born."<sup>xxix</sup> Here he distinguishes contraception, the killing of the unanimated fetus, and abortion of the animated fetus. This distinction between two stages of fetal life with reference to abortion became commonly (though not universally) made. But it should be noted that abortions at both stages are condemned.

As mentioned earlier Dombrowski disagrees with the interpretations of Augustine offered by Noonan, Connery and Gorman. He stresses the distinction made by Augustine between the formed and unformed fetus, and the clear implication at a number of points in his writing that the unformed fetus is not a human being. He suggests that the real source of Augustine's condemnation of early abortion, as of contraception, is a condemnation of any divorce between sex and procreation, a condemnation which he alleges is rooted in Augustine's negative view of sex for pleasure. Dombrowski makes a strong case that Augustine does not view early abortion as homicide, the killing of a human being,<sup>xxx</sup> but it is less clear that Augustine's sole basis for condemning of it is his view of sex. Dombrowski has set up an arbitrarily forced dichotomy by holding that this condemnation can only be the result of either a belief in the humanity of the fetus, or a hatred of sexual pleasure. Are other alternatives possible? A closer look at Augustine's work, in the light of Dombrowski's argument seems appropriate.

Augustine was frequently concerned by the problem of the formed/unformed, animated/unanimated fetus. For example:

If the embryo is still unformed, but yet in some way ensouled while unformed... the law does not provide that the act pertains to homicide, because still there cannot be said to be a live soul in a

body that lacks sensation, if it is in flesh not yet formed and thus not yet endowed with senses.<sup>xxx1</sup>

It should be mentioned here that while the terms "formed" and "unformed" and "animated" and "unanimated" and later "quickened" and "unquickened" eventually came to be seen as equivalent pairs, there was considerable controversy about this point and Augustine's attempts to grapple with the subject illustrate its complexity.<sup>xxxii</sup>

The distinction between "formed" and "unformed" fetuses continued to be made in later centuries. With the development of the tradition of private penance, various penitential books of instruction for confessors appeared which recommended different penalties for the two sins. Commonly a period of one year of penance for the abortion of an unformed fetus was assessed, while three years was given for abortion at later stages of development.

An important tenth century development was the collection *Libri Synodales* by Regino of Prum. In canon 89 of Book II, known by its initial words, *Si aliquis*, anyone who deliberately causes sterility is held to be a murderer. This canon would play a crucial role in later centuries, for it suggested that all abortions be treated as homicides, regardless of the stage of development.

In response to a question regarding the status of a monk who had accidentally caused an abortion (thereby, under *Si aliquis*, being guilty of homicide and subject to loss of his ministry) Innocent III issued the decree *Sicut ex* that if the fetus had been unformed he would not face loss of ministry. Since the earlier canon *Si aliquis* continued in force, a contradiction or at least confusion existed which engaged attention in subsequent centuries. Later authors inclined to accept the view that while all abortions were in some sense

homicide, not all led to clerical irregularity.

The later Middle Ages saw two important developments: the rediscovery of Aristotle's biology, with its claim that males and females were animated at different gestational ages; and the origin of a discussion about therapeutic abortion. Some theologians held that the abortion of an unanimated fetus was licit in order to save the mother's life; abortion of the formed fetus continued, for these writers, to be homicide. In the case of doubt as to the fetus' state, the abortion should not be done. In later centuries the debate over therapeutic abortion widened; it is impossible in the space available here to give an adequate account of it. The fullest and best known development of these theories was by the 16<sup>th</sup> century Jesuit, Tomas Sanchez. Over time the distinction was drawn more clearly between means tending directly to procure an abortion and those treatments which had an unintended abortifacient effect. Noonan notes with respect to this debate that, "the balance struck by the casuists and now set out by St. Alfonso treated the embryo's life as less than absolute, but only the value of the mother's life was given greater weight."<sup>xxxiii</sup>

These speculations by moralists, however, ought not to be confused with Church law. The tradition of *Si aliquis* continued in force, although penalties varied depending on whether or not 40 days had been reached in gestational age; penalties were also lighter than for other homicides, not because the crime was objectively less, but because extenuating circumstances often existed.

A more severe view was taken by Pope Sixtus V in his 1558 bull *Effraenatam* which applied the same penalties — including excommunication — for abortion at any stage of development. This bull was revoked in 1591;

however, the penalty of excommunication continued to be attached to the abortion of the ensouled fetus.

Up to this point we have considered the treatment of abortion in the Roman Catholic Church. What of the Protestant tradition? A study by Germain Grisez notes that there is little in the writings of the early reformers bearing on it, although Calvin does argue that just as it is worse to kill a man in his own house, "it ought to be regarded as more atrocious to kill a fetus who has never seen the light of day, in the womb."<sup>xxxiv</sup> Other examples are cited by Grisez. In general the Reformation spelled no break with the unchanging Christian opposition to abortion. Grisez detects in Lutheranism some tendency to "mitigate" traditional views, while Calvinism maintained traditional beliefs with full force. Nonetheless, Grisez also points to Lutheran theologians who of the 17<sup>th</sup> century took a more restrictive view of therapeutic abortion than some of their Catholic contemporaries.<sup>xxxv</sup> In more modern times, the opposition to abortion expressed by Karl Barth and Dietrich Bonhoeffer is worth noting.<sup>xxxvi</sup>

In the light of the foregoing account it is possible to reply to the pro-choice view of the treatment of abortion by the Church. First of all, there is absolutely no basis for the frequently made statement that abortion was ever allowed in the period prior to what was thought of as animation or formation. Blanchard's statement, quoted above, that abortion was allowed by the church in the first 40 days, is utterly without foundation. How he believed that Noonan's work led to such conclusions is difficult to imagine. Penalties may have varied for early abortion, but there is no reason to suppose that it was permitted. Nor is there reason to support Luker's claim that there was no agreement on whether early abortion was wrong. Given the early Church's hostility to contraception, it is difficult to imagine that the

abortion of the fetus in its early stages would normally be regarded as acceptable. This is clear from McLaren's account, mentioned above, which observes that while abortion was regarded by some as acceptable to save the mother's life, in general it, like contraception, was regarded with profound hostility. Dombrowski concedes that "John Noonan has correctly noted that condemnation of abortion has been "an almost absolute value in history," specifically in the history of Catholicism."<sup>xxxvii</sup> Two points are clear. First, abortion at any stage of development was not accepted. The sources to prove this point are legion and the works of John Noonan, John Connery, Michael Gorman and Gerald Bonner<sup>xxxviii</sup> all testify to this. Connery concludes that:

Whatever one would want to hold about the time of animation, or when the fetus became a human being in the strict sense of the term, abortion from the time of conception was considered wrong, and the time of animation was never looked on as a moral dividing line between permissible and immoral abortion.<sup>xxxix</sup>

Second, abortion after quickening or after the fetus was "formed" was commonly denounced as homicide. Thus St. Jerome explained that "seeds are gradually formed in the uterus, and it is not reputed homicide until the scattered elements receive their appearance and members."<sup>xl</sup>

The pro-life claim to represent a long-standing tradition appears imperiled, however, by the interlinked assertions that while the abortion of early term fetuses was condemned, it was not regarded as homicide because it was not believed that animation had occurred and that the condemnation of abortion at this stage represented not a regard for human life but repressive sexual attitudes. While the first assertion is true for the majority of the Church Fathers, the second

needs to be qualified. That is, while it is the case that the condemnation of early abortion was heavily colored by a loathing of sexual sin, it is true that it was also regarded as an attack on life, even if not necessarily homicide. The presence of a concern about sexual sin does not preclude the simultaneous existence of a concern for life in the condemnation of abortion by many of the Church Fathers.<sup>xii</sup> Even if we were to assume that both of the pro-choice claims are unreservedly true, would it follow that there is not a tradition which rejects the killing of all innocent human life? We should review the history of the tradition that a distinction can be made between early and later fetuses.

The principal sources of the distinction are, of course, the biology of Aristotle and the Scriptural treatment in Exodus. The writings of the early Church reflect these distinctions, as Dunstan and others have stressed, and clearly for many (but not for all) the abortion of an "unformed" fetus was not homicide. St. Basil declared that "A woman who deliberately destroys a fetus is answerable for murder. And any fine distinction as to its being completely formed or unformed is not admissible among us."<sup>xiii</sup>

The distinction between "formed" and "unformed" fetuses continued to be made in later centuries and is at the core of the pro-choice account of the history of abortion. What exactly does it prove? Dunstan seems clear about its significance: "the claim for absolute protection for the human embryo 'from the beginning' is a novelty in the Western, Christian and specifically Roman Catholic moral traditions." Later he asserts that

The aim of this chapter has been, not to claim contemporary relevance for either an outmoded embryology or an outmoded philosophical speculation on the soul and the time of its 'entering' (if

it does) the body; nor yet to ventilate again the liceity of abortion. It has been to recall a moral tradition *expressed in terms* of these three things, persisting to the end of the 19<sup>th</sup> century, and for those cognizant of the arcane casuistry of medical practice beyond that date into this day. The tradition attempted to grade the protection accorded to the nascent human being according to the stages of its development.<sup>xliii</sup>

To assess this claim we must consider more closely the reasons offered in the ancient world for differentiating between the formed and unformed fetus.

On examination it is clear that they reflect a profound — and fully understandable — ignorance of the nature of fetal development. Consider, for example, Aristotle's belief that movement in males first occurred at 40 days, and at 90 days in the case of females. Obviously this is wrong, not merely at a simple level — males and females do not differ in the fashion Aristotle describes, and fetal movement, we now know, occurs far earlier — but in a far deeper way. The role of DNA, the real nature of sperm and egg, the self directing character of the fetus, which secretes hormones to stop the mother's periods, were all either unknown or only partially understood by Aristotle and other ancient thinkers. This is hardly to their discredit, since they were limited to the observation of external phenomena — the physical appearance of aborted fetuses, the mother's sensation of movement — but it is rather the case that they could not adequately perceive the inner dynamics of fetal life.

Of necessity their appreciation of when "life" or the "soul" could be posited was radically limited. To attribute *moral* significance to this ignorance is to allow contemporary beliefs to dictate our historical sense.

Dunstan's argument that the protection of human life "from the beginning" is a novelty is simply not supported by his own evidence. His work has made it clear that it was precisely because human life was not seen as beginning at conception that less protection was

afforded to early fetal life. The profound limitations of the biological knowledge available shaped the decisions made, and hence Dunstan's caveat that he does "not claim contemporary relevance for an outmoded embryology" is misleading. When the Church fathers and later Christian writers knew that human life was present they afforded it full protection; when they had reason to doubt that it was they imposed lesser penalties. To the question *whether there is the sanction of tradition for a movement which seeks full protection for human life from the earliest period where we have good grounds to believe that it exists* the answer is clearly yes. The modern pro-life movement, if somehow brought to the attention of the early Church fathers might seem odd to them on a number of counts — not least in its unconscious acceptance of a "rights" orientation — but it would surely appear congruent with their approach and, in the light of scientific discoveries, a logical development of it.

We should bear in mind the question we are asking, which is surely not *whether the exact set of beliefs of the right to life movement of the late 20th century have existed unchanged from the earliest days of the Church to the present*. Rather, as stated at the start of this essay, we want to see *if until quite recent times abortion was regarded as wrong when it was known with reasonable certainty that a human life was present, and regarded as wrong because it involved the destruction of a human life*. That a concern about sexual sin was mixed with a concern to protect life or that less protection was afforded life in stages when its existence as human life was arguable does not negate the existence of a pro-life tradition. We are, after all, concerned to prove the existence of that tradition, not to prove the unchanging character of biological knowledge.

Turning to the question of English common law and the status of abortion in the Anglo-American world prior to the 19<sup>th</sup> century, we have a handy compendium of the views of pro-choice scholars: the *amicus* brief submitted in *Casey v. Planned Parenthood* by 250 historians:

As this Court demonstrated in *Roe v. Wade*, abortion was not illegal at common law. Through the 19<sup>th</sup> century, American common law decisions uniformly reaffirmed that women committed no offense in seeking abortion. Both common law and popular American understanding drew distinctions depending upon whether the fetus was "quick", i.e., whether the woman perceived signs of independent life. There was some dispute whether a common law misdemeanor occurred when a third party destroyed a fetus, after quickening, without the woman's consent. But early common law recognition of this crime against a pregnant woman did not diminish the woman's liberty to end a pregnancy herself in its early stages....

Recent studies of the work of midwives in the 1700<sup>s</sup> report cases in which the midwives appeared to have provided women abortifacient compounds. Such treatments do not appear to have been regarded as extraordinary or illicit by those administering them.<sup>xliv</sup>

The principal secondary sources quoted in support of these statements are James Mohr's *Abortion in America*,<sup>xlv</sup> Carol Smith-Rosenberg's *Disorderly Conduct*,<sup>xlvi</sup> Cyril Means's "The Phoenix of Abortional Freedom,"<sup>xlvii</sup> and Angus McLaren's *Reproductive Rituals*.<sup>xlviii</sup> There is no reference to the large group of studies by pro-life scholars which contest these points. Particularly notable is the absence of any reference to the works of legal scholars such as John Keown<sup>xlix</sup>, Robert Byrn<sup>i</sup>, Clarke Forsythe<sup>ii</sup> and others.<sup>iii</sup> Particularly notable is the lack of reference to the work of Joseph Dellapenna. Dellapenna, like the pro-choice historians, had presented an *amicus* brief in *Casey*,<sup>liii</sup> and had earlier presented one in *Webster v. Reproductive Health Services*.<sup>liv</sup>

In these and other *amicus* briefs Dellapenna has demonstrated that, contrary to Means and others, a substantial body of evidence exists to show that there was no common law "liberty" to commit abortion:

Common law indictments and appeals of felony for abortion are recorded as early as 1200. While the terse records often do not indicate the outcome of the proceedings, the many clear records of punishment and judgments of "not guilty" (rather than dismissal) prove that the indictments and appeals were valid under common law. Means was simply wrong to assert that only two cases dealt with abortion before 1600 and that the courts in both cases doubted whether abortion was a crime...<sup>lv</sup>

It should be noted that even scholars sympathetic to a pro-choice view dismiss Means's claim to an unlimited common law "right" to abortion.<sup>lvi</sup>

With regard to the assertion that abortion was a right prior to "quickening," we should consider the argument of Robert Byrn that

"quickening" was utilized in the later common law as a practical evidentiary test to determine whether the abortion had been an assault upon a live human being in the womb and whether the abortifacient act had caused the child's death; this evidentiary test was never intended as a judgment that before quickening the child was not a live human being; and... at all times, the common law disapproved of abortion as *malum in se* and sought to protect the child in the womb from the moment his living biological existence could be proved.<sup>lvii</sup>

The difficulty faced by the court in proving that the aborted child had been indeed "quick" made prosecution complicated. For abortion to be a crime it was necessary to prove that what was killed had indeed been alive: given the primitive biological knowledge of the time, this was difficult to do. Nonetheless abortion continued to be a crime. In the 17<sup>th</sup> century in the case of *R. v. Sims* it was declared that if the child was born alive and subsequently died from the abortion

procedure, then the crime was murder; if it was still-born, then murder could not be proved because it was not clear that the child had been alive at the time of the abortion. Subsequently Sir Edmund Coke (Attorney General at the time of the *Sims* case) in his enormously influential legal writings maintained that if the child was delivered dead "this is a great misprision [misdemeanor] and no murder but if the child be born alive, and dieth 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."<sup>lviii</sup>

Does Coke's view mean that the unborn child was not accounted as a person *in rerum natura* before birth? No, Byrn argues, for he was "referring only to the law of homicide where the exigencies of proof prevented labelling the intra-uterine killing a murder. For other purposes, such as inheritance, the unborn child was recognized as a person *in rerum natura* in the womb."<sup>lix</sup>

Moreover, in 1670 Chief Justice Hale held that if a woman died as the result of an attempted abortion at *any* stage in her pregnancy, the person performing the abortion was accounted guilty of a murder. Dellapenna suggests that this was either "akin to felony murder, with the *mens rea* against the child linked to the *actus reus* of killing the mother to support the charge of murder." Alternatively it could be because "the act was one of extreme recklessness, endangering the mother's life, and, therefore, murder."<sup>x</sup> Either way, this hardly equates with the pro-choice claim that abortion was an accepted practice. Clarke Forsythe puts the issue in somewhat different terms:

During the period of the formation of the common law, quickening was the most important point in pregnancy in both law and medicine. It was assumed that the fetus first became alive at quickening. At common law, the primitive state of medical

knowledge made quickening legally significant, "since quickening was determinable at least by the mother, in a time when little else about the fetus was readily understood." Later, in the 19<sup>th</sup> century, physicians came to understand that the fetus was alive at conception. Nevertheless, prior to the 20<sup>th</sup> century, quickening remained the first reliable proof that the mother was pregnant.<sup>lxi</sup>

We have evidence that not only was abortion legally disapproved, but it was regarded with disapproval by much of society. This is not to say that it was not practiced, but only that a strong tradition of abhorrence of it is also part of the historical record. Even pro-choice historians cite numerous hostile references to abortion, and although they assert that abortion prior to quickening was accepted by many women as moral, the fact remains that once it was known that a living fetus was involved, there was frequent condemnation of the practice and even at the earlier stages it had a disreputable character.<sup>lxii</sup>

In this context it is instructive that midwives in England took oaths not to help with abortions and that the Common Council of New York City in 1716 adopted an ordinance forbidding midwives from performing them: "You [midwives] Shall not Give any Counsel or Administer any Herb Medicine or Potion, or any other thing to any Woman being with Child whereby She Should Destroy or Miscarry of that she goeth withal before her time."<sup>lxiii</sup>

Another area which bears examination is the change which took place in both secular and Church legislation in the 19<sup>th</sup> century with respect to abortion. This is a critical period for the pro-choice argument: it is necessary for it to portray the significant tightening of abortion restrictions in this era, and the abolition of the "quickening" distinction as an aberration, as a deviation from the "true" tradition of the West. To do this it is necessary to argue that the change took place not

because of increased scientific knowledge, which rendered the old distinction absurd, but because of more sinister and discreditable reasons. For a summary of the pro-choice view we can turn to Blanchard, who asserts there were four motives for the introduction of statutory bans on abortion in 19<sup>th</sup> century America: "the drive for medical professionalization, a call for moralism, concern for women's health and a mix of social forces stemming from industrialization and mass immigration."<sup>lxiv</sup> As he puts it, "thus a coalition of medical professionals, moralists, xenophobics, anti-Catholics and anti-semites managed to get the various state legislatures to enact laws restricting abortion."<sup>lxv</sup> Note that there is no mention of a concern for the value of fetal life: by implication there is no pro-life tradition, only a variety of selfish or discreditable motives. This analysis appears as well in the historians' *Casey* brief, although somewhat more moderately phrased.

That brief's treatment of the period became the focus of attacks on its credibility, most notably in an article in *First Things* entitled "Academic Integrity Betrayed."<sup>lxvi</sup> Illuminating as well was a roundtable discussion reprinted in *The Public Historian*, in which a number of those involved in preparing the historians' brief spoke candidly about some of the issues involved. James C. Mohr admitted that he did not "ultimately consider the brief to be history, as I understand that craft. It was instead legal argument based on historical evidence. Ultimately it was a political document."<sup>lxvii</sup>

Strikingly the negative view of the 19<sup>th</sup> century American abortion reformers ignores what is actually in the source most frequently cited by pro-choice historians, James Mohr's *Abortion in America*. That work makes it clear that moral concern for the life of the fetus was of central importance. Even when suggesting that professional self-interest helped drive the anti-

abortion crusade by 19<sup>th</sup> century physicians, he acknowledged the reality of their moral concern:

Compelling personal factors certainly added to the substantial professional motives for an anti-abortion crusade on the part of America's regular physicians. The first was a no doubt sincere belief on the part of most regular physicians that abortion was morally wrong. The fact that this belief coincided nicely with their professional self-interest is no reason to accuse physicians of hypocrisy on the issue; instead the convergence probably helps to explain the intensity of their commitment to the cause. As was pointed out in an earlier context, 19<sup>th</sup> century physicians knew categorically that quickening had no special significance as a stage in gestation.<sup>lxviii</sup>

This is made even clearer in Marvin Olasky's very fine and little recognized work, *Abortion Rites: A Social History of Abortion in America*. He notes the real concern for human life manifested by the physicians who led the anti-abortion crusade and suggests that for many of them the slaughter they had witnessed during the Civil War had sensitized them to any attack on life.<sup>lxix</sup>

Two other things stand out in looking at the 19<sup>th</sup> century's attitude to abortion. One is the complete lack of any organized opposition to the new anti-abortion legislation. As Michael Grossberg has observed, "the public advocacy of contraception by sexual radicals and reformers... had no pro-abortion counterparts."<sup>lxx</sup> If abortion was indeed a cherished common law "liberty," it is hard to imagine why legislature after legislature passed laws abolishing the "quickening" distinction and proscribing abortion. The most reasonable explanation is surely that as the scientific case became clearer that fetal development was continuous after conception, the public extended to abortion in early pregnancy the same disapproval with which late-term abortion had always been regarded.

Another notable circumstance is the opposition to abortion manifested by early advocates of women's rights. As Mohr observes, "Virtually all feminists, even those around Victoria Woodhull, viewed the prevalence of abortion in the United States as understandable, under the circumstances, but looked forward to its elimination rather than its wholesale adoption by all women."<sup>lxxi</sup> If abortion restriction really was a plot by the patriarchy to oppress women, then why was it so fervently advocated by feminists?

Angus McLaren has greatly extended the reach of the "discreditable motives" argument, first to Britain and then to the Pope. In the case of Britain, McLaren asserts that the attacks made by doctors on the quickening doctrine reflected not so much the advance of scientific knowledge as a concern "to assert that only medical men could authoritatively discuss issues relating to physiology." While McLaren's assertion about motives is debatable, it is unquestionably true, as even he admits, that "the notion that the mother's awareness of fetal movements signified some clear stage of development was by the 19<sup>th</sup> century clearly no longer scientifically tenable...."<sup>lxxii</sup> The mixed motives of the medical profession in advocating abortion restriction were earlier noted by John Keown, but Keown rightly insists on the reality of the moral concerns of doctors, particularly in the light of new scientific knowledge about fetal development.<sup>lxxiii</sup> The existence of mixed motives does not negate the existence of a pro-life tradition: a concern to protect human life, from the earliest time it was known to exist, was a part of Victorian England, as it was in America at the same time.

More daring is McLaren's suggestion that changes in the Roman Catholic Church also reflected base motives. The argument, advanced by Noonan and others that the Papacy moved to drop references to the

"ensouled fetus" in its 1869 legislation on abortion because of the advance of scientific knowledge is rejected by McLaren. He insists that

the argument that the Church was concerned with scientific findings does not tally with the traditional view of Pius IX — the reactionary propounded of the Syllabus of Errors, the declarer of Papal Infallibility, and the institutor of the Dogma of the Immaculate Conception.<sup>lxxiv</sup>

This is a curious argument, which relies for its force on crude stereotyping: apparently anyone who believes in the Immaculate Conception is incapable of understanding science. The real core of his argument, however, is in the suggestion that the Church was responding to the increased power claimed by doctors over pregnancy:

The Church was more alarmed than relieved by the reports of doctors' increased ability to not only observe but to intervene in the process of reproduction. Pius, in dropping the reference to the 'ensouled fetus' and thereby condemning all abortions, was clearly launching the Church in a campaign against medical intervention in childbirth. Doctors might pride themselves on having led an attack against criminal abortions but they now found themselves in turn attacked by Catholics for their provision of therapeutic abortions.<sup>lxxv</sup>

The argument advanced by McLaren is most unconvincing: it is in fact pure speculation presented with the utmost self-confidence. Even if the Church was spurred into action by concern over the actions of doctors in the 19<sup>th</sup> century — something which he does not prove — there is no case made that the growth of scientific knowledge was an irrelevancy. The changes in Church law represented not the abandonment but the development of a tradition: the truly reactionary position would have been to insist, in the face of increased knowledge, on the maintenance of distinctions

regarding fetal life which arose from ignorance.

More persuasive is the view advanced by Noonan and Connery, that from the 17<sup>th</sup> century on several streams of thought contributed to wiping out the distinction between formed and unformed fetuses. One was the growing medical opinion that ensoulment occurred at conception, or very shortly thereafter. What was under attack here was the Aristotelian biology which had long been so influential. Another influence was the growing attention paid to the Immaculate Conception of Mary, and a concomitant tendency to see life as beginning with conception. The logical result was the 1869 extension of excommunication to all cases of abortion, not just for those where the fetus was older than 40 days. The tightening continued with the new Code of Canon Law in 1917, which made clear that all those involved in abortion - doctors and mothers - were excommunicated. During the same period the therapeutic abortion exceptions taught by some theologians were declared invalid by the Vatican. In 1930 the encyclical *Casti connubii* made crystal clear the utterly unacceptable character of abortion under any circumstances. This was reaffirmed by the Second Vatican Council.

The changes in abortion attitudes in English law, the corresponding tightening of American abortion laws, as well as the more restrictive Papal legislation, all must be set in the context of growing scientific knowledge about the nature of life before birth. The Aristotelian biology had fallen into discredit and scientists inclined more and more to the view that pregnancy was a biologically continuous process. The existence of the ovum was scientifically demonstrated in 1827, completing the triumph of the "ovists" - those who believed that human beings developed from eggs which were in some

fashion activated by sperm. The rival theorists, the "animalculists," believed that life developed from the sperm. As Carl Degler has put it, "what is spoken today as the moment of conception, the time when egg and sperm unite, had no specific meaning, or even conceptualization for people at the opening of the 19<sup>th</sup> century. About all that physicians and lay people alike knew was that at some point after sexual intercourse the male sperm (or the egg) began to develop into a recognizably potential human being." He notes that:

With the scientific establishment of the existence of the ovum and the idea of conception as the moment at which sperm united with egg to begin the process of growth that would eventuate in a baby, the whole matter took on a different aspect. Since the process from conception to birth was now viewed as continuous, whatever sanctity had been attached to the life of the fetus after quickening now had to be extended to the full life of the fetus before quickening began, that is, from the moment of conception.<sup>lxxvi</sup>

To conclude, it is clear that the pro-life movement has deep roots in the past, reaching back several millennia at least. There indeed existed a tradition which graded the protection accorded a fetus according to its stage of development, but that tradition rested on a view of fetal life no longer supportable in the light of the medical discoveries made by the early 19<sup>th</sup> century. The changes in the laws of Church and state in the 19<sup>th</sup> century represent a development, not a repudiation of that tradition. To deny this is of necessity to ignore the statements made by those effecting the change and to give credence instead to theories which attempt to place the full weight for these changes on discreditable motives. Such motives no doubt existed, but to make them the whole of the story is bad history. The pro-life movement should not look upon the years before the 1960<sup>s</sup> as some sort of pro-life golden age: it was not.

But it can see its concerns as part of a long and honored tradition.

NOTES

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i. Joyce Appleby, Lynn Hunt and Margaret Jacob, *Telling the Truth About History* (New York: W. W. Norton 1994) 195.

ii. John Noonan, "An Almost Absolute Value in History" in John Noonan, ed., *The Morality of Abortion: Legal and Historical Perspectives* (Cambridge: Harvard Univ. Press 1970) 1-59.

iii. Michael A. Cavanaugh, "Secularization and the Politics of Traditionalism: The Case of the Right-to-Life Movement" in *Sociological Forum* 1/2 (1986) 251-283 at 260.

iv. George Devereux, *A Study of Abortion in Primitive Societies* (New York: International Univ. Press 1976; 1<sup>st</sup> ed. 1955) 53. See also his "A Typological Study of Abortion in 350 Primitive, Ancient and Pre-Industrial Societies" in Harold Rosen, ed., *Abortion in America* (Boston: Beacon 1967).

v. Noonan 3-4.

vi. Noonan 5. See also John M. Riddle, *Contraception and Abortion from the Ancient World to the Renaissance* (Cambridge: Harvard Univ. Press 1972) 18.

vii. Aristotle, *Generation of Animals* II, 3 and *History of Animals* VII, 3 in Jonathan Barnes, ed., *The Complete Works of Aristotle*, Vol. I (Princeton: Princeton Univ. Press 1984) 1142-1144 and 913-914. Aristotle's theories are discussed in John Connery, S.J., *Abortion: The Development of the Roman Catholic Perspective* (Chicago: Loyola Univ. Press 1977) 17-18. Also see D. M. Balme, "Anthropos anthropon genna, Human is Generated by Human" in G. R. Dunstan, ed., *The Human Embryo: Aristotle and the Arabic and European Traditions* (Exeter: Univ. of Exeter Press 1990) 20-31. Balme (p.30) writes that "Aristotle envisages conception as taking place slowly, over some days. But when then semen has, as he

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expresses it, 'set' the menstrual blood as rennet sets milk, the female's residue has acquired the necessary source of movement and has become a fetus.... It now possesses in potentiality all the soul faculties including nous." Also informative is Helen King's, "Making a Man: Becoming Human in Early Greek Medicine" in Dunstan 10-19.

viii. A very restrictive reading of the oath is given by Riddle (pp. 7-10).

ix. Michael J. Gorman, *Abortion and the Early Church: Christian, Jewish and Pagan Attitudes in the Greco-Roman World* (Downers Grove: Intervarsity Press 1982) 29-30; Riddle 21.

x. Connery 23.

xi. Connery 22.

xii. Connery 16.

xiii. Connery 15.

xiv. Connery 19. As Gorman says in *Abortion and the Early Church* (37), "While the translators of the Septuagint and the philosopher Philo distinguished the nonhuman from the human fetus, ... this legal concern should not be seen as the primary aim of these writers or of Alexandrian Judaism generally. Rather, their fundamental concern is the serious immorality of killing any unborn, especially when the killing is deliberately executed."

xv. For fuller discussions of this complex topic see Gorman and Connery. Particularly useful is David M. Feldman, *Marital Relations, Birth Control and Abortion in Jewish Law* (New York: Schocken Books 1974). Especially significant is Feldman's statement (284) that non-therapeutic abortions are "very likely not even contemplated in the Mishnaic law." The claim by Riddle (20) that the passage in Exodus "seems to support abortion implicitly" does not seem tenable.

xvi. Sir Immanuel Jakobovits, "The Status of the Embryo in the Jewish Tradition" in G. R. Dunstan and Mary J. Seller, *The Status of*

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*the Human Embryo: Perspectives From Moral Tradition* (London: King Edward's Hospital Fund for London 1988, printed and distributed by Oxford Univ. Press) 62-73 at 70. He expresses the same view in "Jewish Views on Abortion" in *Human Life Review* 1/1 (Winter 1975) 76: "While the destruction of an unborn child is never regarded as a capital act of murder (unless and until the head or the greater part of the child has emerged from the birth canal), it does constitute a heinous offense except when indicated by the most urgent medical considerations."

xvii. Dallas Blanchard, *The Anti-Abortion Movement and the Rise of the Religious Right: From Polite to Fiery Protest* (New York: Twayne Publishers 1994) 11.

xviii. Blanchard has almost certainly been confused by Noonan's discussion of the relative penalties attached to abortion at different stages and the fact that the abortion of the pre-quickened fetus was frequently not considered homicide. Whatever the penalties, abortion was always a sin and hardly "allowed" by the Church at any time.

xix. Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: Univ. of California Press 1984) 13.

xx. Angus McLaren, *A History of Contraception* (Oxford: Basil Blackwell 1990) 82.

xxi. Daniel A. Dombrowski, "Augustine, Abortion and *Libido Crudelis*" in *Journal of the History of Ideas* 39/1 (Jan-Mar 1988) 151-154.

xxii. In Dunstan and Seller 39-57 at 40.

xxiii. Connery 36-37.

xxiv. Connery 39-40.

xxv. Connery 40-41, Gorman 57-58.

xxvi. Connery 41-42. See also Noonan 13.

xxvii. Connery 49, Gorman 66-67.

xxviii. Connery 53-54.

xxix. Noonan 16, Connery 55-59, Gorman 70-72.

xxx. Dombrowski.

xxxi. Quoted in Riddle 21.

xxxii. For a discussion of this issue for several early writers, see Connery, ch. 4.

xxxiii. Noonan 32.

xxxiv. Quoted in Germain Grisez, *Abortion: the Myths, the Realities and the Arguments* (New York: Corpus Books 1970) 157-58; the other information in this paragraph also comes from Grisez 156-65.

xxxv. Grisez 161.

xxxvi. Grisez 297-98.

xxxvii. Dombrowski 151.

xxxviii. See notes 2, 7, 9 above. Gerald Bonner, "The Teaching of the Early Church as regards Abortion" in Joseph W. Koterski, S.J., ed., *Life and Learning IV* (Washington, D.C.: Univ. Faculty For Life 1995) 230-252.

xxxix. Connery 304.

xl. Quoted in Noonan 15. Augustine's similar view is cited on the same page.

xli. See Connery 54.

xlii. Quoted in Dunstan 44.

xliii. Dunstan 40, 55.

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xliv. "Brief of 250 American Historians as *Amici Curiae* in Support of the Petitioners," reprinted in Leon Friedman, *The Supreme Court Confronts Abortion: The Briefs, Arguments and Decision in Planned Parenthood v. Casey* (New York: The Noonday Press, Farrar, Strauss and Giroux 1993) 136-163.

xlv. James C. Mohr, *The Origins and Evolution of National Policy, 1800-1900* (New York, Oxford Univ. Press 1978).

xlvi. Carroll Smith-Rosenberg, "The Abortion Movement and the AMA, 1850-1880" in *Disorderly Conduct: Visions of Gender in Victorian America* (New York: Oxford Univ. Press 1985) 217-244.

xlvii. Cyril B. Means, "The Phoenix of Abortional Freedom: Is a Penumbra or 9<sup>th</sup> Amendment Right About to Arise from the 19<sup>th</sup> Century Legislative Ashes of a 14<sup>th</sup> Century Common Law Liberty?" in *New York Law Forum* 17 (1971) 335.

xlviii. McLaren (note 20 above).

xlix. John Keown, *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (Cambridge: Cambridge Univ. Press 1988).

i. Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion" in *Fordham Law Review* 41 (1973) 807.

ii. Clarke D. Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms" in *Valparaiso Law Review* 21/3 (Spring 1987) 563-629.

iii. For example, Robert Destro, "Abortion and the Constitution: The Need for a Pro-Life Protective Amendment" in *California Law Review* 63 (1975) 1250; James Witherspoon "Re-examining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment" in *St. Mary's Law Journal* 17 (1985) 29; John D. Gorby, "The 'Right' to an Abortion: The Scope of Fourteenth Amendment 'Personhood' and the Supreme Court's Birth Requirement" in *Southern Illinois University Law Journal* 1 (1979) 1-36.

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liii. Brief of the American Academy of Medical Ethics as *Amicus Curiae* in Support of the Respondents and Cross Petitioners Robert P. Casey *et al.* (April 6, 1992).

liv. Brief of the Association for Public Justice and the Value of Life Committee, Inc. (Feb. 23, 1989). This brief is reprinted as "The Historical Case Against Abortion" in *Continuity* 13 (Spring/Fall 1989) 59-83. See also Dellapenna's "The History of Abortion: Technology, Morality and Law" in *The University of Pittsburgh Law Review* 40/3 (Spring 1979) 359-428.

lv. Dellapenna (see note 53 above) 7-8.

lvi. Shelley Gavigan "The Criminal Sanction as It Relates to Human Reproduction" in *The Journal of Legal History* 5/1 (May 1984) 20-41.

lvii. Byrn 815-16.

lviii. Quoted in Byrn 819-20.

lix. Byrn 820.

lx. Dellapenna (1979) 387-389.

lxi. Forsythe 568.

lxii. McLaren (89-112) makes reference to a number of these.

lxiii. For references to the oaths imposed on English midwives, see Catherine M. Scholten, "On the Importance of the Obstetrick Art: Changing Customs of Childbirth in America, 1760 to 1825" in *William and Mary Quarterly* 34/3 (July 1977)429. Dellapenna reprints the 1716 ordinance adopted by the Common Council of New York as an appendix to his *Casey* brief, p. 37a. See also Dennis J. Horan and Thomas J. Marzen, "Abortion and Midwifery: A Footnote in Legal History" in Thomas W. Hilgers, Dennis J. Moran and David Mall, eds., *New Perspectives on Human Abortion* (Frederick, Md.: Univ. Press of America 1981) 199-204.

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Ixiv. Blanchard 12.

Ixv. Blanchard 15.

Ixvi. Gerald V. Bradley, "Academic Integrity Betrayed" in *First Things* 5 (Aug./Sept. 1990) 10-12. Significantly, one of the most notable signatories of the 1988 brief, James Mohr, did not sign the 1992 brief.

Ixvii. James B. Mohr, "Historically Based Legal Briefs: Observations of a Participant in the *Webster Process*" in *The Public Historian* 12/3 (Summer 1990) 25.

Ixviii. Mohr 164-165.

Ixix. Marvin Olasky, *Abortion Rites: A Social History of Abortion in America* (Wheaton: Crossway Books 1992) 119-22.

Ixx. Michael Grossberg, *Governing the Hearth: Law and Family in Nineteenth-Century America* (Chapel Hill: Univ. of North Carolina Press 1985) 169.

Ixxi. Mohr 111-12.

Ixxii. Angus McLaren, "Policing Pregnancies: Changes in Nineteenth-Century Criminal and Canon Law" in Dunstan 193.

Ixxiii. Keown 38-48.

Ixxiv. McLaren in Dunstan 196.

Ixxv. McLaren in Dunstan 196.

Ixxvi. Carl Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (New York: Oxford Univ. Press 1980) 240-41.