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# Individual Liberty and the Common Good - The Balance: Prayer, Capital Punishment, Abortion

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# INDIVIDUAL LIBERTY AND THE COMMON GOOD—THE BALANCE: PRAYER, CAPITAL PUNISHMENT, ABORTION

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In striking the balance between individual freedom and the common good of society, judges are relying "on ideology or policy preference more than on legislative intent."[1] Professor Jude P. Dougherty, President-elect of the American Catholic Philosophical Association, has declared that "this is particulary apparent in actions of the United States Supreme Court where the envisaged effects of a decision are often given more weight than the intentions of the framers of the Constitution or of the legislators who passed the law under consideration."[2] The dominant trend of the United States judiciary is to begin its reasoning with "liberty" or "freedom" as the ultimate moral value in the Franco-American sense of maximum individual self-assertion, and then to maximize it.

It will be the purpose of this paper to show that "liberty" or "freedom" is only an instrumental moral value, and that by treating it otherwise, the courts are damaging the common good of society. I shall follow the philosophy of the objective natural law, mindful of the approaches of other philosophies in this respect, especially the Kantian.

## I

The philosophy of an objective natural law prevailed during the formative period of United States political and juridical institutions.[3] A higher law concept was the fundamental basis of the Declaration of Independence

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[1] Memorandum of Jude P. Dougherty to the members of the American Catholic Philosophical Association, proposing "Philosophy and Civil Law" as the topic for the 1975 Convention of the Association 1.

[2] *Id.*

[3] Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928). *See generally* Kenealy, *The Majesty of the Law*, 5 LOYOLA L. REV. 101, 105-106 (1950).

with its hard core of unchallengeable rights.[4] The Declaration had a higher law or objective natural law basis, obviously, because these rights did not come from the wills of the authors of the Declaration, or from the people, whom they represented. The authority was divine; it rested upon something beyond human will.

Since the philosophy of an objective natural law was dominant in the formative period of United States institutions, it is manifest that its concept of liberty or freedom prevailed. The idea of "liberty" which evolved during the American Revolution was conceptually different from that of the subsequent French Revolution.[5] In the French experiment it was wholly subjective, the total creation of human will, and detached from the obligation of right reason, as prescribed by the natural law. The word "liberty" in the phrase "life, liberty, or property" in the fifth amendment of the United States Constitution meant human dignity, but it was used because the Constitution was written in the eighteenth century, an age of struggle for political freedom.

Natural law imposes the duty to respect human dignity as the final moral value, and additionally, subultimate or instrumental values such as liberty. Correlated with the right to liberty is the corresponding duty of restraint where justice to other individuals, the state, and society so requires. The duty is imposed by this higher law in consequence of the essential nature of man, a reasoning and free-willing entity.[6]

Freedom of the human will is limited by the natural law in the area of conduct in the private sphere of morality, as well as in the public area of law. The coercive power of state law is to be exercised only when the violation of the moral law results in social injustice.[7] Man is not considered free to act so as to deviate from the fundamental requirements of his human nature, characterized by certain specific functions and faculties, although he has the physical power to do so.[8]

The moral and jural value of legally upholding individual liberty in its twofold sense—first, of allowing the individual to do what he pleases, and second, to be protected from unjust compulsion to do what he does not will to do—lies in the preservation of the integrity of the great human faculty of will. But this faculty is limited by the other great faculty of reason, operating on the norm of objective morality.

Natural law philosophy balances individual liberty against the social or common good, but the relative weights to be given to each in any situa-

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[4] *See generally* Brown, *The Natural Law Basis of Juridical Institutions in the Anglo-American Legal System*, 4 CATH. U.L. REV. 81, 82 (1954) [hereinafter cited as Brown].

[5] VAN DUZER, CONTRIBUTION OF THE IDEOLOGUES TO FRENCH REVOLUTIONARY THOUGHT 5-7 (1935).

[6] H. ROMMEN, THE NATURAL LAW 35 (1947).

[7] *See* Brown, *Natural Law: Dynamic Basis of Law and Morals in the Twentieth Century*, 31 TULANE L. REV. 491 (1957).

[8] *See* III M. CICERO, ON THE COMMONWEALTH, ch. XI, at 206, ch. XXII, at 215 (G. Sabine and S. Smith transl. 1929).

tion must first be ascertained. This is done by determining what effect the claimed area of liberty, if given legal protection, would have on individual human dignity. In the balancing process between the individual and society, therefore, greater weight is to be given to society, except only when this would erode the fundamental worth of the individual. Hence, the precise degree of individual freedom allowable in any given situation is to be determined by questioning its necessity in terms of the preservation of essential human dignity.

The protection of essential individual liberty is indispensable for the common good. However, unrestricted freedom may very well erode human dignity and impair that good. No person has a right to liberty which interferes, directly or indirectly, with an activity which is essential to the good of society. Individual freedom is limited by social requirements, which are, in turn, indispensable for the individual's good.

Therefore, during the formative period, individual liberty was not weighed against the common good, as it is in the philosophy of Kant, but in its favor, as in the philosophy of the higher law. Hence, when Patrick Henry exclaimed, "Give me liberty or give me death,"[10] he really meant, "Give me enough liberty for the reasonable protection of my human dignity, or give me death."

Not only did this philosophy of an objective or higher natural law give us a specific concept of liberty during the formative period, but it also resulted in the doctrine of judicial supremacy.[11] According to this doctrine, the Supreme Court of the United States and the courts of last resort in the respective states may void a legislative enactment, even though made by the representatives of the people. The reason was that the Constitution of the United States was regarded as implementing a higher law, which had greater moral authority than even the will of the people. It was manifestly intended by the framers of the Constitution that its meaning should be interpreted in the light of higher laws.

## II

The philosophy of an objective natural law was gradually superseded by theories, as exemplified by the philosophy of Kant, which made individual liberty the basic moral starting point.[12] Hence, the Constitution was no longer considered as the implementation of natural law. The authority,

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[9] *See* 1 R. POUND, JURISPRUDENCE 510 (1959) [hereinafter cited as POUND].

[10] *See* 1 W. HENRY, PATRICK HENRY 266 (1969) (from a speech delivered Mar. 22, 1775, in support of his resolution to create a militia and put the colony of Virginia on a military defense footing).

[11] H. REUSCHLEIN, JURISPRUDENCE—ITS AMERICAN PROPHETS 26-27 (1951) [hereinafter cited as REUSCHLEIN].

[12] *See* Brown, *Natural Law and the Law-Making Function in American Jurisprudence*, 15 NOTRE DAME LAW. 9, 12-17 (1939).

which the courts exercised under the doctrine of judicial supremacy, began to rest on a consensus of the wills of the justices themselves, as moved in each case by their own philosophical predilections. They felt free to use whatever philosophy of law would justify their personal views as to how the case in question should be decided. By the end of the nineteenth century, and during the first third of the twentieth, the courts were exalting individual liberty, with regard to property and contract, at the expense of the common good. It will be recalled how much needed labor, and other social legislation, was declared unconstitutional, on the grounds that individual liberty must be constitutionally protected.[13]

Thereafter, successful resistance to this erroneous balancing process came from the sociological school of jurisprudence, so ably led by Roscoe Pound.[14] Individual liberty in the field of property and contract was finally limited by giving proper weight to the common good of society, or to use the amoral language of the sociological school, the social interest. This began in the mid-1930's. President Roosevelt had unsuccessfully attempted to pack the Supreme Court by appointing additional Justices with a social legal philosophy.[15] The same result was achieved, however, by a voluntary change of legal philosophy within the Court itself.

But after the sociological school of jurisprudence had brought a social consciousness to the thinking of the Supreme Court, and corrected its prior imbalance between individual liberty and the common good with regard to property rights, it then began to repeat the same mistake in the area of personality. This may have been due, in part, to the indirect influence of the sociological school. It had asserted that property interests were entitled to less legal protection than personality interests in reference to the social good.[16] Hence, when the Court began to create a new imbalance on the level of the asserted claims of personality, it parted company with both the sociological school and the school of objective natural law, both of which give considerable weight to the social claim, whether in the field of property or personality.

It is submitted that an erroneous imbalance took place in at least five historical antisocial cases within the past fourteen years, namely, *Engel v. Vitale*[17] and *Abington School District v. Schempp*[18] (the prayer cases); *Furman v. Georgia*[19] (the capital punishment case); and *Roe v. Wade*[20] and

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[13] *See* 1 POUND, *supra* note 9, at 437-50; Beard and Ellington, *Prospects for Individual Freedom: Toward Greater Fairness for All*, 7 GA. L. REV. 410, 422 (1973).

[14] 1 POUND, *supra* note 9, at iii-xiii.

[15] *See generally* Olney, *The President's Proposal to Add Six New Members to the Supreme Court*, 23 A.B.A.J. 237 (1937).

[16] *See* 3 POUND, *supra* note 9, at 327-34.

[17] 370 U.S. 421 (1962).

[18] 374 U.S. 203 (1963).

[19] 408 U.S. 238 (1972).

[20] 410 U.S. 179 (1973).

*Doe v. Bolton*,[21] (the abortion cases). It should be noted that none of these cases was decided by a unanimous Court.

## III

In *Engel v. Vitale*,[22] the first "prayer case," decided by the Supreme Court in 1962, the Regents of the New York public school system had directed all teachers to lead the children each morning before school started in the following affirmation: "Almighty God, we acknowledge our dependence upon Thee and we beg Thy Blessing upon us, our parents, our teachers, and our Country." In *Abington School District v. Schempp*,[23] decided by the Court a year later, the Lord's prayer and Bible reading were required. In both cases, any student who did not wish to join in the affirmation might stay in the classroom and remain silent, or leave the classroom during the period in question.

The Court in both *Engel* and *Abington* declared that any prayer or Bible reading requirement was prohibited by the first amendment establishment clause and was therefore unconstitutional. The insignificant relevance of the establishment clause was admitted by Justice Black, author of the majority opinion in *Engel*, who declared that the affirmation "seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago."[24] Another member of the *Engel* majority, Justice Douglas, wrote that,

> I cannot say that to authorize this prayer is to establish religion in the strictly historic meaning of those words. A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads.[25]

Hence, the real issue in the case related to the balance between the individual liberty of the dissenting children to be free from any possible coercion or embarrassment,[26] and the need of society to have the state strengthen the idea of the duty of obedience to a higher moral law. But to have put the decision wholly on a freedom basis would have limited the result in certain communities where homogeneity of moral view existed.[27] In such communities, much litigation might have been necessary by dissenters.[28]

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[21] 410 U.S. 113 (1973).

[22] 370 U.S. 421 (1962). *See also* Pollack, *Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62 (1963) [hereinafter cited as Pollack].

[23] 374 U.S. 203 (1963).

[24] 370 U.S. at 436.

[25] *Id.* at 442 (footnote omitted).

[26] *See* Kenealy, *The Proposed Prayer and Bible-Reading Amendments: Contrasting Views*, 10 CATH. LAW. 185, 186-87 (1964).

[27] Pollack, *supra* note 21, at 70.

[28] *Id.*

Surely, the demands of human dignity forbid the needless infliction of embarrassment, but here the survival of a great necessary social postulate was at stake. If there was indirect coercion upon the dissenting children, it would only be of secondary effect, and not strong enough to overcome the need of society.

As discussed above, the most basic political, juridical and moral postulate of American society since the founding of the Republic has been the duty of conformity to a higher law. Its inner core of values was unchallengeable, as stated in the Declaration of Independence. The outer aspect, humanly created by the application of those central values, was changeable, because of the changing minor premise of varying social and scientific facts.[29] It should have been realized by the Court that "dependence" in the prayer affirmation meant the willingness to follow the standard of right and wrong, divinely ordained, discoverable by the natural faculty of reason and in conformity with the nature of man.

The area of liberty, therefore, which the Court accorded the dissenters was not necessary to reserve any fundamental aspect of their dignity. No central requirement of such dignity was protected by guaranteeing the freedom of pantheists, agnostics, and atheists not to hear an anthropomorphic affirmation of the source of the higher law. Human dignity is not offended when the higher law postulate is propagated because it is truth. This is so although certain persons may deny it. There are still those who believe that the world is flat. But the liberty to believe this does not prevent the teaching of the contrary.

It was an historical accident that most of the American colonists were Christians or Jews. But since they were, it was inevitable that their concept of the higher or divine natural law should be a monistic one. Acceptance of the rational postulate of a higher law has been strengthened by its inclusion as part of the Christian and Jewish religions, and there given the additional authority of religious revelation. In this context, the higher law was regarded as the enactment of a Divine Power, conceived of as the Person Who had authored the revelation.

It is clear that acceptance of the higher law itself, regardless of its origin or source, was the most fundamental postulate of the civilization which generated the Declaration of Independence, the Constitution and the Bill of Rights. It is true, of course, that not all of the Founding Fathers were monists. Some were pantheists. But all who had any part in writing the first amendment to the Constitution accepted this rational postulate, despite their pluralism in the field of divine revelation.

The concept of a small, hard core of moral values, imposed by the authority of a higher law, transcends all pluralism in any society, whether that pluralism be religious, political, or philosophical. The common good of every society demands the acceptance and implementation of these

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[29] *See generally* Brown, *supra* note 7.

values. Certainly, the common good of society requires that the state be neutral with reference to the supernatural aspects of the various religions. But no state should be neutral with reference to the preservation and promotion of the natural law which is discoverable through the natural faculty of reason. Maximum tolerance must be shown to the supernatural teachings of the great religions, but there should be no tolerance with reference to fundamental natural law. Such tolerance or permissiveness will result in the eventual collapse of any society.

The state must be neutral with reference to the supernatural teachings of religion lest it interfere with the common good of a religiously pluralistic society by creating dissension and divisiveness in matters which are not related to the natural faculty of reason. It is true that the church and the home should foster the concept of a divine natural law, but it is also the duty of the state to make its very important contribution in this field.

The basis of morality may not be found in a mere social contract, or a consensus, because morality could then be changed or disregarded by a totalitarian state, or by a modern democracy with the consent of the majority of the citizens.[30] A strong assurance against governmental abuse can come only from adherence to an unchallengeable scale of values, and not simply to the will of the state. There must be an acknowledgement by the state of the existence of a higher moral standard other than itself.[31]

With the decline of faith in all religions, including Christianity and Judaism, the natural or higher law rational postulate lost an important channel of support. Obviously, the New York Regents were attempting to make up for this loss by having the state propagate this fundamental postulate, so important for the continuation of our democratic way of life. In *Engel* and *Abington*, the United States Supreme Court, however, frustrated this attempt. Was the weight given to the liberty of the dissenting children and their parents justified? Certainly not, according to the philosophy of the objective natural law.

It is gratifying to note that Justice Stewart dissented in the *Engel* and *Abington* cases. In *Engel* he wrote: "[T]he history of the religious traditions of our people [is] reflected in the countless practices of our institutions and officials of our government."[32] He declared that "to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation."[33] By "spiritual heritage," he meant the heritage of the acceptance of the natural law by all, and a Judeo-Christian idea of the source of that law by many.

It is submitted, therefore, that the situation in the prayer cases did not affect the inner hard core of values of human dignity, which the dis-

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[30] Rice, *Let Us Pray—An Amendment to the Constitution*, 10 CATH. LAW. 178, 183 (1964).
[31] *Id.*
[32] 370 U.S. at 446.
[33] 370 U.S. at 445.

senting children had the right to have protected, and hence the social claim should have been legally protected. Rather, the opportunity to make the affirmation was conducive to that dignity because it recognized man's obvious dependence upon the operation of eternal laws, geared to the nature of each part of the universe, including rational life.

In the prayer cases, the Court used the doctrine of judicial supremacy to declare unconstitutional an activity which would strengthen the concept of natural law. It was repudiating the philosophy of those who wrote the Constitution, and the rationale behind the great constitutional decisions of Marshall, Story, and many others in the formative period of the United States.[34] The words of a document like the Constitution take on a meaning only insofar as they are interpreted within the framework of a specific philosophy.

## IV

In *Furman v. Georgia*,[35] the capital punishment case, one of the petitioners, Furman, had been convicted of murder, and the two other petitioners had been convicted of rape. In each instance, the jury, which had been given the discretion to impose the death penalty, exercised that discretion in favor of that penalty. The Supreme Court held, in a 5-4 per curiam opinion, "that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[36]

The holding in *Furman* by the five Justices "did not purport to prohibit, although it did not approve, a statute where the death penalty is mandatory for a particular crime."[37] Regardless of the constitutionality of more narrowly drawn death penalty statutes, it has been observed that the *Furman* Court "has prohibited capital punishment in the overwhelming majority of cases where it has previously been imposed for rape and murder at the discretion of the jury."[38] It may be that "in addition, *Furman* may contain the seeds, in the opinions of Justices Brennan and Marshall, of a complete proscription of the death penalty in the future."[39]

The reasoning behind the decision was that it was cruel and unusual punishment to allow a jury, after it had found an accused guilty of murder or rape, to sentence him to either death or imprisonment. This was on the apparent premise that capital punishment itself, however carried out, was cruel and unusual. The illegality of one of the two choices left to the discretion of a jury constitutionally voided the statute which attempted to

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[34] REUSCHLEIN, *supra* note 11, at 26-27.
[35] 408 U.S. 238 (1972).
[36] *Id.* at 239-40.
[37] Note, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 62, 85 (1972).
[38] *Id.*
[39] *Id.*

confer the discretion. It is submitted that the real reason was to enlarge the individual liberty of the convicted. For almost two hundred years the words "cruel and unusual punishment" in the Constitution had meant only such obviously unreasonable punishments as cutting off a man's hand for theft, or crucifixion for murder or rape. Prior cases had interpreted the eighth amendment as forbidding "torturous or barbaric penalties,"[40] or cruel methods of carrying out a sentence of capital punishment.

The argument that capital punishment is cruel and unusual is clearly specious. According to a natural law approach, a punishment is not cruel and unusual when it is necessary to carry into effect the death penalty as an essential protection of the common good, and when it is not used as an end in itself, such as inflicting pain as a matter of revenge or sadism.[41] There must be a reasonable relation between the gravity of the crime and the penalty imposed. The penalty should fit the crime as well as the criminal. Obviously, death would be an excessive punishment for offenses other than murder, rape, or treason. It should also be understood that capital punishment is justified only when the criminal in question has, beyond a reasonable doubt, committed the crime with full knowledge that his act is evil and antisocial. Likewise, the crime must be a great injustice against the human dignity of the victim, as in murder or rape, or the life of a justly ruling state, as in treason.

What weight is to be given to the values which are to be balanced in the area of capital punishment? On one side of the scale is the freedom of the convict not to forfeit his life. On the other is the right of society to have the common good protected against the gross injustice which such crimes as murder inflict. The formula is that the greater weight should be given to the social claim as long as this does not deprive the individual of a liberty which is absolutely indispensable for the preservation of his human dignity. According to this formula, the scale should be tipped in favor of the social interest.

The claim of society to protect itself by recourse to capital punishment is not unreasonable. While it is not certain that capital punishment protects society by deterrence, the conclusion that it does is not unreasonable. Life imprisonment may not be adequate as a punishment by society because it is common knowledge that sentences of life imprisonment are seldom, if ever, fully served. Whether capital punishment protects society by way of deterrence is a conclusion of fact, which cannot be resolved with certainty. But the conclusion of the members of the forty legislatures in the respective states who enacted the death penalty is surely not less valid in this matter than that of the Justices of the Supreme Court.[42] What superior wisdom do judges have to reach the factual conclusion that capital

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[40] *Id.* at 81.

[41] T. DAVITT, THE ELEMENTS OF LAW, 218-21 (1959) [hereinafter cited as DAVITT].

[42] *See* Furman v. Georgia, 408 U.S. 238, 385 (1972) (Burger, C.J., dissenting).

punishment is not necessary as a deterrent, and as a definitive means of permanently preventing a repetition of the crime?

Recourse to the death penalty by society does not deprive the convict of any essential of his human dignity. The criminal has surrendered his human dignity during the commission of his crime. The commission of a grave crime, such as murder or rape, involves the self-inflicted degradation of the criminal's human dignity, along with that of his innocent victim. How does freedom from the fear of the death penalty enhance the essential human dignity of a murderer or rapist, before, during, or after the commission of his crime? Indeed, it will aid him in his purposes for he will have the certain knowledge that his own life is not in danger.

The criminal is not morally or legally free to degrade human nature—either his own or that of another. He has forfeited his right to be treated in every instance as if he had human dignity if society decides that capital punishment is the only way in which it can protect itself.[43] The common good is adversely affected when the individual inflicts a serious wound upon his own human dignity or that of another because each individual is related sociologically to every other individual within the unity of society. In one sense, each is like a cell in the body social. The tainted human dignity of an unjust aggressor has never been allowed to outweigh the right of personal self-defense to protect life or limb. Nor has the morally impaired human dignity of persons killed while waging an unjust war been held to outweigh the right of a state to wage a just war of self-defense,[44] except by a small percentage of pacifists.[45]

The criterion to be followed, according to natural law doctrine, in determining whether society should have recourse to the protection of capital punishment is objective, not subjective. The criterion is not the will of the people, or the frequency or the infrequency of capital punishment, or the subjective, philosophical preference of a particular justice. A law made by a majority of the people, for example, that all persons, upon reaching the age of one hundred, should be put to death by public authority because this was necessary for the common good would not be binding. The human dignity of these centenarians, never tainted by the commission of great crime, would outweigh any economic advantage of society by their execution. But it would be otherwise in the case of the great criminal, whose human dignity has been impaired by the permanent, irrevocable and irreversible results of his offense, with reference to himself and his victim. This is so despite the religious necessity of forgiveness and possible rehabilitation.

Finally, capital punishment serves such goals as giving the criminal

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[43] DAVITT, *supra* note 41, at 221.

[44] *See* J. KEENAN & B. BROWN, CRIMES AGAINST INTERNATIONAL LAW 66-71 (1950).

[45] Brown, *supra* note 4, at 85, 89-90.

his due and reinforcing public morality.[46] According to natural law philosophy, crime is a great injustice, not only against society, but also against the victim and his family. In addition to protecting society, therefore, capital punishment vindicates the human dignity of the victim. It would be vengeance for a member of the dead victim's family to give the convict his due, but it becomes a matter of social justice when society inflicts the death penalty.

## V

The two abortion cases, *Roe v. Wade*[47] and *Doe v. Bolton*,[48] were decided by the Supreme Court in 1973. In the former, a pregnant unmarried woman sued on behalf of herself and all other women so situated to void the Texas statute which forbade her an abortion. In the second case, a married woman sued to void a Georgia statute which obliged her to conform to certain medical practices before she had a right to an abortion. In each case, the Court declared the anti-abortion statute unconstitutional on the ground that it violated the fourteenth amendment by a denial of liberty and privacy without due process of law. In so doing, the Supreme Court stretched the doctrine of due process to unprecedented lengths and imposed such limits upon permissible abortion legislation "that no abortion law in the United States remained valid."[49] The Court concluded that patient and physician were free to end any pregnancy during the first trimester without regulation by the state. The state may not interfere with the liberty of the woman even to protect her health during this stage of pregnancy.[50] State regulation, if any, is constitutionally permitted only at the point of viability, *i.e.*, "when a fetus can survive with artificial aid outside the mother's body."[51]

Here again, the Court balanced individual liberty, now extended under the notion of privacy, to the detriment of the common good. The Court made the same philosophical mistake it had made in the prayer and capital punishment cases, and much earlier in the freedom of contract and property cases. It started its judicial reasoning from the subultimate value of liberty, which can have no genuine judicial significance except as an instrumental value to protect human dignity as necessary for the common

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[46] Furman v. Georgia, 408 U.S. 238, 444, 445, 452, 453 (1972) (Powell, J., dissenting) (citing the testimony of Lord Justice Denning before the British Royal Commission on Capital Punishment).

[47] 410 U.S. 113 (1973).

[48] 410 U.S. 179 (1973).

[49] Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 2 (1973) [hereinafter cited as Tribe].

[50] Roe v. Wade, 410 U.S. 113, 163 (1973). *See* Tribe, *supra* note 49, at 4.

[51] *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 75, 78 (1973), *citing* Roe v. Wade, 410 U.S. 113, 160 (1973).

good. In fact, the error was compounded by starting with privacy,[52] a subsubultimate value.

In both *Wade* and *Bolton*, the liberty of a woman to destroy the fetus at will was on one scale. On the other, was the common good of society, requiring the protection of human life. Individual liberty was given such weight in the balancing process as to deny the right of society to protect what is now regarded by the best scientific evidence as human life. This life starts with the zygote or first fertilized cell.

The growth of the embryo "has been traced in a continuous line from a single unfertilized ovum through the unbroken processes of fertilization, cell division, segmentation, implantation of the blastocyst in the uterine wall, and gradual fetal development to the point of birth."[53] It is manifest that "the advance of embryology and medicine over the past century and a half rendered untenable any notion that the fetus suddenly 'came to life' in a physiological sense at a definable point during pregnancy."[54]

In any event, "the recent scientific evidence about the humanity of the zygote is enough to raise a reasonable doubt . . ."[55] which must be placed on the scale. If present human life is not on the scale, with absolute certainty, it is at least possibly there, if not probably. The burden of proof is upon those who claim that there is no possible human life during the first twelve weeks of pregnancy.

It is obvious that abortion destroys something which otherwise could have matured into a human being.[56] But only human life can so mature. May any Justice of the United States Supreme Court deny that at one time he was a zygote? Would he have given his mother the constitutional right to abort him during the first twelve weeks of her pregnancy?

How does the liberty to destroy what is now human life, or probably human life, and in the due course of nature, certain human life, contribute in any way to the safeguarding of the human dignity of the pregnant women? The arbitrary killing of the unborn any time from the moment of conception is an unnatural interference with an essential life function, and hence a vitiation of human dignity. Is it not akin to the mutilation of an important organ, or suicide? Liberty must not be allowed just for the sake of liberty.

Is it any wonder that one of the dissenting Justices, Mr. Justice Rehnquist, wrote that "the disaster would have been less complete" had the Court applied at least a traditional rationality standard.[57] Professor Tribe has stated: "What makes *Roe* unusual, as Professor Ely rightly ob-

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[52] Roe v. Wade, 410 U.S. 113, 155 (1973).

[53] Tribe, *supra* note 49, at 19-20.

[54] *Id.* at 19. *See also* GRANFIELD, THE ABORTION DECISION 15-43 (1969).

[55] Brown, *Recent Statutes and the Crime of Abortion*, 16 LOYOLA L. REV. 275, 285 (1970).

[56] *Id.*

[57] Tribe, *supra* note 49, at 5.

serves, is that, for reasons the Court never adequately explains, 'the liberty involved is accorded a . . . stringent protection, so stringent that a desire to preserve the fetus' existence is unable to overcome it.' "[58]

In the abortion cases, the Court extracted the sub-subultimate right of privacy from the subultimate right of liberty, and gave it such unprecedented weight that it may be balanced against the common good, conceivably, so as to legalize homosexual marriages, eliminate all legal restrictions on what was formerly regarded as obscene conduct, and permit the free sale and use of narcotics.[59] Sacrificed on the altar of privacy would be social consciousness.

The alternative is either to repudiate liberty as the ultimate value or accept the rule of physical force by some anti-democratic state form. The social interest will sooner or later assert itself. The fixed pattern of human nature ultimately demands and obtains a rational balance between the aspiration to be free and the necessity of living in society.[60]

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[58] *Id.* at 17.

[59] *See The Supreme Court, 1972 Term*, 87 HARV. L. REV. 75, 83 (1973).

[60] 13 T. AQUINAS, SUMMA THEOLOGICA, Question 90, at 3 *et seq.* (Blackfriars edition, E. Hill transl. 1964). *See* B. BROWN, THE NATURAL LAW READER 69 (1960).