October 2017

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ON THE LEGAL STATUS OF THE UNBORN

STEPHEN J. HEANEY*

INTRODUCTION

The July, 1989 Supreme Court ruling in *Webster v. Reproductive Health Services*,1 concerning a Missouri statute regulating abortions, once again brought that high-voltage issue to the media forefront. Not the least controversial aspect of the statute was the preamble, which claims that human life begins at conception. Ostensibly, this leads to the conclusion that such beings would be considered legal persons with at the least the most basic rights.2

This part of the debate—the “personhood” of the fetus—is often ignored, or at least obfuscated. Consider these exchanges from the PBS forum “Abortion: National Town Meeting,” broadcast the evening of the march for abortion rights in Washington on April 9, 1989; they are typical of exchanges heard thousands of times since the early 1970’s.

Rev. William Schultz (President, Unitarian Church): The key issue here is a religious question. The key issue here is at what point does fetal life turn into full human life entitled to the rights of protection of the Constitution. The legislature of Missouri has said at the point of conception. The legislature of Missouri has taken a religious position. . . . There are many religious positions.

Susan Smith (National Right to Life Committee): It is a human rights issue, and the question is not whether a woman has the right or the decision to bear a child. When she’s pregnant, she’s with child, and the question before us is whether or not she has a right to kill that child.

* * *

Audience member: If it’s not a baby at the moment of conception, what

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* Assistant Professor of Philosophy, College of St. Thomas, St. Paul, Minnesota.
2 The authors phrased the preamble such that it would remain consistent with Supreme Court rulings, while asserting that life begins at conception.
is it?
Schultz: It's a fetus.

[Moderator Fred Graham turns this apparently medical question over to Dr. Louise Tyrer of Planned Parenthood.]

Tyrer: The opinion of the entire medical community of the world is that conception is not synonymous with either the onset of pregnancy or the beginning of life. . . . Human life, when that starts, is an individual moral decision, and it's all over the maps. Some people believe that it starts at the moment of fertilization; they're entitled to that belief. Some people believe that human life or personhood—and the law supports in the English law—that personhood occurs at the time of birth.

Graham: So you're saying that some biological functions may have started; human life, in your judgment, you can't say.
Tyrer: That's correct.

Smith: Some doctors think that babies aren't babies until they're three days old. Should they have the right to snuff out the life of that baby?
Kate Michelman (National Abortion Rights Action League): Of course not. What a stupid question.

Another audience member: I would like to ask Miss Michelman, or any of her colleagues, if they see any substantive difference between abortion and infanticide, and if so, what would that be?

Schultz: We continue to get back to a question of faith. You equate abortions with infanticide. It's clear that infanticide means what it says: the killing of infants. Now infants are clearly born children. There is no comparison between abortion and infanticide. These are two different issues. And the issue of when a fetal life becomes full human life entitled to the full rights and protection of the Constitution is a religious question and a question of faith. And just as we do not impose the views of one Church, on birth control, for example, on all the rest of us, just as we don't insist that we should pray one prayer in our public schools that one religious tradition likes, so we don't try to impose this one religious perspective on the rest of us.

These excerpts from a television forum are just one more chapter in this ongoing debate. Many people—intelligent, professional, earnest people—have been puzzling over the question of whether we should grant the legal status of “personhood” to the unborn. Unfortunately, no one has decided who is supposed to answer the question. The scientific community, the legal community, and the philosophical community have all been asked to deal with the question, and all have wrestled with it. These communities have added a great deal to our understanding of the status of the unborn. Still, when the talking is done, each community looks to the others for the final answer. The lawyers and the lawmakers suggest that we need more scientific evidence, or that it is an unsettled and unsettlesable philosophical issue. The scientists only deal with measurable facts, claiming that theorizing on the metaphysical or legal status of “per-
sonhood" is out of their purview. The philosophers and theologians note that they cannot come to a consensus on the issue, and toss it over to the lawyers and scientists to work out as pragmatically as possible. An essay several years ago in *Time* followed things to their logical conclusion—hence to the height of confusion—by making the surprising suggestion that "the very idea of 'actual human life' or 'personhood' is a political . . . notion." Yet the Supreme Court did come to an answer about these questions, somewhat cagily in *Roe v. Wade*, more explicitly in later decisions. This essay will examine how this decision was arrived at by that portion of the Court in favor of abortion rights, what kind of a decision it was, and how the question ought ultimately to be decided. Part I will analyze the opinions of members once in the majority, now (perhaps) in the minority, to see how they resolved the "personhood" issue. The focus will be on opinions written by Harry A. Blackmun and John Paul Stevens. Part II will show what I believe to be the best (perhaps the only) legitimate way to talk about the issue of legal personhood.

**PART I**

There are two opinions by Justice Blackmun of particular interest here: his opinion for the Court in *Roe*, and his dissent in *Webster*. Justice Stevens offered some memorable words in *Thornburgh v. American College of Obstetricians and Gynecologists*, and in his *Webster* dissent. We will concentrate first on Justice Blackmun's writings.

A(1). Justice Blackmun: *Roe v. Wade*

Of the four we will examine, this opinion is the most careful in attempting to keep separate the questions of legal and philosophical notions of personhood, a distinction discussed at length in Part II of this commentary. In Part VIII of the decision, Blackmun, speaking for the majority, claimed that previous decisions have already established the existence of a right to privacy, even though it is not specifically mentioned in the Constitution. The Court believed this right broad enough to cover

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8 Charles Krauthammer, *In Search of the Silver Bullet*, *Time*, Nov. 4, 1985, at 98 (emphasis added). Justice Scalia echoed this opinion in his concurrence to *Webster*, 109 S. Ct. at 3064-66; it is unclear whether he included the personhood questions in this evaluation.


6 109 S. Ct. at 3067-79 (Blackmun, J., concurring in part and dissenting in part).


8 *Webster*, 109 S. Ct. at 3079-85 (Stevens, J., concurring in part and dissenting in part).


the abortion decision—certainly a very intimate and personal matter—because of the possible harm the woman could undergo if this choice were denied.11 There must be important state interests to legitimize curtailment of such a liberty.12

Blackmun next considered, in Part IX, two vital questions: the legal personhood of the unborn, and the question of when life begins.13 In considering the former question, the Court decided that the word “person,” as it appears in the Constitution and its amendments, was not intended to refer to the unborn,14 and that in other areas of the law which have treated prenatal life, the law has never treated the unborn as “persons in the whole sense.”15

As to Texas’ claim of a compelling interest in protecting the unborn because life begins at conception, Blackmun gave this now famous response: “We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”16

At the same time, Blackmun recognized the importance of determining the legal status of the unborn and of the possibility of doing so through “the well-known facts of fetal development,” stating that “[i]f this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”17

Now, let us examine closely what went on here. A state wished to protect the unborn as “persons.” Admittedly, there is no place in the


Justice Stewart’s list is even more extensive. See id. at 167-69 (Stewart, J., concurring).

11 Roe, 410 U.S. at 153 (enumerated concerns were detrimental impact upon mother’s mental and physical health; inability of family to care for child; problems attached to unwanted children; difficulties associated with unwed motherhood; and disruption of mother’s life and future plans).

12 Id. at 155-54.

13 Id. at 156-62.

14 Id. at 156-59.

15 Id. at 162. The view that the unborn were not considered persons under the fourteenth amendment is contested by Justice Rehnquist in his dissent. See id. at 172-75 (Rehnquist, J., dissenting). See also S. KRASON, ABORTION: POLITICS, MORALITY, AND THE CONSTITUTION 158-73 (1984) (analysis of status of unborn in the law).

16 Roe, 410 U.S. at 159.

17 Id. at 156-57.
Constitution or in the case law to this point which has done so explicitly; on the other hand, nothing in the Constitution's use of the term forbids understanding the term in this way. It has not to this point been explicitly understood in this way, but the state proposed good reasons for doing so. The Court admitted that if the fetus was a person, it was protected under the due process clause of the fourteenth amendment. Next, the Court said that the philosophical question of “human life” or “personhood”—apparently relevant to the issue at hand—was at present undecided, and probably undecidable. Since the unborn had not yet been recognized as persons, but the woman had been recognized a person, the Court came to the conclusion that the woman's asserted liberty rights must always prevail. From this we discover that no state may ever say that a fetus is a person, nor ever adopt a definition of personhood or life.

In this way, the states are effectively shut off from ever finding the truth of the situation, or at least of acting on that truth. No beings are ever again allowed to be called persons, if doing so might curtail an already existing liberty.

If I might be permitted to draw a rough analogy, let us suppose we stumbled onto a uncharted island where there are two races of people, one which practices cannibalism, the other its victims. We confront the cannibals, asking, “How can you in good conscience eat them?” “It's o.k.,” the cannibals respond, “because they are not persons.” We point out that they are indeed persons, that these victims have the same characteristics for being considered persons as we and the cannibals do. We take the matter up before the High Cannibal Judge, who pronounces: I cannot decide whether these are persons as we are, but we have never said so before in our laws. Of course, if we recognized them as persons, we could not eat them; but then we would have to pick fruit and hunt game. So we will not recognize them as persons.

What is going on in both cases—in Roe and in our analogy—is that a matter of law has been decided on the basis of the result desired (do not abridge the liberty of the woman or her doctor) rather than on the possible facts of personhood. Blackmun did not squarely face the question of why certain entities are considered persons under the law, and whether the unborn might match the criteria. It is also ironic that the Court was able to find a “right to privacy” where it publicly acknowledged none was stated, but found it impossible to discover a right to life for the unborn, which it publicly acknowledged might be found in the due process

\[18 \text{ Id.} \]
\[19 \text{ Id.} \]
\[20 \text{ Id. at 159.} \]
\[21 \text{ Id. at 159-62.} \]
\[22 \text{ Id. at 152.} \]
clause, because it interfered with this right to privacy.

One suspects that, although Blackmun said that no decision had been made as to whether an embryo is a living human being, a decision had in fact been made that the embryo was not a person. How could one recognize that, if such a life exists, it should be protected under the law, and yet fail to try to determine whether there is such a life to be protected—and further excoriate a state for having done so—unless a decision has been reached against the embryo? The first tipoff to the Court's rationale came in Justice Stewart's concurring opinion to Roe, where he called the unborn "potential future human life." In other words, it may be human life in the future, but it is not a human life yet.

A(2). Justice Blackmun: Webster v. Reproductive Health Services

Blackmun used the same sort of circular reasoning in his dissent to Webster. In the first footnote, he argued against the constitutionality of the Missouri statute's preamble (section 1.205) because of its effects, i.e., the state's declaration that human life begins at conception unconstitutionally "chills" women's exercise of their right to terminate a pregnancy, and further unconstitutionally burdens the use of abortifacient contraceptive devices. This, of course, begs the question. If the preamble is correct in its findings, does such a constitutional right to an abortion or abortifacient devices exist at all? We have already seen that Blackmun thinks not.

The only way Blackmun could have avoided begging the question here is to have come to the conclusion that the fetus is not a human life, and thus not a legal person. If this were so, however, there would be no need to argue from effects, because the preamble would be unconstitutional on its face; the question of effects would be quite secondary—indeed, irrelevant—to the point at hand.

Still, Blackmun made it clear that it is precisely these effects which are the problem, and that the states cannot rely on the "decisional law" findings (rather than constitutional findings) of the Court in regard to fetal life. We must ask: Is it not important to settle the status of the fetus? Do not the purported constitutional rights to abortion and abortifacients follow from that status?

To clarify the point, Blackmun seemed to admit that, were there to

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* Id. at 156-58.
* Id. at 152-53.
* Id. at 170 (Stewart, J., concurring).
* Id. at 3067-79 (Blackmun, J., concurring in part and dissenting in part).
* Id. at 3068-69 (Blackmun, J., concurring in part and dissenting in part).
* Id. (Blackmun, J., concurring in part and dissenting in part).
be proper evidence showing the embryo as a human life from conception, the Court would logically be forced to recognize such beings as persons under the law. The Missouri preamble claimed, in effect, to have made such findings. Blackmun, however, claimed that any laws based on such findings, or on the Court's own findings, which expand fetal rights, are invalid, not because the findings are invalid, but because the effect is "unconstitutional." The constitutionality of the effect, however, is dependent on those findings. Thus, Blackmun can at most say that the laws are invalid because he finds the effects undesirable.

Blackmun did approach the personhood issue when discussing the majority's attack on the trimester scheme, and Rehnquist's statement that the state's interest in protecting fetal life may be uniform throughout pregnancy. 30 Blackmun noted—correctly, I think—that the plurality did not argue to the alleged problem with the trimester scheme, nor to its view of the state's interest in fetal life. 31 But Blackmun—and Justice Stevens, as we shall now investigate—did recognize the importance of such arguments: Roe v. Wade stands or falls on them. Only Justice Scalia from the plurality seemed to have seen clearly the implications of the issue. 32

Justice Blackmun's response to the plurality view came in the form of a quote from Justice Stevens' written opinion in Thornburgh. 33 It is to this opinion that we now turn.

B(1). Justice Stevens: Thornburgh v. American College of Obstetricians and Gynecologists 34

Some interesting claims were made by Stevens in his concurring opinion in Thornburgh. 35 There are six of particular interest to us here:

(1) It is "obvious" that the state's interest in protecting the embryo in-

30 Id. at 3057.
31 Id. at 3072-76 (Blackmun, J., concurring in part and dissenting in part).
32 Id. at 3064-67 (Scalia, J., concurring in part and dissenting in part). Scalia recognized that had the majority done its job in establishing legitimate arguments for these positions, they would have been forced to act, and probably overturn Roe. Id. (Scalia, J., concurring in part and dissenting in part). "We have not disposed of this case on some statutory or procedural ground, but have decided and could not avoid deciding, whether the Missouri statute meets the requirements of the United States Constitution. The only choice available is whether, in deciding that constitutional question, we should use Roe v. Wade, as the benchmark, or something else." Id. at 3064 (Scalia, J., concurring in part and dissenting in part).
33 Id. at 3073 (Blackmun, J., concurring in part and dissenting in part). "It is this general principle, the 'moral fact that a person belongs to himself and not others nor to society as a whole.' . . ." Id. (Blackmun, J., concurring in part and dissenting in part) (quoting Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J. concurring) (quoting Fried, Correspondence, 6 Phil. & Pub. Aff. 288, 288-89 (1977))).
35 Id. at 777-82 (Stevens, J., concurring).
creases as the embryo’s ability to survive, to experience pain and pleasure, and to react, increases; the government’s interest in protecting cannot be “static,” because pregnancy and fetal development are not static; recognizing the fetus as a person is a “religious view”; there is a “fundamental and well-recognized difference between a fetus and a human being;” “if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures;” since, however, we do treat fetuses differently from human beings under Roe, there is no reason why we cannot make distinctions during the nine months prior to birth.

Stevens used these arguments again in Webster, but a few comments are called for now. To the first claim, that protection increases as the ability to feel and react increases, one must ask whether, alternatively, the protection decreases as these abilities decrease or, as in some (the neurologically damaged or comatose, or the just plain unconscious), they disappear? It would have to, if the ability to feel and react is the criterion for protection, and if the government’s interest is not to be “static.” Stevens’ second claim, however, is also strange. No part of life is static; there is always change and development. Yet, the government “statically” protects all living human beings after birth, despite the changes.

Stevens believed the remaining claims definitively answered this objection. In the third claim, he said that calling the fetus a “human life” or “person” is a “religious view,” and yet in his fourth claim he said, not that we do not know whether the fetus is a human being, but rather that it definitely is not a human being. In other words, Stevens had taken an equally “religious” stand (as had Blackmun, by quoting Stevens). One must further ask: If the fetus is not a human being, what is it? And if the difference is so “well-recognized,” why is there such a battle, and why has the pro-abortion side on the Court been trying to hide behind Justice Blackmun’s assertion that the issue is undecided?

Stevens’ fifth claim is right on the money, and Blackmun said as much in 1973. At least they recognized the issue at stake. The reasoning underpinning his sixth claim, however, is purely circular. Roe said that we

88 Id. at 778 (Stevens, J., concurring).
89 Id. at 778-79 (Stevens, J., concurring).
90 Id. at 779 (Stevens, J., concurring).
91 Id. (Stevens, J., concurring).
92 Id. (Stevens, J., concurring).
93 Id. at 778-79 (Stevens, J., concurring).
94 Id. at 792 (White, J., dissenting). Justice White said as much in his dissent, noting that “there is no nonarbitrary line separating a fetus from a child, or indeed, an adult human being.” Id. (White, J., dissenting).
95 Id. at 779 (Stevens, J., concurring).
96 Id. (Stevens, J., concurring).
may make distinctions between the unborn and the born. The issue at stake here is whether Roe is correct in this assertion. Stevens appealed to Roe for the solution—a perfect circle.

For a longer analysis of these and other arguments, let us now turn to Stevens' Webster opinion. This opinion is so riddled with errors that it requires a careful look.

B(2). Justice Stevens: Webster v. Reproductive Health Services

Justice Stevens concentrated most of his efforts in his dissenting opinion on an attack of the constitutionality of the preamble to the Missouri statute. Stevens recognized that if human life did begin at fertilization, the preamble would rule out the use of many common forms of contraception which work as abortifacients. He concluded: “To the extent that the Missouri statute interferes with contraceptive choices, I have no doubt that it is unconstitutional under the Court’s holdings in Griswold v. Connecticut, Eisenstadt v. Baird, and Carey v. Population Services International.”

Did these cases give a woman a right to an abortion or abortifacients, we might ask? Insofar as they merely said that contraception is legal, they did not rule out proscription of abortifacients. You can practice as long as it does not harm another. This is true of any liberty.

Stevens’ response to this objection was that there might be a theological argument to support this thesis—one that shows, perhaps, that ensoulment takes place at fertilization—but that “a secular basis for valid legislation” is required. However, said Stevens, “I am not aware of any secular basis for differentiating between contraceptive procedures...” Thus, the preamble violated the establishment clause of the first amendment, not because it coincides with religious tenets, nor because legislators may have been religiously motivated, but because it is “an unequivocal endorsement of a religious tenet” that “serves no identifiable secular purpose.”

To illustrate his point, Stevens launched into an explanation of the teaching of St. Thomas Aquinas and Catholicism on ensoulment and

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47 Id. at 3079-82 (Stevens, J., concurring in part and dissenting in part).
48 Id. at 3080-81 (Stevens, J., concurring in part and dissenting in part).
49 Id. at 3081 (Stevens, J., concurring in part and dissenting in part) (citations omitted).
50 Id. at 3082 (Stevens, J., concurring in part and dissenting in part).
51 Id. (Stevens, J., concurring in part and dissenting in part).
52 Id. (Stevens, J., concurring in part and dissenting in part).
abortion, and tried to make a comparison to the present circumstances.\textsuperscript{53} Stevens' misunderstanding of both Aquinas and Catholic teaching was so profound as to be painful. He took his information from two sources: a report entitled \textit{Catholic Teaching on Abortion} prepared by the Congressional Research Service of the Library of Congress, and the \textit{amicus curiae} brief by Americans United for the Separation of Church and State.\textsuperscript{54}

Stevens referred to the fact that St. Thomas Aquinas believed that the infusion of the rational soul into the embryo did not occur until some forty to eighty days after fertilization, and that this view was "widely accepted by the leaders of the Roman Catholic Church for many years."\textsuperscript{55} He then asserted that "abortion of the 'unformed' or 'inanimate' fetus (from \textit{anima}, soul) was something less than true homicide. ..."\textsuperscript{56} This was because "[w]hat is destroyed in abortion of the unformed fetus is seed, not man."\textsuperscript{57} Consequently, the Church did not treat abortion before animation as homicide.\textsuperscript{58}

Stevens took this situation to be similar to that facing the Supreme Court: if a state legislature were to enact such views today—even if they were widely held—the Court would invalidate "such an endorsement of a particular religious tenet." The preamble to the Missouri statute is just such a "theological doctrine."\textsuperscript{59}

This conclusion demonstrated an understanding neither of Aquinas nor of the relationship of his beliefs to Church teaching. For Aquinas there was no such thing as an "inanimate" fetus. By definition, any living thing is considered to have a soul, as the soul equates with the principle of life. Aquinas considered that as living things developed, the soul appropriate to its level of development was present. For humans, this meant that a human being first had a soul on the level of a plant, then on the level of an animal, and finally a rational soul. He believed this last event, the infusion of the rational soul, took place between forty and eighty days after fertilization, because at that point he knew the fetal body to be developed enough to support rational activities. Thus the embryo, while not fully a person, is nonetheless human, and never merely "seed."\textsuperscript{60}

\textsuperscript{53} Id. at 3083-84 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{54} Id. at 3083 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{55} Id. (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{56} Id. (Stevens, J., concurring in part and dissenting in part) (quoting Report on Catholic Teaching on Abortion, in CONG. RESEARCH SERV.).
\textsuperscript{57} Id. (Stevens, J., concurring in part and dissenting in part) (quoting C. WHITTIER, CATHOLIC TEACHING ON ABORTION: IT'S ORIGIN AND LATER DEVELOPMENT 18 (1981), \textit{reprinted in} Brief for Americans United for Separation of Church and State, at 13a, 17a, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (No. 88-605).
\textsuperscript{58} Id. (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{59} Id. (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{60} \textit{See} \textit{SUMMA THEOLOGIAE} I, 76, 3 corpus and ad 3; 4. corpus and ad 1; 118, 2, ad 2; \textit{SUMMA
Aquinas based this belief on the best scientific evidence available in his day, which evidence had not changed since the time of Aristotle. In fact, it is to Aristotle that we owe this theory, not Aquinas. Aquinas took his evidence almost word for word from Aristotle—and acknowledged as much. The theory of the succession of souls is also Aristotle's, a person who, having been born almost 400 years before the birth of Christ, could hardly be said to be promoting Christian doctrine.

Aristotle's explanation could best be described as a scientific one: given the evidence at hand, it could best be explained in this way. Similarly, the Copernican theory of the planets, or the Darwinian theory of natural selection, or Einstein's relativity theory have been scientific explanations of known facts. Since the evidence had not changed between 360 B.C. and 1260 A.D., Aquinas accepted Aristotle's explanation as sound. The Church's acceptance of this theory followed from the fact that it was the best science of the day. It is not based on revelation, as theological doctrines are. As such, the theory of the late infusion of the rational soul is no more a religious tenet than the once widely held belief that the earth was the center of the solar system. It is rather a scientific explanation which happens to have a religious significance insofar as it happens to support certain beliefs of Christianity—a relationship which Stevens had explicitly accepted as legitimate in forming valid legislation.

We must grant, however, that despite the basically scientific character of Aristotle's and Aquinas' claims, they can also properly be called philosophical speculation, since they venture beyond the actual facts at hand to an explanation of how these facts could be. Of course, this is the nature of all scientific theorizing; we may have more facts at hand in the twentieth century, but an overall explanation of these facts calls for philosophical speculation. Let us grant, then, that theories about personhood or full humanity of the fetus are philosophical, and thus (perhaps) not properly incorporated into law. A secular basis for valid legislation is required. Examination of the facts at hand regarding the fertilized ovum/embryo/fetus is possible, and will yield that secular basis, and a solution to the question of the proper legal status of the unborn. We will take this in Part II.

In the meantime, let us see how Justice Stevens dealt with the alleged "theological" problem. He said that to incorporate a theological
(philosophical) position into law, a valid secular interest must be met. One might well argue that the state interest in seeing to it that all human beings are protected from unjust death is served by the adoption of such a philosophical position. A response to this might be to say that this puts the cart before the horse: having decided to put a particular course of action into effect, a theory is adopted by law to make that possible. Such a rebuttal is clearly legitimate.

I believe this response to be correct. Despite the laudable interest in protecting all possible human life, adopting a theory merely because it supports the goal is improper, especially insofar as it reduces the bases of fundamental rights to the desires of the lawmakers. What, however, did Stevens do to support his claim of a woman’s fundamental right to procure abortion before viability, unimpeded by any state regulation?

As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. . . . [A] State has no greater secular interest in protecting the potential life of an embryo that is still “seed” than in protecting the potential life of a sperm or an unfertilized ovum.

Relating this to the contraceptive issue, Stevens said that “the Constitution allows the use of contraceptive procedures to prevent potential life from developing into full personhood.”

What is going on here? Bluntly, Stevens did precisely that which he purportedly argued against—he adopted a philosophical theory in order to justify his position. In footnote twelve of his dissent in Webster, Stevens noted that the justification for abortion rights is the lack of consensus among experts about life’s onset. Yet Stevens stated categorically, here and in Thornburgh, not that we do not know when human life begins, or when a fetus becomes a human being; rather, he said the embryo most definitely is not a human life or person, but only “potential life,” equivalent to “seed” (which, by definition, is “not man”).

Indeed, this is the only way the Court could possibly uphold such a “liberty interest” as sweeping as abortion rights. If, as the Court seemed to think, legal personhood follows only from philosophical personhood, and if there were truly no holding on whether an embryo is (philosophically) a human life, the Court would be forced to hold the “liberty” of abortion in abeyance, not knowing whether abortion would kill a person,

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Webster, 109 S. Ct. at 3083-84 (Stevens, J., concurring in part and dissenting in part).
Id. at 3084 (Stevens, J., concurring in part and dissenting in part).
Id. (Stevens, J., concurring in part and dissenting in part).
Id. at 3083 n.12 (Stevens, J., concurring in part and dissenting in part).
Id. (Stevens, J., concurring in part and dissenting in part) (quoting Report on Catholic Teaching on Abortion, in Cong. Research Serv.).
and realizing that no liberty can be exercised which is at the expense of another's life (except, perhaps, self-defense). Indeed, it would be imperative for the attainment of such liberty that the embryo be found not a "person." This is precisely what the Court did implicitly in Roe, and Stevens stated explicitly here. Having decided to grant abortion rights, a theory of life—that the embryo is not a human life or person, while "born" people are—has been adopted to back up that right. The move by Justice Stevens is as illegitimate as the move he accused the statute's authors of making.

Stevens has a peculiar notion of why it is that human beings should be granted a right not to be killed. We saw it in Thornburgh, and he repeated it in Webster: "There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid." Two claims are entailed in this statement: (1) in order to be considered human life or a person (in the philosophical sense), one must be capable of experiencing physical pain or mental anguish; and (2) these are the only two things from which the state protects us.

Both of these claims are nonsense. To the first, one must ask Stevens his opinion of the legal status of the comatose, perhaps the severely retarded (who may lack mental anguish), or the cerebrally or spinally damaged (who may feel no pain from certain actions). For that matter, a sleeping or unconscious person would fit the description. Some poisonous gas or a lethal injection would cause neither pain nor anguish to these people. Are they thus not persons or human beings because of this fact? Of course they are; in fact, we protect such as these precisely because these handicaps (temporary or permanent) make them especially vulnerable.

The second claim is equally spurious. If someone is killed in such a manner whereby he or she experienced neither pain nor anguish, can we reasonably say that person has not been harmed? Why do we protect as legal persons corporations and institutions which are (by definition, not by accident) incapable of pain or anguish? It is because there are more ways to suffer harm than to experience pain and anguish. The most fundamental harm for living beings is to lose that without which there can be neither pain, nor anguish, nor liberty—to lose one's life. The state is harmed as well when those under its protection (or, in the present case, those who should be under its protection) suffer harm. To allow such harming to go unchecked places everyone, and the state itself, at risk.

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67 Thornburgh, 476 U.S. at 778 (Stevens, J., concurring).
68 Webster, 109 S. Ct. at 3084 (Stevens, J., concurring in part and dissenting in part).
It seems fairly clear that, in order to have abortion count as a liberty interest under the right to privacy located in the due process clause of the fourteenth amendment, it is necessary to make a decision about the personhood of the fetus. The decisions cited seem to indicate the belief that the philosophical or theological notion of personhood is important to the resolution of the legal question. Through a series of circular arguments and outright contradictions, these opinions claim to have left the philosophical/theological question unanswered while in fact answering it in the negative, thus opening the field for nearly unrestricted abortion rights.

Justice White had some very telling remarks about the pro-abortion rights rationale. In his dissent in *Thornburgh*, he said the following:

> As the Court appropriately recognized in *Roe v. Wade*, “[t]he pregnant woman cannot be isolated in her privacy,” 410 U.S., at 159; the termination of a pregnancy typically involves the destruction of another entity: the fetus. However one answers the metaphysical or theological question whether the fetus is a “human being” or the legal question whether it is a “person” as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. Given that the continued existence and development—that is to say, the life—of such an entity are so directly at stake in the woman’s decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy. Accordingly, the decisions cited by the Court both in *Roe* and its opinion today as precedent for the fundamental nature of the liberty to choose abortion do not, even if all are accepted as valid, dictate the Court’s classification.

> If the woman’s liberty to choose an abortion is fundamental, then it is not because our precedents (aside from *Roe* itself) command or justify that result; it can only be because protection for this unique choice is itself “implicit in the concept of ordered liberty” or, perhaps, “deeply rooted in this Nation’s history and tradition.” It seems clear to me that it is neither.

** PART II **

What the introduction and Part I of this essay indicates, I think, is the depth of the confusion concerning how to go about answering the “personhood” question from a legal standpoint. No one seems to be able to sort out which community—scientific, philosophical/theological, or legal—should be relied on, nor how they should be related, nor even the

** *Thornburgh*, 476 U.S. at 792-93 (White, J., dissenting) (footnote omitted).**
LEGAL STATUS OF THE UNBORN

meaning of the terms involved.

There are two main difficulties to be addressed. There is confusion concerning the expectations placed on each of the communities to come up with the answer. Also, there is even greater confusion about the term “human life” and the term “personhood,” and their various meanings. Since the former confusion relies so heavily on the latter, let us try to clarify the latter first.

One of the maddening things about how this issue is argued is the way the pro-abortion rights side abuses the normal usage of the terms and smudges the boundaries between scientific, philosophical, and legal senses of the word. More maddening still, however, is the normal response of the anti-abortion side, a flat contradiction without explanation. For the light that is generated, a typical exchange might just as well go as follows:

“It’s a philosophical/religious issue.”
“No, it’s a scientific fact.”
“No, it’s not.”
“Yes, it is. . . .”

and so on. We never get to the root of the matter: what are scientific terms and questions, what are legal ones, and how did philosophy and theology get into the argument at all?

There are two basic terms that get bandied about in this debate—by both sides—as though they are interchangeable. The first is “person” (or “personhood,” depending on context). The second is “human life.” (Dr. Tyrer’s speech above is a particularly remarkable example of such blithe movement from scientific, to philosophical, to legal terms and usage.) We must clearly distinguish these terms.

The term “person” can be used legally or philosophically. Legally, it is a question of who can make a legitimate claim to be a recipient of constitutional rights. Those who can make such a claim are called persons. The philosophical concept of “personhood” is very different. It deals with a different set of issues, such as whether personhood is something that happens once and for all to the individual, or is grown into; how great a degree of rationality is necessary to be considered a person; or whether other beings (animals with higher intelligence, rational extraterrestrials, God) could be considered persons.

The term “human life,” on the other hand, is clearly not a legal one. It is a question of who can make a legitimate claim to be a recipient of constitutional rights. Those who can make such a claim are called persons. The philosophical concept of “personhood” is very different. It deals with a different set of issues, such as whether personhood is something that happens once and for all to the individual, or is grown into; how great a degree of rationality is necessary to be considered a person; or whether other beings (animals with higher intelligence, rational extraterrestrials, God) could be considered persons.

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words to ask the philosophical question, “At what stage do we reach a certain fullness of humanity (personhood)?” Ask Andrew Puzder, co-author of the Missouri statute, who pointed out on the April 23, 1989 edition of “This Week with David Brinkley,” that with such a question, pro-legalization writers “try and go a step beyond and ask quality-of-life-type questions.” This is very different from the empirically-based question, “When does human life begin?” It is precisely the kind of muddling of the issue necessarily perpetrated by those in favor of decriminalizing abortion, and enriched by the Supreme Court in 1973. Justice White’s Thornburgh dissent tries to point to this fact.

The scientific question is about brute fact, empirically discernable. The brute facts, the scientific data, can be supplied by the medical community. They can tell us the processes by which the sperm and ovum unite and begin development from zygote to newborn. They can tell us about the relationship of dependence between this entity and its environment (be it uterus or petri dish). This is all science can legitimately tell us, and all we ask of the medical community in this regard.

The legal community must look into what sorts of entities have been recognized by the status of “person,” and on what grounds. The only question that they need to answer in this regard, then, is: Does this developing entity meet the criteria for protection under the law? If so, this entity is a legal person. This is the entirety of the legal role in the debate.

The philosophical community, by contrast, has no place in the debate at all. While the philosophical search is interesting in its own right, and of practical concern to people as moral agents, it only muddies the waters in this argument. Why?

Let us consider the gist of the furor in Washington, and in legislatures across the nation. The one side says, “Look, these little entities are no different from you and me. They have just as much right to the protection of their lives from the use of deadly force as we do.” The other side retorts, “No, the situations are entirely different. If you can even establish that this entity is a human life, that does not mean it has rights as a person.” What question is being asked here? The legal question being asked is: What are the reasonable criteria for providing basic legal protection, and does this unborn entity match the criteria?

The basic criteria for providing legal protection that we have come to recognize as legitimate are that the entity be (a) an individual, (b) living, and (c) human. This formulation should surprise no one. These are the same criteria that made us see that slaves were not just pieces of furniture. They are the criteria by which women ceased being viewed as simple extensions of their fathers and husbands. They are the basis of our cries of anguish at the slaughter of European Jews, repression in South Africa, disappearance and death squads in South America. They are the basis of the legislation protecting children from being considered the property of
their parents. On these grounds, even foreigners are afforded protection and due process.

These criteria are the only ones that can be used if a legal system is going to claim to protect anyone. If we allow ourselves to get off on tangents, to even discuss a "deeper metaphysical meaning" of personhood, then no one is safe. Philosophy, by its very nature, cannot supply final answers to any question. It can supply insights, yes, some of which become part of how we live (the basic political and legal philosophy on which our Constitution is based, for instance). Its contributions, however, are inherently subject to revision and growth, or even a complete change of outlook. As long as the legal concept of personhood is subject to change due to philosophical perspective, no one's rights are certain. The question becomes, as we say, political. Whatever group is in power can legislate any other group out of its rights simply by definition—by declaring that the group has failed to meet certain dubious criteria for personhood. It can happen; it has happened. Ask blacks. Ask Jews. Ask women.

The criteria, then, are that an entity be an individual, living, human being. What kinds of creatures fit this standard? We should be willing to recognize that any being of human parentage, from the time of fertilization, matches the criteria. Here is where the medical community can add something to the debate. Let us look at some medical facts.

Is the conceptus "human"? Undoubtedly. As the result of fertilization of a human ovum by a human sperm, with human genetic patterns, it cannot be anything else. It will not develop into a rock, or a rosebush, or a rabbit. It will develop into a full-grown human being. Ah, one might ask, but is it then fully human, truly human? This question is irrelevant. It is a philosophical red herring that has been allowed to slip into this debate. When does anyone become fully human? Is a three-year-old fully human? How about a retarded adult, or a comatose patient? Am I as fully human as my grandfather? These are philosophical questions, not legal ones, not medical ones, and as such they must be left out of the legal debate.

Is the conceptus "living"? Certainly. Again, it is the result of fertilization of a human ovum by a human sperm, with human genetic patterns, it draws nourishment from its environment. It grows. What other criteria could there be? Perhaps a human being needs to be capable of breathing on his or her own to be alive. Of course, this would rule out as "living" many human beings on life support systems. What about brain activity? This is a good indication of when a human being has ceased living, has ceased being its own center of activity and maintenance, but it is hardly a definitive test for life. Any bacterium is considered alive, but it would hardly register brain activity.

Is the conceptus an "individual"? Clearly. It is a separate living entity from the mother, an independent existent. By "independent" I don't mean that it is dependent on no person or thing around it for support. A
child is fully dependent on those around it to give it what it needs to sustain itself, as is a fully paralyzed adult. Every human being, as well, is radically dependent on a suitable environment to survive. None of us can survive, without artificial means, in a methane atmosphere, or in the middle of the Atlantic Ocean. What I mean here is that the conceptus is fully separable from its mother, has a separate identity from its mother. This is most clearly illustrated in the case of so-called test-tube babies. Doctors can identify the little bundle of cells in the petri dish, and then place it in the mother's uterus, where it attaches itself to the uterine wall. It is not part of the mother; though like any child, it is entirely dependent on her to live.

Unless we begin to use terms such as "human," "living," and "individual" in entirely new ways, it is clear that we are all individual living human beings from conception. Thus, the scientific community has done its job—it has identified the embryo/fetus as human life—and can bow out of the debate. The philosophical/theological community, which became illegitimately drawn into this human life/personhood debate, should recognize its inability to add anything helpful—since metaphysical and moral topics are not the issues—and withdraw gracefully as well.

This leaves only the legal community to do its job. If protection under the law is to have any meaning—if any of us are to be guaranteed our right—then protection must be granted on the sole basis of being an individual, living, human being. As such, the unborn, from conception, are persons in the legal sense, and it is time for legislators, litigants, lawyers and judges to acknowledge the fact.

This is the thrust of the argument of Nellie Gray, a member of the March for Life, in the following exchange with Kate Michelman.

Gray: You're losing [the] fact of what's happening. You're killing a preborn child. Of course this is the state's business. This is homicide.

Michelman: In your view it's a preborn child . . .

Gray: It is culpable ignorance if you don't know that a preborn child is in existence at fertilization.

Michelman: Nellie, you have a right to your position, but you don't have a right to impose it on everyone else.

Gray: It's not a belief, it's a fact.

Now, we acknowledge that Ms. Michelman is correct insofar as we ought not legally impose any philosophical definitions. It was the movement for the legalization of abortion, however, that brought up the issue. Ironically, it is this movement that is imposing a philosophical opinion. By raising the specter of "imposition of religious doctrine," the pro-abortion rights forces have gotten the Court to declare as the law of the land the view that the unborn are not persons, and thus may be treated as disposable property. The anti-abortion argument, on the other hand, has
never rested on philosophical definitions or theological opinions. It rests on an empirically verifiable state of affairs.

Thus, Nellie Gray is essentially correct. Because it is a fact, the government is no more "imposing a belief" on anyone than they are by acknowledging that the earth is round. Some people disagree (e.g., the Flat Earth Society), but the government is not thereby under obligation to abandon air traffic regulations, or to refuse to support the space program.

It is not enough, to simply repeat that it is a fact, as though that settles the argument. By doing so, pro-abortion rights forces are allowed to continue to cloud the issue. It must be shown that this is not a philosophical or religious "belief;" it must be shown how a claim to legal personhood is based, and must be based, solely on the stated medical facts; it must finally be shown how the philosophical notion of personhood has no place in the argument, and should never have influenced the Supreme Court's decision in the first place. It is now up to that Court—or, if it should fail, the legislators of the nation—to ignore the philosophical issues, and return the claim to personhood to its rightful heirs: individual, living, members of the species homo sapiens. Furthermore, it is up to all of us to refuse to allow this continued confusion between the terms "human life" and "personhood" and their various uses.

While the recognition of this simple fact may shed light on previously darkened places, it does not solve all difficulties. In the abortion debate, for example, there is still the question of balancing the rights of one individual existing human being—the unborn child—against those of another—the mother. The question now becomes another legal one: What are the reasonable criteria for the use of deadly force by one individual human being against another? Again, if legal protection is to mean anything, these criteria must be as stringent in the case of abortion as in any other life situation.

If there is one lesson that George Orwell's 1984 should have taught us, it is that our greatest fear should not be death by nuclear incineration, but rather extinction by definition. It is a lesson we ignore only at great peril.