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# Parental Preferences and Selective Abortion: A Commentary on Roe v. Wade, Doe v. Bolton, and the Shape of Things to Come

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# PARENTAL PREFERENCES AND SELECTIVE ABORTION: A COMMENTARY ON ROE v. WADE, DOE v. BOLTON, AND THE SHAPE OF THINGS TO COME

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After balancing the interests involved, the Supreme Court in *Roe v. Wade*[1] held that the state's interests in protecting the fetus and the health of the mother are outweighed, at least initially, by the mother's interest in obtaining an abortion.[2] Both state interests, however, grow in substantiality as the pregnancy advances, and at different points, corresponding roughly with the end of the first and the second trimesters, become compelling.[3] As these points are reached, states may

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1. 410 U.S. 113 (1973).

2. *Id.* at 150-64. At times the Court speaks of the right to an abortion without mentioning the woman's role in the process, stating, for example, that the decision "must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. At other times the opinion speaks of the decision to abort as one that must be made by the woman and her physician. *E.g., id.* at 163. Inclusion of the physician in the decision-making process seems inconsistent with the rationale of the decision, namely, the woman's right to privacy, and has been criticized as "medical elitism." Comment, *Abortion: The Five-Year Revolution and Its Impact*, 3 ECOLOGY L.Q. 311, 329-30 (1973) [hereinafter cited as *Abortion: The Five-Year Revolution*].

3. 410 U.S. at 163.

begin to regulate with increasing stringency the conditions under which abortions may be performed, and after the sixth month may prohibit abortions entirely except when they are necessary to protect the health or life of the mother.[4]

In upholding the mother's right to an abortion, the Court recognized a number of potential psychological and physical "detriments" confronting pregnant women who are denied the choice of abortion.[5] But one question not addressed by the Court in *Roe* or its companion case, *Doe v. Bolton*,[6] is whether there are other maternal interests or detriments; nor did the Court consider whether, if there are additional interests, they would prove sufficiently compelling to override countervailing state interests. In particular, the Court did not consider whether a decision to abort based on advance knowledge of certain characteristics of the fetus would also be protected by the mother's right to privacy. The opinions were simply silent on this issue, and the novelty of the questions raised by selective abortion, as well as the obvious implications of this practice for genetic engineering,[7] make a legal and constitutional inquiry timely and important. In addition to providing an advance view of some of the dilemmas that more sophisticated methods of human genetic engineering will pose ten or twenty years hence,[8] analysis of selective abortion can provide new insight into the dynamics of the recent abortion decisions and their implications for the debate concerning the beginnings of human life.

## I

Selective abortion can be employed in a number of ways to assure the birth of children with certain predesignated characteristics. The following illustrations suggest only some of the many possibilities that ingenious parents could devise. Each technique has its own advantages in terms of time,[9] cost,[10] and safety,[11] as well as its disadvan-

4. *Id.* at 163-64.

5. *Id.* at 153.

6. 410 U.S. 179 (1973).

7. Genetic engineering is the application of genetic principles to modify certain traits of future generations. *See generally* Davies, *Prospects for Genetic Intervention in Man*, 170 SCIENCE 1279 (1972); Nagle, *Genetic Engineering*, BULL. ATOMIC SCI., Dec. 1971, at 43.

8. *See* text accompanying notes 38-42 *infra*. *See also* notes 45-49 *infra* and accompanying text.

9. If immediate results are desired, it will be advantageous to be able to select at one time from among the largest possible amount of genetic material. Thus, selec-

tages. Each appears to be within the capacity of presently existing medical technology.[12]

## A. *Multiple Fetuses*

### 1. *Arbitrary Abortion of a Selected Number*

A married couple, Mr. and Mrs. Particular, had been childless for the five years of their marriage. Desperate to conceive a child, the couple consulted a local medical specialist in human fertility who, after performing a few initial tests, informed the couple that their chances of having a child were almost nonexistent.[13] The woman, it appeared, ovulated only infrequently and irregularly.[14] When less drastic measures failed to produce results, the physician proposed that Mrs. Particular receive the "fertility drug," clomiphene citrate.[15] She readily agreed. A few months later, Mrs. Particular was elated to discover that she was pregnant. Her joy turned to shock, however, when during a routine examination the doctor, listening through his stethoscope,

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tive abortion among multiple fetuses would be indicated. *See* notes 13-29 *infra* and accompanying text.

10. Since partial abortion amounts to major abdominal surgery, the costs would be fairly high. Simple abortion of single fetuses, in contrast, ranges in cost from about $150 to $700, depending on the stage of pregnancy and the occurrence of complications. Almost all abortions are performed within the first thirteen weeks of pregnancy and require only a five-hour visit to a clinic. *Abortion: The Five-Year Revolution* 339. Thus, for the woman willing to wait a few months, serial abortion, *see* notes 30-33 *infra* and accompanying text, would normally be the indicated procedure.

11. No statistics exist on the safety of partial abortion. Any operation that involves opening the abdominal cavity, however, is accompanied by significant risk. On this ground alone a physician's refusal to perform the operation might be justified under the rationale of *Roe*. *See* 410 U.S. at 163-64; Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 30 (1973). Some indication of the risk involved can be gained from the complication rate for abortions performed after the thirteenth week, which is on the order of 22%. *Abortion: The Five-Year Revolution* 339.

12. *See* notes 19, 34-40 *infra* and accompanying text.

13. Approximately 10% of all couples experience some degree of difficulty in conceiving because of organic disorder. G. PINCUS, THE CONTROL OF FERTILITY 24 (1965).

14. Ovulatory disturbances are among the most common causes of female sterility. *Id.* at 197; *see* notes 15 & 17 *infra* and sources cited therein.

15. Clomiphene citrate, a nonsteroid synthetic organic compound, is commonly used to treat female infertility due to ovulatory problems. Murthy, Parekh & Arronet, *Experience with Clomiphene and Disclomiphene*, 16 INT'L J. FERTILITY 66 (1971). *See also* Johnson, *Outcome of Pregnancies Following Clomiphene Citrate Therapy*, in PROCEEDINGS OF THE FIFTH WORLD CONGRESS ON FERTILITY AND STERILITY 101 (1967).

announced that at least three, and possibly as many as five, distinct heartbeats could be heard;[16] Mrs. Particular was due for a multiple birth.[17] This result was not what Mrs. Particular had bargained for, however, and she lost no time informing the physician that she regarded the prospect of raising five children as intolerable. Having to care for five children, she declared, would doom her to a life of domestic drudgery, possibly endangering her health, and would stretch the family's finances to the breaking point. Mrs. Particular placed the blame for her plight squarely on the shoulders of the physician who, she felt, had not fully explained to her the possibility of multiple birth as a side effect of the drug. Unless he "did something," she warned, she would consult her attorney about a malpractice lawsuit.[18]

The doctor suggested an abortion; Mrs. Particular replied she had already waited too long for a baby. Out of this impasse, the idea of a partial abortion was born. The physician, who was also an obstetric surgeon, would open Mrs. Particular's abdomen and remove all the fetuses save one, which would be permitted to develop normally and come to term. Relieved, the parties separated, the physician to research the feasibility of the contemplated operation, Mrs. Particular to consult with her attorney about the legality of the procedure under *Roe* and *Doe*.

At their next meeting, the physician reported that his research indicated that a partial abortion, while risky, appeared feasible.[19] For her

16. The fetus' heart begins to beat early in the second month of pregnancy, B. PATTEN, HUMAN EMBRYOLOGY 138 (2d ed. 1953), and can first be heard by the physician sometime between the twelfth and eighteenth week. J. WILLIAMS, OBSTETRICS 225 (1930).

17. Multiple pregnancy is a fairly frequent side effect of the various fertility-inducing drugs. *E.g.*, Johnson, *supra* note 15; Marshall & Wider, *Results of HMG Therapy for Anovulatory Infertility Using a Nonvariable Treatment Schedule: Comparison with Previous Reports*, 22 FERTILITY & STERILITY 19, 23 (1971).

18. Failure to warn a patient about the possible side effects of a drug or therapeutic procedure can constitute a cause of action for medical malpractice. Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972); Berkey v. Anderson, 1 Cal. App. 3d 790, 82 Cal. Rptr. 67 (1969); Salgo v. Leland Stanford Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957); Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628 (1970). Where the course of treatment is purely elective—that is, not essential to health—the duty to disclose possible side effects would presumably be even higher than usual.

19. Although there are no reported cases, such an operation appears to be within the capacity of the newly developed medical specialty known as fetology. In a leading article, three of the foremost physicians in this specialty describe some of the surgical

part, Mrs. Particular reported that her attorney, after reviewing the abortion decisions, had advised her that her contemplated operation was legal. Until the end of the second trimester, he had said, a woman has virtually an unqualified right to an abortion. And, although in other contexts the law has been reluctant to permit arbitrary selection of persons for unfavorable treatment,[20] fetuses are not "persons" within the meaning of the Constitution.[21] Mrs. Particular and her doctor then agreed to proceed with the operation, which was a complete success. At present, the Particulars are the proud parents of a charming baby girl who, it is said, bears a striking resemblance to her mother.

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procedures that have been successfully performed on human fetuses, concluding that "a fetus can be taken completely out of the uterus for a period of 30 minutes, be operated upon, and be replaced without changes in fetal heart tone or EKG." Asensio, Figueroa-Longo & Pelegrina, *Intrauterine Exchange Transfusions: A New Technic*, 32 OBSTETRICS & GYNECOLOGY 350, 355 (1968). In another article, the same authors describe an operation in which the amniotic sac was opened, a corrective procedure performed, and the sac closed with sutures. Asensio, Figueroa-Longo & Pelegrina, *Intrauterine Exchange Transfusions*, 95 J. OBSTETRICS & GYNECOLOGY 1129 (1966); *cf.* Asensio, *Surgical Treatment of Erythroblastosis Fetalis*, in DIAGNOSIS AND TREATMENT OF FETAL DISORDERS 264 (K. Adamson ed. 1968). In summarizing their results, the three authors state: "The absence of premature labor, the minimal trauma sustained by the fetus, and the relatively long-term correction [of the condition] have led us to believe that the procedure might be the safest [available]." Asensio, Figueroa-Longo & Pelegrina, *Intrauterine Exchange Transfusions, supra* at 1133. *See also* Beck, *Intrauterine Renal Surgery: Techniques for Exposing the Fetal Kidney During the Last Two-Thirds of Gestation*, 8 J. INVEST. UROLOGY 182 (1970); Idriss & Boggs, *Experimental Intrauterine Surgery: Studies in Fetal Skin Healing*, 27 INST. MED. CHICAGO PROC. 93 (1971).

Such results suggest that surgeons, at least in some cases, will be able to abort some, but not all, of a set of multiple fetuses. Interview with J. Emmet Lamb, M.D., Acting Chairman, Department of Obstetrics & Gynecology, Stanford University Medical School, in Stanford, Cal., Mar. 21, 1974. In some cases, the multiple fetuses may share circulatory systems to such an extent that an operation to separate them would be difficult or impossible. Interview with Edward T. Bowe, M.D., Professor of Obstetrics & Gynecology, Columbia University Medical School, in New York, N.Y., Mar. 21, 1974. Such an operation might prove more difficult than the above-described operations on single fetuses, since the human uterus is very sensitive to changes in size and circulation. Interview with Alan Margolis, M.D., Professor of Gynecology & Obstetrics, University of California Medical Center, in San Francisco, Cal., Mar. 18, 1974.

Selection can, of course, be carried out more simply by means of serial pregnancy and abortion. *See* notes 29-33 *infra* and accompanying text. The main advantage of partial abortion is that it obtains the same results as selective serial abortion, but faster. *See* note 9 *supra*.

20. *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305 (1966); Skinner v. Oklahoma, 316 U.S. 535 (1942); *cf.* Roe v. Wade, 410 U.S. 113, 169 (1973) (Stewart, J., concurring).

21. Roe v. Wade, 410 U.S. 113, 158-59 (1973).

## 2. *Abortion Based on Sex*

A few weeks after the meeting with her doctor at which a selective abortion was agreed upon, Mrs. Particular telephoned her doctor to inquire into the feasibility of assuring that her baby be a boy.[22] She professed finding boys more physically attractive than girls. Moreover, males enjoy a superior position in present-day society, she felt, and are thus better able to care for their parents in their old age.[23] Since there were at least three fetuses present, the chances should be good, she suggested, that at least one of them would be a male.[24] By aborting the females and leaving a single male to develop, she would be able to realize her ambition of having a baby boy. Reluctantly, the doctor agreed and ordered amniocentesis[25] and amnioscopy[26] to determine in advance the sex of each fetus.

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22. Parents seem to prefer male children by a substantial margin. *See* note 50 *infra* and accompanying text.

23. The average annual wage paid to a full-time white male worker in the United States in a recent year was $7396; to a black male, $4777; to a white female, $4729; and to a black female, $3194. PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE 18 *et seq.* (1970). Women comprise less than 3% of the lawyers in the United States, DEPARTMENT OF COMMERCE, SOCIAL & ECONOMIC STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1971), and less than 19% of the members of college and university faculties. *Hearings on Discrimination Against Women Before the House Special Subcomm. on Education & Labor*, 91st Cong., 2d Sess. 77 (1970).

24. Where three non-identical fetuses are present, the probability that at least one will be male is approximately 87%. Where there are four fetuses, the probability is on the order of 94%. And if there are five fetuses, the probability increases to about 97% that at least one will be male.

25. Amniocentesis is a technique in which a small quantity of fluid is extracted transabdominally by means of a small-gauge needle. Local anesthesia is generally used. The fluid contains fetal cells, which can be analyzed through chromosome karyotyping or enzyme assay, revealing many characteristics of the fetus, including sex and the presence or absence of certain chromosomal defects. Omenn & Motulsky, Intra-Uterine Diagnosis and Genetic Counselling: Implications for Psychiatry in the Future 2 (to be published in October 1974 in 6 AMERICAN HANDBOOK OF PSYCHIATRY (3d ed. D. Hamburg & H. Brodie 1974); on file at law library, University of California—Berkeley) [hereinafter cited as Omenn & Motulsky]. *See also* notes 31 & 35 *infra*.

26. Amnioscopy involves introducing a flexible fiberoptic device into the uterine cavity. It permits the physician to look at the fetus "eyeball to eyeball." Still at the experimental stage, the technique involves some risk, but it permits the physician to detect deformities such as cleft lip or open spine that could not be detected through other means. Interview with Gilbert S. Omenn, M.D., Ph.D., White House Fellow & Staff Assistant to the Chairman, U.S. Atomic Energy Commission, and Professor of Medical Genetics, University of Washington, in Washington, D.C., Jan. 3, 1974. *See* Omenn & Motulsky 11, 25; Saling, *Amnioscopy and Fetal Blood Sampling*, in DIAGNOSIS AND TREATMENT OF FETAL DISORDERS 141 (K. Adamson ed. 1968).

### 3. *Selection Based on Race*

Shortly before the operation, Mrs. Particular contacted the physician for a third time. Swearing him to secrecy, she confided that both she and her husband, a prominent local merchant, had Negro forebears. The Particulars, although Caucasian in appearance, were concerned that their son might betray the presence of his black ancestors.[27] Mrs. Particular requested that the physician examine each fetus, selecting for survival the one with the lightest pigmentation and the least negroid appearance. The woman's threat of a lawsuit very much in his mind, the physician agreed to consult with a geneticist and an embryologist about the feasibility of making a "racial" determination *in utero*[28] or at the time of the operation.[29]

## B. *Serial Abortion*

Ms. Positive, thirty-five years old, already had one child, a boy, when she discovered she was again pregnant. She was delighted, since she had wanted to have two children. But, believing world population growth to be a real and severe problem, Ms. Positive thought she could not in good conscience have more than two children. She was therefore especially concerned that this baby be exactly what she wanted.

First, she of course wanted the child to be normal and healthy. Aware that her age meant a higher probability of a defective fetus,[30] Ms. Positive decided to risk amniocentesis in order to discover whether

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27. Although as a general rule the pigmentation of a child approximates the average of the pigmentation of the biological parents, some variation is possible, and a child of two parents each of whom has a Negro forebear could be substantially darker in appearance than either parent. Interview with Charles Blank, Ph.D. (genetics), in Berkeley, Cal., Feb. 12, 1974.

28. Although race-related characteristics cannot reliably be predicted from amniocentesis at the present time, fetal skin biopsy guided by an amnioscope should permit the examining physician to make an approximate determination of the eventual pigmentation of the child beginning about the fourth or fifth month of pregnancy. Interview with Edward T. Bowe, *supra* note 19; *see* notes 26 *supra* & 58 *infra*. Geneticists are also intrigued by the prospect of mapping chromosomal characteristics of human populations; proposals have been made that such studies be carried out in relation to populations from diverse habitats and races, *see* Sharma, *Chromosome Studies in Man: Present Trends*, 14 NUCLEUS 171 (1973), and it seems possible that even earlier detection might be possible one day through analysis of fetal cells in the amniotic fluid.

29. *See* note 58 *infra* and sources cited therein.

30. Omenn & Motulsky 7.

the fetus evidenced any chromosomal defect.[31] If the fetus were genetically defective she intended to have an abortion.[32] Second, Ms. Positive wanted her next child to be female. She already had a male child, and felt a "balanced" family was desirable, both for herself and for the children.[33]

When amniocentesis revealed that the fetus Ms. Positive was carrying was normal but male, she made the difficult decision to abort. A few months later, Ms. Positive again became pregnant. This time amniocentesis showed the fetus to be normal and female. Ms. Positive happily carried the fetus to term, and she and her son are now very pleased with her new daughter.

## II

Selective abortion of the type employed by Ms. Positive is unquestionably possible with existing medical techniques.[34] Amniocentesis, already a relatively common procedure,[35] is performed primarily to reveal genetic defects,[36] but it also reveals the sex of the fetus.[37]

31. The primary use of amniocentesis to date has been to enable the physician to detect chromosomal abnormalities in the fetus. NATIONAL FOUNDATION—MARCH OF DIMES, BIRTH DEFECTS, ORIGINAL ARTICLE SERIES: INTRAUTERINE DIAGNOSIS (1971) [hereinafter cited as INTRAUTERINE DIAGNOSIS]; Omenn & Motulsky 4-5.

32. The presence of a genetic defect was considered adequate justification for an abortion in many states even before *Roe* and *Doe*. The *Model Penal Code*, for example, permits an abortion once it is determined that "the fetus would likely be born with a grave, permanent, and irremediable mental or physical defect." MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962). This proposal, which was partially invalidated by *Doe*, served as a model for legislation in about one-fourth of the states. 410 U.S. at 182. Other states had adopted "liberalized" statutes that permitted abortion on eugenic grounds. *E.g.*, N.Y. PENAL LAW § 125.05 (McKinney 1967), *as amended*, (Supp. 1973); *see* Roe v. Wade, 410 U.S. 113, 140 n.37 (1973). Many persons find abortion of a defective fetus less objectionable than abortion of a normal fetus. Lieberman, *Psychosocial Aspects of Selective Abortion*, in INTRAUTERINE DIAGNOSIS 20.

33. Many couples prefer to have a family with a certain ratio of boys to girls. Spraic, *Sexual Selection and the Law*, 20 COLORADO Q. 516, 522-23 (1972) [hereinafter cited as Spraic].

34. *See* notes 24-26 *supra* & 35-40 *infra* and accompanying text.

35. For example, amniocentesis has been performed 285 times at the Prenatal Detection Center at the University of California Medical Center in San Francisco, California. S.F. Chronicle & Examiner, Mar. 3, 1974, at 18, col. 2. It is considered a relatively safe and painless medical procedure. Fuchs, *Amniocentesis and Abortion: Methods and Risks*, in INTRAUTERINE DIAGNOSIS 18, 18-19; Scrimgeour, *Amniocentesis: Techniques and Complications*, in ANTENATAL DIAGNOSIS OF GENETIC DISEASE 11 (A. Emery ed. 1973).

36. *See* notes 25 & 31 *supra* and accompanying text.

37. Omenn & Motulsky 4.

Amnioscopy, while still experimental, will soon be available for use by trained specialists.[38] This procedure will allow a physician literally to look at the fetus while it is *in utero*.[39] Partial abortion of the type requested by Mrs. Particular has yet to be performed in the post-*Roe* United States, but developments in the field of fetology indicate that such an operation is within the capability of surgeons specializing in this field of medicine.[40]

The possibilities of combining these modern screening techniques with post-*Roe* permissive abortion have not been lost on a few alert and determined parents; already the medical literature contains references to requests for selective abortion based on sex,[41] and race cannot be far behind.[42] It is likely that requests for selective abortion will increase as the diagnostic tests become safer, more accurate, and more complete in the information they reveal about the fetus, and as the possibility of selective childbearing becomes more widely known or is

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38. *See* notes 26 *supra* & 40 *infra* and accompanying text. Other techniques that are used to inspect the fetus are fetography and ultrasound scanning. In the former procedure, a solution is injected into the amniotic sac, outlining the fetus' skin and filling the gastrointestinal tract. A. MILUNSKY, THE PRENATAL DIAGNOSIS OF HEREDITARY DISORDERS 184 (1973). Ultrasound is used to detect a number of gross defects in the fetus. *Id.* at 186.

39. A. MILUNSKY, *supra* note 38, at 186.

40. For a vivid description of the work of a leading fetologist, see Rorvik, *The Brave New World of the Unborn*, LOOK, Nov. 4, 1969, at 74. Dr. Asensio of the University of Puerto Rico School of Medicine has performed a number of corrective operations on fetuses. In one case, Dr. Asensio removed one embryo completely from the womb, performed the corrective procedure, then replaced it in the womb thirty minutes later. *Id.* at 76. Fetologists have injected dye into the amniotic fluid to illuminate the fetus' gastrointestinal tract, and have performed blood transfusions on fetuses while they were still attached to the mothers' bodies. There are amnioscopes in experimental use "through which you can view the fetus and introduce tiny knives to take fetal blood and skin samples." *Id.* at 80. *See also* note 19 *supra* and sources cited therein.

41. *E.g.*, Letter to the Editor ("An Abuse of Prenatal Diagnosis"), 221 J.A.M.A. 408 (1972); Omenn & Motulsky 29; *cf.* Fried, *Indications for Amniocentesis*, in ANTENATAL DIAGNOSIS OF GENETIC DISEASE 4, 8 (A. Emery ed. 1973) ("Parents may wish to know the sex of the fetus for personal reasons, with interruption of the pregnancy if the fetus is not of the desired sex . . . ."); S.F. Chronicle & Examiner, Mar. 3, 1974, at 18, col. 2 ("Sex Prediction Fad Gains Popularity"—cites interview with Dr. Mitchell S. Golbus at meeting of California Medical Association); Curtis, *Abortion for Babies of the Wrong Sex?*, S.F. Chronicle, July 3, 1973, at 19, col. 3 (referring to report from Dr. Mortimer Stenchever, Professor of Obstetrics and Gynecology, University of Utah College of Medicine; *see* Letter from Lindsay R. Curtis, M.D., Feb. 7, 1974, on file at law library, University of California—Berkeley). A modest survey of college students revealed that 80% would utilize a technique for selection of the sex of their children if such a technique were available. Spraic 523.

42. *See* notes 57-62 *infra* and accompanying text.

discovered by the popular media.[43] Whether there exist any legal bars to selective abortion remains to be seen; no suit has yet been brought to challenge the procedure, and no state has introduced legislation attempting to regulate it.[44]

Certainly, selective abortion is only the tip of the iceberg, a crude forerunner of more sophisticated methods of human engineering to be developed in the future.[45] Already, medical scientists have devised a technique that affords an eighty percent certainty of selecting the sex of one's child,[46] and a method of separating male and female sperms by centrifugation may soon be perfected.[47] Manipulation of the DNA in human sperm and ova tissue, which offers almost unlimited possibilities for tailoring children to parental specifications, has attracted considerable interest among genetic researchers,[48] and the first attempt at reproducing a human being asexually, by cloning, can be expected by the end of the century.[49]

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43. Motulsky, Fraser & Felsenstein, *Public Health and Long-Term Genetic Implications of Intrauterine Diagnosis and Selective Abortion*, in INTRAUTERINE DIAGNOSIS 22, 30; *see* Frankel, *The Specter of Eugenics*, COMMENTARY, Mar. 1974, at 25; note 41 *supra* and sources cited therein; *cf. Abortion: The Five-Year Revolution* 311 (suggests that "the primary effect of legalization will be an improvement in the quality of the abortion operations, rather than an increase in the quantity of operations performed") (headnote); *id.* at 344.

44. Some states have attempted to limit the impact of *Roe* and *Doe* in other ways, however. For example, following the Supreme Court's decisions, Rhode Island attempted to put into effect a statute purporting to define human life as beginning at the moment of conception. The statute was held unconstitutional on its face in Doe v. Israel, 358 F. Supp. 1193 (D.R.I. 1973). For a discussion of other legislative responses to the decisions, see *Abortion: The Five-Year Revolution* 331-32.

45. For a discussion of the possible impact on human society of developments in human engineering, see Davies, *supra* note 7; Etzioni, *Sex Control, Science, and Society*, 161 SCIENCE 1107 (1968) [hereinafter cited as Etzioni]; Rivers, *Grave New World*, SATURDAY REV., Apr. 8, 1972, at 23. *See also* A. ETZIONI, GENETIC FIX (1973) [hereinafter cited as GENETIC FIX].

46. Spraic describes a technique developed by Landrum B. Shettles, M.D., Professor of Clinical Obstetrics and Gynecology at Columbia College of Physicians and Surgeons, for selecting the sex of children prior to conception. The technique evidently is based on older discoveries relating to acid-alkali balance. Spraic 521.

47. *Id.* at 519-20.

48. *E.g.*, GENETIC FIX 50; Omenn & Motulsky 2.

49. *See* GENETIC FIX 20, 71; A. MILUNSKY, *supra* note 38, at 177; Kindregan, *State Power Over Human Fertility and Individual Liberty*, 23 HASTINGS L.J. 1401, 1416-18 (1972); *cf.* Spraic 517-18.

Dr. Douglas Bevis, a leading English researcher in human reproduction, recently announced to the British Medical Association that he had participated in a successful experiment in which the ova of three infertile women were removed, fertilized in the laboratory, and reimplanted in the women's wombs. Dr. Bevis maintained that the women

Undoubtedly, many of these procedures will work imperfectly at first, and mistakes will be made. It will thus be necessary to rely on amniocentesis and other techniques to monitor the development of the made-to-order child; when observation shows that the fetus is not developing according to plan, it will be a simple matter to abort it and begin again. Thus, until highly reliable techniques are available, selective abortion will be necessary as a corrective measure of last resort.

What are the implications for the social order if these practices become commonplace? Studies carried out by behavioral scientists indicate that married couples prefer male children over female by a considerable margin, perhaps on the order of sixty-one to thirty-nine.[50] Yet it has been suggested that even a slight additional imbalance in the ratio of the sexes could substantially alter many aspects of our national life.[51] A society dominated by males, it is said, would tend to take on the rough-hewn characteristics of a frontier town.[52] Men tend to be more aggressive and acquisitive than women.[53] By contrast, women purchase more books, support music and cultural programs, and tend toward pacifistic values in politics and international relations.[54] Proportionately more women than men support the Democratic party;[55] a change in the sex ratio of the population could thus alter the present balance of two-party power.

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subsequently gave birth to three "perfectly normal" children. *See* NEWSWEEK, July 29, 1974, at 70.

50. Spraic and Etzioni have reviewed the major studies in this area. Spraic concludes that governmental intervention may be needed in order to curb the adverse effects of sexual imbalance. Spraic 522-25, 527. *See also* GENETIC FIX 16, 30. *But see* G. TAYLOR, THE BIOLOGICAL TIME BOMB 207 (1968) (arguing that sexual imbalance is unlikely to result). Those who discount the danger of imbalance often base their faith on the intervention of an "invisible hand" that will set things right. Etzioni 1109. Others argue that a "free market" of choices will act to rectify any threatened imbalance. *Id.* This theory, although perhaps partly correct, may underestimate the extent to which parental preferences for male children are rooted in unconscious psychic factors, including very basic (even Freudian) attitudes about fathers and parenthood. *Id.*

51. Etzioni 1109.

52. *Id.* Manifestly, this and the following conclusions are predicated on societal role-typing and notions of female inferiority. Such attitudes, it is hoped, are bound for extinction as society realizes that they are merely learned patterns and not the reflection of "innate" differences between the sexes. In the meantime, however, their effect cannot be ignored.

53. *Id.*

54. *Cf. id.*

55. *Id.*

These forecasts, while speculative and even fanciful-sounding, may well contain an element of truth. The simple fact is that no one really knows for certain what effects would follow from parental selection that resulted in a noticeable skewing of the population. Such selection, if persisted in over a period of time, could easily produce permanent changes in the frequency of appearance of certain genetic traits, and it is even conceivable that certain human characteristics would disappear completely.[56] Minority racial features, like any other gross, readily identifiable traits that are regarded by large numbers of persons as unesthetic or undesirable,[57] would be prime candidates for extinction. Skin pigmentation is detectible fairly early in pregnancy,[58] and other race-like characteristics such as facial features and patterns of hair growth make their appearance at various points in the development of the fetus.[59] The rise of ethnic consciousness among minority groups[60] offers some assurance that selective abortion would not be universally adopted among minority families as a means of eradicating racially distinctive features, but the "marry light" mentality still persists among middle-class black families,[61] and favoritism toward "el guerito" (the light-skinned one) is far from extinct in Chicano culture.[62] Of course, a pregnant woman of the majority race who is anx-

56. Motulsky, Fraser & Felsenstein, *supra* note 43, at 22-26; *see* Ackerman, *Biological Consequences of Population Control*, 17 INT'L J. FERTILITY 131, 131-34 (1972).

57. *See generally* E. FRAZIER, *Race Contacts and the Social Structure*, in ON RACE RELATIONS 43 (1968).

58. Cells indicative of negroid pigmentation begin to appear about the fourteenth week. Sagebiel & Odland, *Ultrastructural Identication of Melanocytes in Early Human Embryos*, in PIGMENTATION: ITS GENESIS AND BIOLOGIC CONTROL 43, 44 (V. Riley ed. 1972). The degree of pigmentation can be assessed visually with increasing accuracy in the following months. *See generally* A. ZIMMERMAN & S. BECKER, MELANOBLASTS AND MELANOCYTES IN FETAL NEGRO SKIN (1959). For a description of amnioscopy, which permits the physician visually to examine the developing fetus and even remove skin and blood samples, see notes 26, 35 & 40 *supra*.

59. *See generally* B. PATTEN, *supra* note 16.

60. *See* Drake, *Prospects for the Future*, in KEY ISSUES IN THE AFRO-AMERICAN EXPERIENCE 285, 299 (N. Huggins ed. 1971); Leirne, *The Concept of the New Negro and the Realities of Black Culture*, in *id.* at 125.

61. In a classic work, E. Franklin Frazier observed that because Negroes, since the days of slavery, had been taught to see their black skin as a curse and a sign of their inferiority to whites, great value was placed on a light complexion by Negroes themselves. One aspect of this phenomenon was that having a light-skinned spouse also came to be perceived as desirable. E. FRAZIER, *Black Bourgeoisie*, in ON RACE RELATIONS 243 (1968). Although rising awareness among ethnic groups, *see* note 60 *supra* and accompanying text, may have lessened the impact of this attitude, it is unlikely to disappear totally in the near future.

62. *See* L. GREBLER, J. MOORE & R. GUZMAN, THE MEXICAN AMERICAN PEOPLE

ious to conceal an extramarital affair with a man of minority race, or vice versa, might have an extremely strong incentive for ascertaining in advance the characteristics of her fetus.

In addition to private incentives, economic and even governmental pressures might encourage parents to take steps to assure that their children bear certain characteristics that are believed desirable. Since females have a longer life expectancy than males and Caucasians outlive blacks,[63] it has been suggested that sellers of group life insurance policies might offer financial advantages to families who agreed in advance to bear only children likely to be longlived.[64] In wartime, the advantage to the Government in having large numbers of males is evident.[65] Indeed, following both world wars the Soviet Union instituted a national program of incentives designed to increase the birth rate.[66] Because of the disproportionate number of females resulting from battle casualties among the male population,[67] there is little doubt that the Soviet government would have embraced a program of selective male birth had the techniques for effectuating it been available.

In the United States, state intervention in favor of fetal selection is perhaps less likely, but the declining birth rate[68] and the resulting emphasis on the qualitative aspect of family life[69] may well have the same effect through the working of individual choices. Once the potential inherent in fetal screening becomes known, it is difficult to

334-35 (1970); E. STODDARD, MEXICAN AMERICANS 80-84 (1973); *cf.* A. PRAGO, STRANGERS IN THEIR OWN LAND 3, 10 (1973).

63. DEPARTMENT OF COMMERCE, SOCIAL AND ECONOMIC STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 57 (1973).

64. Interview with Gilbert S. Omenn, *supra* note 26.

65. *E.g.*, Spraic 528. For discussion of the constitutional aspects of governmental involvement in controlling human reproduction, see Kindregan, *supra* note 49; Montgomery, *The Population Explosion and United States Law*, 22 HASTINGS L.J. 629 (1971); Rabin, *Population Control Through Financial Incentives*, 23 HASTINGS L.J. 1353 (1972).

66. D. DALLIN, THE CHANGING WORLD OF SOVIET RUSSIA 30 *et seq.* (1956); Eason, *Population Changes*, in PROSPECTS FOR SOVIET SOCIETY 203, 223 (A. Kassof ed. 1970).

67. D. DALLIN, *supra* note 66, at 40-41; Eason, *supra* note 66, at 225-30.

68. The birth rate for both blacks and whites has decreased steadily since 1955. In that year 23.8 white babies and 34.7 black (and "other") babies were born per thousand living persons. The preliminary figures for 1970 show this statistic to be about 15.5 white and 25.2 black babies per thousand. DEPARTMENT OF COMMERCE, SOCIAL AND ECONOMIC STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 52 (1973).

69. Lieberman, *supra* note 32.

see how, short of legislation, determined couples could be prevented from exercising selection in the sex, and possibly other characteristics, of their offspring if they are willing to incur the expense and inconvenience of an occasional trip to the doctor.

## III

Assuming it desired to do so, could a state regulate, or a court enjoin, the use of selective abortion by couples who desire to have children of a certain type?[70] Although *Roe* and *Doe* appear to permit abortion "on demand,"[71] the precise issue of selective abortion was not before the Court in either case and, until finally resolved by the Court, should be regarded as an open question. It would be a mistake to suppose that simply because a woman need not give any reason to justify an abortion, *every* reason is beyond judicial scrutiny. After all, a landlord may rent or not rent an apartment at his or her absolute discretion, even whim, but when the landlord decides to refuse to rent to blacks, or to the foreign born, constitutional notions of due process and equal protection enter the picture, limiting his or her freedom of choice.[72] This is not to suggest that a womb is exactly

70. A third alternative would be adoption of a position statement by the American Medical Association (AMA) or the American College of Obstetricians and Gynecologists opposing selective abortion. The AMA has adopted such position statements in the past. *See* Proceedings of the AMA House of Delegates 221 (June 1970). Passage of such a resolution does not seem likely, however, at least without legislation or a judicial holding, since most physicians probably believe that *Roe* and *Doe* gave women an unqualified right to any type of abortion. Even if such a statement were passed, individual doctors might hesitate to adhere to it in light of what many might perceive to be the clear mandate of *Roe* and *Doe*. Interview with Edward T. Bowe, *supra* note 19.

71. Although *Roe* permits states to regulate abortion in the interest of the mother's health after the third month of pregnancy, 410 U.S. at 163, and to bar it completely after the sixth month except to protect the life or health of the mother, *id.* at 163-64, the view of many seems to be that abortion is now available at a woman's request. *Abortion: The Five-Year Revolution* 332, 339; *cf.* Dudar, *Abortion for the Asking*, SATURDAY REV. OF SOC'Y, Apr. 1973, at 35. Often overlooked is the requirement of the physician's concurrence. This requirement can pose serious difficulties for the woman unable to find a willing physician, especially in small towns or Catholic communities.

72. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); Shelley v. Kraemer, 334 U.S. 1 (1948); Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950). A federal statute, 42 U.S.C. § 1982 (1970), prohibits all racial discrimination in the sale or rental of property. This statute was held valid under the thirteenth amendment in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

like an apartment with a nine-month leasehold; the relationship of mother and child is both more intimate and momentous than that. But it is important to realize that *Roe*'s holding that a woman may abort the contents of her uterus does not necessarily mean that she may do so in order to reach any objectives whatsoever, including ones that are constitutionally impermissible.[73]

The mother's interest in privacy, which *Roe* held to include the right to an abortion,[74] is substantial enough to override the state's interests in protecting the fetus and in regulating medical procedures in the interest of the mother's health, at least during the first trimester of pregnancy. But the mother's interest in privacy is not unlimited, and at various points in her pregnancy it begins to be exceeded by the state's interests.[75] The introduction of additional interests into the Court's equation might well affect the balance struck, compelling a different result.[76]

When abortion is attempted on a selective basis, one such additional state interest, mentioned earlier, is that of preventing alteration of the demographic or genetic balance.[77] If it could be shown that parental preferences were likely to change the character of the population in undesirable or even unpredictable ways, the state would seem to have a legitimate interest in resisting selective practices. Moreover, "fads" or styles in babies could cause certain human characterstics to be reduced in frequency or to disappear.[78] A society committed to pluralism[79] might well decide to curb such a trend by forbidding the use of selective abortion.

Society's interest would appear strongest when the endangered type is one, such as race[80] or sex,[81] that courts traditionally have singled

73. *See* 410 U.S. at 163; *cf.* Poulos v. New Hampshire, 345 U.S. 395 (1953) (first amendment's guarantee of free speech does not afford an absolute right to speak where, when, or in the manner the speaker pleases).

74. 410 U.S. at 153, 163.

75. *See* notes 2-4 *supra* and accompanying text.

76. This possibility is present whenever a balancing test is used. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Roth v. United States, 354 U.S. 476 (1957); Dennis v. United States, 341 U.S. 494 (1951).

77. *See* notes 50-62 *supra* and accompanying text.

78. *Id.*

79. *See* G. MYRDAL, AN AMERICAN DILEMMA 167 *et seq.*, 853 (1944); Drake, *supra* note 60.

80. U.S. CONST. amends. XIII, XIV; *see* Shelley v. Kraemer, 334 U.S. 1 (1948); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

81. Although sex has not been declared a suspect classification by the Supreme

out for special protection. Fetuses are not "persons" in the constitutional sense, as *Roe* made clear,[82] but arguments can nonetheless be made for extending them the state's protection from maternal choices that threaten their existence. First, reduction in the number of children born potentially affects the numerical and economic strength of minority interest groups now in existence.[83] Groups such as the NAACP and the National Organization for Women that rely in large part on numerical strength to effect social change[84] might well have

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Court, four Justices urged that sex be recognized as a suspect class in Frontiero v. Richardson, 411 U.S. 677, 686 (1973), observing that "sex . . . is an immutable characteristic determined solely by the accident of birth. . . ." *See also* Reed v. Reed, 404 U.S. 71 (1971). In Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), the California Supreme Court recognized sex as a suspect classification. The proposed equal rights amendment, H.R.J. Res. No. 208, 92d Cong., 2d Sess. (1972), which would guarantee equality of rights regardless of sex, was passed by Congress on March 22, 1972 and submitted to the legislatures of the states for ratification. This proposed amendment was cited by three Justices in *Frontiero* as a reason for not declaring sex a constitutionally suspect class at the present time. 411 U.S. at 692.

82. 410 U.S. at 157.

83. The Supreme Court has intervened a number of times to protect the interest of minority groups from forced dilution of their political power. *E.g.*, Hadnott v. Amos, 394 U.S. 358 (1969) (filing fees used to deter Negroes from running for political office); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax requirement); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (gerrymandering Negro district); *cf.* Baker v. Carr, 369 U.S. 186 (1962). A writer has even suggested that a cause of action for wrongful sex determination might be developed. Brodie, *The New Biology and the Prenatal Child*, 9 J. FAMILY L. 391, 400-01 (1969).

84. Some black leaders have seen population growth in the black community as a positive good and have resisted the establishment of birth control clinics as an attempt by the white community to perpetrate genocidal policies on blacks. P. EHRLICH & A. EHRLICH, POPULATION, RESOURCES, ENVIRONMENT: ISSUES IN HUMAN ECOLOGY 246-47 (1970). That women comprise slightly more than 50% of the population has frequently been cited as a reason why sex should not be declared a suspect classification for purposes of equal protection analysis. *E.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); *cf.* Frontiero v. Richardson, 411 U.S. 677 (1973). Despite this numerical preponderance, women are not equally represented, since societal tradition has effectively precluded women from sitting in the legislatures, on the courts, and in the executive chambers. *See id.* at 686 n.17; Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933-35 (1973) [hereinafter cited as Ely]. *See generally* K. DAVIDSON, R. GINSLING & H. KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 99-107 (1973). This discrepancy is central to the demands of many modern feminists, and the decisions in *Roe* and *Doe* may well have been, in large part, a response to the pressures of large numbers of women. *See id.* at 404-05; Cisler, *Unfinished Business: Birth Control and Women's Liberation*, in SISTERHOOD IS POWERFUL 245, 274-81 (R. Morgan ed. 1970). It seems safe to assume that chances for the ratification of the equal rights amendment by the requisite thirty-eight state legislatures are greatly enhanced by the fact that women comprise over one-half of the constituencies of the legislators involved. *See* A. FERRISS, INDICATORS OF TRENDS IN THE STATUS OF WOMEN 179-82 (1971).

cause to fear any diminution in numbers resulting from multiple abortions of potential members.

In addition, the fetus, while not a person, is not *nothing*.[85] As Professor Ely has observed, the Government has routinely enacted legislation to protect infrahuman life, such as dogs, and even inanimate things like draft cards.[86] These protections have been upheld even in the face of contrary constitutional interests, such as free speech.[87] As a result, to point out that the fetus has no constitutional right to continue to exist, while the mother's interest is of constitutional dimension, is, in a way, beside the point. The state has many interests which, while not specifically enumerated in the Constitution, are nonetheless protectible.[88] One such non-constitutional interest suggested by selective abortion is simply the concern that permitting human fetuses to be weeded out on grounds that could be considered frivolous or invidious would set an example of disrespect for human life.[89] Protection of the public's morals has often been cited in justification of statutes protecting animals or symbolic objects. Owners of American flags, for example, may not display or destroy them in a manner calculated to communicate disrespect or scorn for the national symbol.[90] Similarly, legislation for the protection of dogs and other domestic animals has frequently been enacted with the express purpose of prohibiting behavior that might encourage an attitude of cruelty or unconcern toward *human* life.[91] Whether fetuses are more or less deserving of

85. Ely 931.

86. *Id.* at 926 & n.49.

87. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

88. Ely 926.

89. *Id.* at 924. For a more emotional attack on all permissive regulation of abortion as furthering an anti-life attitude, see Brief for National Right to Life Foundation as Amicus Curiae, *cited in* Roe v. Wade, 410 U.S. 113, 150 n.45 (1973).

90. A federal statute, 18 U.S.C. § 700 (1970), makes it an offense punishable by up to one year in prison and a fine of $1000 to "knowingly [cast] contempt upon any flag of the United States" by certain means. This statute has been held not to place any restrictions on first amendment freedoms "greater than is essential to the furtherance of the national interest." United States v. Gibson, 462 F.2d 96, 102 (9th Cir. 1972); *see* Hoffman v. United States, 445 F.2d 226, 228 (D.C. Cir. 1971). *See also* CAL. MIL. & VET. CODE § 614 (Deering 1955), *as amended*, (Supp. 1974), *held constitutional in* People v. Cowgill, 274 Cal. App. 2d 923, 78 Cal. Rptr. 853, *appeal dismissed*, 396 U.S. 371 (1969).

91. Although cruelty to animals was not an offense under the common law, State v. Karstendiek, 49 La. 1621, 22 So. 845 (1897), today most jurisdictions have enacted statutes making the infliction of needless pain on animals a criminal offense. *E.g.*, CAL. PENAL CODE § 597 *et seq.* (Deering 1971, Supp. 1974); MICH. STAT. ANN. §§

protection than animals has yet to be decided; at the moment their status is simply that of a "potential of life."[92] But the policy supporting animal protection statutes would appear to be equally applicable to fetuses, and a state might well conclude that permitting abortions on suspect or frivolous grounds would foster disrespect for potential human life, which would in turn create disrespect for actual human life. Recent legislation forbidding scientific experimentation with live fetuses tends to corroborate this suggestion.[93]

But partial or selective abortion does more than raise new state interests that could upset the equation offered in *Roe* and *Doe*; the countervailing interest of the mother seems proportionately weaker. A woman who desires a selective abortion is not opposed to having a baby; she simply wants a baby of type *X* and not type *Y*. Arguably, the privacy interest involved in protecting this "fine tuning" is less deserving of protection than that involved when the interest is in not bearing children at all.[94] A defendant at a criminal trial, for example,

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28.161-67 (1962, Supp. 1974); N.Y. AGRIC. & MKTS. LAW § 350 *et seq.* (McKinney 1972). Such statutes are often founded upon the need to preserve public morals. *See* Hunt v. State, 3 Ind. App. 383, 29 N.E. 933 (1892); Stephens v. State, 65 Miss. 329, 3 So. 458 (1888). A few courts subscribe to the theory that animals have rights of their own. *E.g.*, State v. Karstendiek, *supra* at 1625, 22 So. at 847; Hodge v. State, 79 Tenn. 528 (1883). *See also* Annot., 82 A.L.R.2d 794 (1958).

The Court in *Roe* rejected a related argument premised on public morals when it dismissed an alleged state interest in discouraging promiscuity and illicit sexual conduct. 410 U.S. at 148. The state's interest in discouraging extramarital relations, however, is arguably less weighty than its interest in opposing an attitude of disrespect toward human life or the potential for life. *See id.* at 163; notes 1-4 *supra* and accompanying text.

92. Roe v. Wade, 410 U.S. 113, 163 (1973).

93. *E.g.*, CAL. HEALTH & SAFETY CODE § 25956 (Deering Supp. 1974); MINN. ANN. STAT. § 145.422 (Supp. 1974). On the federal level, an amendment to a House Resolution banning fetal experimentation, H.R. Res. 7724, 93d Cong., 2d Sess. (1973), passed the House of Representatives by a vote of 354-9 on May 31, 1973, and is now the subject of a joint conference with the Senate. A number of House bills were introduced during the ninety-third Congress which would prohibit the use of federal funds for fetal experimentation, *e.g.*, H.R. 7850, 8778, 9488, or make it a crime to experiment on human fetuses, *e.g.*, H.R. 6849, 7725, 9459. All of these bills are still in committee.

94. *Cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 23-24 (1973) (state's obligation to supply basic education to children residing within state does not require plan that guarantees perfect fiscal equality to each district).

Of course, choosing not to have a severely deformed child can be considered a type of "fine tuning," too. But the interest involved in choosing not to give birth to such a child is usually much stronger than that involved in choosing not to have a healthy child simply because it is of the "wrong" sex, for example. *See* Omenn & Motulsky 29. The right to abort a defective child has been recognized since well before *Roe* and *Doe*. *See* note 32 *supra*.

has the right to be provided with counsel;[95] he or she has no right to be represented by Clarence Darrow.[96]

Many of the components of the privacy interest enumerated in *Roe*—determination of family size, avoidance of medical or psychological harm resulting from bearing an unwanted child, the mental and physical strain of caring for the child, and, in some cases, the stigma of unwed motherhood[97]—are absent or greatly weakened when qualitative rather than quantitative selective criteria are used. The financial cost, for example, of raising a blue-eyed boy is likely to be no greater than that of raising a brown-eyed girl. And the increase in family size is obviously the same regardless of a child's sex, eye color, or skin pigmentation.

Moreover, to the extent that characterizing the woman's interest in obtaining an abortion as an aspect of privacy represents something more than a conceptual *tour de force* by the Supreme Court,[98] that interest may well be diminished when a woman elects to undergo the probing and screening necessary to ascertain the characteristics of the fetus inside her body.[99] In actuality, the right invoked in *Roe* and *Doe* probably was not privacy, at least not in the traditional sense, but some entirely new interest.[100] Nevertheless, to the extent that the interest in obtaining an abortion shares some of the features of the traditional interest in privacy, the standard defenses of waiver[101] and consensual violation[102] may be available.

## IV

Recent cases have demonstrated that privacy, like many other personal interests protected by the Constitution, is not an absolute

95. This guarantee has even been held to include the right to effective counsel. Von Moltke v. Gillies, 332 U.S. 708, 725 (1947). *See* ABA CANONS OF PROFESSIONAL ETHICS Nos. 4, 15.

96. Drumgo v. Superior Court, 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631 (1973); *see* Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970); United States v. Burkeen, 355 F.2d 241, 245 (6th Cir. 1966); Tibbett v. Hand, 294 F.2d 68, 73 (10th Cir. 1961).

97. 410 U.S. at 153.

98. *See* Ely 923-26, 928-37.

99. *See* notes 101-02 *infra.*

100. Ely 932. The author suggests that what is really involved in *Roe* is "the freedom to live one's life without governmental interference." *Id.*

101. W. PROSSER, THE LAW OF TORTS 817 (4th ed. 1971) (waiver by seeking publicity).

102. *Id.* (defense of consent).

right.[103] Rather, privacy is a limited and relative interest, whose weight must be balanced against competing interests in each situation.[104] Because unregulated use of selective abortion by private individuals potentially affects a number of traditional state interests,[105] and because the parent's right to decide whether to bear a child is attenuated when she is willing to have *a* child but not *any* child,[106] some form of social regulation may be indicated. How should such regulation be effected?

One possibility would be to prohibit physicians from divulging to prospective parents any information about the fetus other than the presence or absence of chromosomal defects. Such an approach would be objectionable, however, on a number of grounds. First, it comes perilously close to book-burning and state-enforced ignorance, and may well run afoul of the first amendment.[107] Second, it fails to distinguish between abortion based on "suspect" characteristics, that based on relatively harmless characteristics such as size of the fetus, or that based on "frivolous" characteristics such as the presence or absence of dimples.[108] Accordingly, this method of regulation should be avoided.

A better approach might be to permit the parent to acquire information about the fetus, but to prohibit abortion thereafter except for compelling reasons of maternal health.[109] Such a statute could be drafted

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103. Roe v. Wade, 410 U.S. 113, 154 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). The limited nature of the right to do with one's body what one pleases, in a medical context, has also been recognized in Buck v. Bell, 274 U.S. 200 (1927), and Jacobson v. Massachusetts, 197 U.S. 11 (1905).

104. Roe v. Wade, 410 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

105. *See* notes 50-62, 83-93 *supra* and accompanying text.

106. *See* notes 94-102 *supra* and accompanying text.

107. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." Griswold v. Connecticut, 381 U.S. 479, 482 (1965). *See also* Weiman v. Updegraff, 344 U.S. 183, 195 (1952); Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Meyer v. Nebraska, 262 U.S. 390 (1923).

108. *See* notes 80-81 *supra* and accompanying text.

109. An argument can be made that such regulation should also take into account the interest of the father, since his genetic contribution to the make-up of the fetus amounts to roughly one-half. Although this interest would be unlikely to prevail in the classic yes/no decision under consideration in *Roe* and *Doe*, when weighed against the interest of the mother in not bearing an unwanted child, *see, e.g.*, Jones v. Smith, 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 94 S. Ct. 1486 (1974), selective abortion presents a different constellation of interests, *see* notes 74-102 *supra*, and the outcome may well be different. For a discussion of the father's interest, see *Abortion:*

in terms of waiver:[110] parents may enlist the aid of doctors to learn what they can about the fetus, but the price is forfeiture of the right to obtain an abortion. Such a statute could prohibit abortion based on any criteria, or only suspect criteria such as race or sex. Alternatively, abortion based on race or sex could be limited to parents who show a compelling reason, or even a merely rational reason;[111] since fetuses are not persons, adherence to every detail of traditional equal protection doctrine would appear unnecessary.

Every attempt to regulate abortion runs the risk of prompting a resurgence of back-room abortions performed by untrained personnel under dangerous and unsanitary conditions.[112] A number of considerations indicate that this suggested type of regulation will not result in such a resurgence, however. First, the women who formerly had the strongest motivation to obtain an illegal abortion—unmarried mothers, career women, women with very large families, and women who carried fetuses likely to be deformed[113]—are unlikely to be the same women who request selective abortion. For the former class of women, an unwanted child can indeed go a long way toward destroying the mother's life.[114] But a woman in the latter class is willing,

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*The Five-Year Revolution* 329; Note, *Abortion: The Father's Rights*, 42 U. CIN. L. REV. 441 (1973).

110. Even constitutionally protected rights may be waived, provided the waiver is knowing, voluntary, and free from coercion. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (waiver of fourth amendment right to be free from unreasonable searches and seizures); Miranda v. Arizona, 384 U.S. 436, 475-76 (1966) (waiver of fifth amendment privilege against self-incrimination); Van Moltke v. Gillies, 332 U.S. 708 (1948) (waiver of sixth amendment right to counsel).

111. Abortion of a defective fetus was recognized as legitimate even before *Roe* and *Doe*, *see* note 32 *supra*, and should meet even the compelling interest test.

112. The Court in *Roe* discussed the dangers of the illegal "abortion mill." 410 U.S. at 150. *See also* note 115 *infra* and authorities cited therein.

113. Roe v. Wade, 410 U.S. 113, 153 (1973); *Abortion: The Five-Year Revolution* 313 (describes the sharp increase in number of abortions necessitated by the epidemic of rubella in 1964). Many other environmental or genetic factors can result in a deformed fetus. *E.g.*, Lowe, *Congenital Malformations and the Problem of Their Control*, 1972 BRIT. MED. J. 515; Vukowitch, *The Dawning of the Brave New World—Legal, Ethical, and Social Issues of Eugenics*, 1971 U. ILL. L.F. 189. The plight of Ms. Finkbine, who had received the drug thalidomide but was unable to obtain a legal abortion in the United States in 1962, attracted widespread public attention. *See* LIFE, Aug. 10, 1962, at 32; NEWSWEEK, Aug. 13, 1962, at 54; SCIENCE NEWSLETTER, Aug. 18, 1962, at 99; TIME, July 13, 1962, at 52; U.S. NEWS & WORLD REP., Sept. 13, 1962, at 89. *See also* Kenny, *Thalidomide—Catalyst to Abortion Reform*, 5 ARIZ. L. REV. 105 (1963).

114. *See* Ely 923.

in fact desires, to have a child; the only question is which one. Such a need will rarely approach the urgency of the unwed mother, the working woman whose income is necessary to support her family, or the woman who knows she is likely to have a badly deformed child who will require life-long attention and support, and the pressure to defy the law by resorting to an illegal back-room operation will accordingly be less.

Of course, any statute that forces a woman to bear a child against whom she may have strong feelings will pose a temptation to lawlessness.[115] The Court in *Roe* recognized the intensity and legitimacy of the woman's feelings[116] and the absence of any compelling state justification[117] for the statutes then under consideration, and properly struck down the offending legislation.[118] But when the woman's decision consciously introduces new and less urgent elements, the Court's decision might well be different, and a statute properly tailored to protect concrete and demonstrable state interests[119] might well withstand judicial scrutiny.[120]

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115. For a discussion of the manner in which restrictive abortion laws drove "large numbers of desperate women into the hands of the very person from whom the law seeks to shield them," see Leavy & Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52 (1964). *See also* Moore, *Unrealistic Abortion Laws*, 1 CRIM. L. BULL. 3 (Dec. 1965).

116. 410 U.S. at 153.

117. *Id.* at 163.

118. *Id.* at 164.

119. *See id.* at 165.

120. There is no certainty, of course, that such legislation would not be struck down by a Supreme Court decision. The foregoing survey of the interests involved only concludes that on the basis of the "detriments" or interests identified in the *Roe* and *Doe* opinions, some state legislation regulating selective abortion might be constitutionally justifiable. A subsequent decision could find that a woman's interest in obtaining a selective abortion also overrides the countervailing state and societal interests. Such a decision would need to focus on the precise interests of the mother—and perhaps the father, *see* note 109 *supra*—in refusing to permit the birth of a child of the "wrong" sex or race. *See* notes 94-97 *supra* and accompanying text. Although many of the detriments discussed in *Roe* and *Doe* are absent or are present only in an attenuated form in selective abortion, *see* notes 94-97 *supra* and accompanying text, the mother's interests are nevertheless substantial. A mother forced to bear a child of the "wrong" race or sex may find motherhood unsatisfying and may even suffer psychological harm. *See* United States v. Vuitch, 402 U.S. 62, 71-72 (1971) (mother's health includes both physical and psychological factors); *accord*, Doe v. Bolton, 410 U.S. 179, 192 (1973). The unwanted child may develop a stunted or warped personality. The couple's marriage may suffer. In extreme cases the state may even be forced to assume the care of an abandoned, delinquent, or mentally ill child rejected by his or her parents. These possibilities should not be minimized, and any statute drafted to deal with selective

## V

Regulation of selective abortion raises issues that force us to chart unfamiliar territory, issues that require us to abandon the familiar realm of means and begin to think in terms of ultimate ends. This is a dilemma, however, that advancing technology will thrust upon us on many fronts in the years ahead. To cite but one example, recent developments suggest that behavior-modification techniques have been perfected to the point where it is now possible to alter the responses of a prisoner or inmate in fundamental and permanent ways, without resorting to such drastic and constitutionally suspect means as lobotomy, drug therapy, and electroshock treatment.[121] If the human personality can be modified by means that do not violate the Bill of Rights, the question then becomes, what range of target personalities is permissible? What kind of person can be created?[122] Human engineering through selective abortion paints this dilemma in the starkest possible terms, since it involves the very creation of human beings of certain types rather than modification of individuals already in existence. The extent to which problems of ends, like those of means, are subject to constitutional constraints is thus one that is criti-

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abortion should take these interests into account, tailoring any limitations of the parents' freedom to choose only to meet compelling state interests that are clearly formulated and defined. *See* Roe v. Wade, 410 U.S. 113, 155, 163 (1973).

Subsequent decisions may base the right to abortion not on privacy but on the mother's right to choose. *See* Doe v. Bolton, 410 U.S. 179, 211 (Douglas, J., concurring). Such an approach would undoubtedly make regulation of *any* abortion decision highly problematical at best.

121. Moya, Parsons & Chaukin, *The Scientific and Non-Scientific Manipulation of Behavior*, 50 NOTRE DAME LAW. — (1974).

122. Very few judicial opinions seem to have addressed the permissibility of the objectives of a coercive, therapeutic, or other personality-shaping program, as distinguished from a review of the means employed. The recent federal case of Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972) (state mental institution must tailor treatment program toward normalization of patients; goals must be clearly articulated and justifiable; therapy may not be aimed at conditioning the patient to accept his or her institutionalized status), is one of the few cases on record to have undertaken a review of objectives. A committee of the National Academy of Science recognized the problems inherent in regulation of *ends* when it wrote:

> Man, although potentially able to select his own genetic constitution, has not yet made use of this power. . . . But who shall decide what is desirable? How much genotypic and phenotypic variability would be optimal in the human society? . . . And to whom would society entrust such decisions?

COMMITTEE ON LIFE SCIENCES, NATIONAL ACADEMY OF SCIENCE, BIOLOGY, AND THE FUTURE OF MAN 926 (P. Handler ed. 1970). *See also* Civil Liberties, Mar. 1974, at 5, col. 1.

cal to the future interface of law and technology; the outcome, for better or worse, will have much to say about the shape of mankind's future. Such problems can be dealt with willy-nilly as they arise, or can be studied now, while they are still in the germinal stages and the law of ends has not yet hardened into a fixed pattern. For the reasons discussed in this Article, it is not too early to begin sober reflection on the manner in which these ultimate questions of human personality vis-à-vis public and private preferences should be resolved.