WHETHER WE CAN SPEAK OF A DIFFERENCE BETWEEN THE HUMAN BEING AND THE HUMAN PERSON*

One of the major issues intimately involved in any serious consideration of abortion concerns the humanity of the fetus: specifically, whether or not in abortion we are dealing with one human being (the mother) or with two (the mother and the fetus). In stricter terms, the problem involved is: (a) whether or not the fetus is as much a human being as the mother; (b) consequently, with as much a right to life as the mother; and (c) in cases of conflict of rights (as are raised in most abortion cases), which right or set of rights may prevail. The problem is strictly a moral one but if a reasonably defensible solution is found on the moral level, then the problem of abortion as well as a number of related problems might conceivably become more amenable to a solution on the practical and legal levels.

In this essay, I shall bypass the problem of fetal and maternal rights and consider the humanity of the fetus from a different perspective. In so doing, I shall advance a theory, rather tentatively and possibly in rudimentary form as a basis for further discussion, even if in the process I shall raise more questions than I can possibly answer. For, in my discussion of the problem, I am not, of course, unaware of my severe limitations, particularly in that the theory I shall propose revolves round a number of unresolved issues.

Perhaps I should rephrase my concern to read that I will put forward not a thesis but a hypothesis, i.e., assuming that the premises I shall submit are correct, or at least philosophically and theologically plausible, what might the consequences drawn from these premises, as applied to abortion, be?

My proposition can, therefore, be stated briefly as follows: whether, in philosophical and theological terms (and possibly in social and le-

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gal terms), we can speak of a difference — not a distinction but a difference — between the human being and the human person. In other words, whether or not the two terms are interchangeable to the extent that they are synonymous and, therefore, no question of a distinction, much less of a difference, arises. Or, again, whether or not one can say that there is a stage in the development of the human entity in the womb at which it is a human being but not a human person.

I — THE STATE OF THE QUESTION

I shall take my point of departure from the historical and doctrinal problem that gave rise to the difference in the first place, the revelation of the two great mysteries of the Christian faith: (a) the mystery of the Trinity; and (b) the mystery of the Incarnation.

With regard to the mystery of the Trinity, the theologian faces the problem of acknowledging the existence of one nature in three persons;¹ with regard to the mystery of the Incarnation, a different problem arises, the problem of acknowledging the existence of two natures in one person: the divine and human natures hypostatically united in one person, Christ.²

To elaborate a little further on the mystery of the Incarnation and express it in layman's terminology: when the Son, as a divine person, became man, he carried with him, as it were, his divine personality and his divine nature. But while he assumed the nature of man he did not assume the personality of man. And yet the Church believes and proclaims, as a dogma of faith, that Christ, or the second person of the Trinity, is 'true God and true man': he was indeed divine; he was indeed human; or, in one phrase, he was indeed a divine person who had assumed human nature but not human personality.³

In this case, the divine person existed on his own and on becoming man his divine personality also upheld in existence his human nature which did not have and could not possibly have independent existence — otherwise, besides his divine and human natures, Christ would also have had two personalities or would have been two persons, divine and

¹ S. Th., I, qq. 29-36, 39, 40; De Pot., q. 9.
² S. Th., III, qq. 2-6, 16, 17; C. Theol., c. 211; III Sent., D. 5, qq. 1-3; D. 6, qq. 1-3; D. 10, q. 1.
³ S. Th., III, q. 4, a. 2.
Thus the position of the Church with regard to the personality and humanity of Christ permits a difference between the personality and the humanity of an intellectual being. How Christ's human nature or humanity was upheld in existence by his divine being is precisely where the mystery of the Incarnation lies, a mystery which has provoked no inconsiderable controversy in theology and philosophy.5

Briefly, then, if we can speak of Christ as being 'true God and true man' without saying that the divine person was also a human person, can we not also say that as far as man is concerned there might possibly be a difference between the human being and the human person? It may well be found that even in man there is indeed a difference between his 'humanbeingness' on the one hand, and his 'personhood' on the other, a difference which must be as clearly and sharply defined as our philosophical and theological resources permit.

II – THE HUMAN BEING AND THE HUMAN PERSON AT DEATH

At a Special Convention held in Sydney, Australia, in July-August 1968, the World Medical Association in a statement known as The Declaration of Sydney proposed guidelines for establishing the determining factors of death. Though the participants themselves (212 members from 28 different countries) found it increasingly complex to agree on a precise definition and determination of death, they nonetheless reached a consensus to accept irreversible coma and related indications as the major criteria of death. At about the same time that the Sydney Convention was drawing up its criteria, an independent body of eminent doctors of the Harvard Medical School was also settling on the same criteria.

4 Besides being a heresy condemned by the Council of Ephesus held in 431, A.D., the acceptance of two personalities in Christ would morally and psychologically create irreconcilable situations and consequences. Cf. H. Denziger and K. Rahner, Enchiridion Symbolorum (Fribourg: Herder, 1952), §148; Louis Ott, Précis de Théologie Dogmatique (Fribourg: Herder, 1954), Bk. III, Chap. III.

These criteria may be summarized as follows:

(a) *Unreceptivity and Unresponsitivity*: A total unawareness to externally applied stimuli and inner need and complete unresponsiveness, even the most painful stimuli that can ethically be applied—a working definition of irreversible coma;

(b) *No Movements or Breathing*: A total absence of muscular movements or spontaneous respiration. If the patient is on a mechanical respirator, the total absence of spontaneous breathing may be established by turning off the respirator for three minutes to establish whether there is the slightest effort on the part of the patient to breathe spontaneously and independently;

(c) *No Reflexes*: Irreversible coma with abolition of central nervous system activity evidenced in part by the absence of elicitable reflexes: the fixed and dilated pupils will not respond to a direct source of bright light. (Since the establishment of fixed, dilated pupils is clear-cut in clinical practice, there should be no uncertainty as to its presence); absence of ocular movement (to head turning and to irrigation of the ears with ice water) and blinking; no evidence of postural activity (decerebrate or other); absence of corneal and pharyngeal reflexes; total absence of muscular reflexes after tapping the tendons of the biceps, triceps or quadriceps; and

(d) *Flat Electroencephalogram*: Certain evidence of total absence of brain activity.

The series of technical steps outlined above provide accurate indications of irreversible cerebral damage. However, to cover some very few special cases or any exceptions that might arise, the Harvard Committee also added that 'all of the above tests shall be repeated at least 24 hours later with no change'. When the patient's brain is hopelessly and irreversibly damaged as described above, 'death is to be declared and then the respirator turned off'.

'Death', said Cleveland's Dr. Charles L. Hudson, principal U.S. delegate at the Sydney Convention, 'is a gradual process at the cellular level, with tissues varying in their ability to withstand deprivation of oxygen. Medical interest, however, lies not in the preservation of isolated cells but in the fate of a person. Here the point of death is not so important as the certainty that the process has become irreversible.'

In their guidelines, neither Sydney nor Harvard paid any particular attention to the heart - the time-honoured organ which for centuries had provided clear aural and tactile evidence that death had indeed occurred. The heart has since been recognized for what it really is: a blood-pumping organ.

So the question arises: which is that organ or that last cell in man which when it 'dies' — or, better, when it ceases to function without any possibility of its functioning again — the whole being or the whole person has ceased to be? To answer this question, classroom format with blackboard, chalk, eraser and all would probably be necessary. In the absence of such visual aids, I can do no better than follow a somewhat cumbersome description. To this end, we shall assume that we are watching a patient on his deathbed, one whose illness is terminal and whose process of dying has reached the point of no return. We shall further assume that this patient is attached to an electroencephalogram (EEG) and to an electrocardiogram (ECG).

Since the time these electronic instruments have been in operation, it has been found that in non-cardiac cases brain activity invariably stops sooner than heart activity. And in any case, for heart transplantation purposes — which made the question of establishing the moment of death a very urgent problem in the first place — the attending physicians cannot wait until the heart has stopped its vital organic beats; on the contrary, it has to be removed when it is still active and undamaged. So it has to be removed when a more vital organ, other than the heart, has permanently stopped functioning. The brain, 'the master control, the guiding force behind all of man's actions', is now being considered to be this vital organ, which in turn raises a host of questions:

(a) Can it be said that death does indeed occur when the brain has

permanently ceased to function, despite the fact that the heart has continued to perform its organic blood-pumping function?

(b) If we, as a society, accept brain death as being a scientifically and medically reliable criterion of death (on the assurance that the medical criteria for determining death are settled and not in doubt among physicians), can we not then, as philosophers and theologians, have the courage not only to speculate but what is more important to make a practical value-judgment declaring that in the context of these criteria what constitutes the human person is the presence of a functioning brain and, therefore, the human person has ceased to be at a very specific point in the process of death, that point being when brain death occurs, despite the fact that—provided the use of the following terminology is not unacceptable—the human being (because of his beating heart) has gone on to live? With possibly one eye on the quality of life, can it not also be said that the human person ceases when awareness goes out and unawareness comes in, and awareness goes out when it becomes intolerable to itself? Or when the human person has become incapable of reflecting upon himself as he reflects about himself and his ability to infinitely reflect upon himself? Or to use scholastic terminology, when the human person has irreversibly ceased to be an individual substance of rational nature? At this stage of philosophical and theological research, very cautious qualified answers can be given. Nonetheless, such a theory has already been proposed by philosophers and theologians, Catholic and non-Catholic. To cite Richard A. McCormick, S.J.: 'At a certain point... it is legitimate to say that this person is dead' or 'there is here no longer a human person'. What is that point? Since organs function but it is the person who lives and dies, the determination of this point involves not merely clinical knowledge, but also a grasp of the meaning of person upon or against which a definition of the absence of personhood can be made. Admi-

10 Boethius, De Duabus Naturis, c. III. Cf. De Pot., q. 9, a. 4, Where St. Thomas formulates the same definition as follows: 'Distinctum subsistens in aliqua natura intellectuali' (a distinct subsisting being endowed with intellectual life); S. Th., I, q. 29, a. 3; III, q. 16, a. 12, ad 2.
11 Richard A. McCormick, S.J., 'Notes on Moral Theology', Theological Studies,
tedly, McConnick does not specify at what stage in the process of
death we can no longer speak of the human person or what constitutes
the human person. His intention is simply to point out that there is
such a stage, namely that in the absence of whatever element consti-
tutes the human person, possibly in the absence of brain activity, no
person is present.

(c) Finally, if such a value-judgment can be made with respect to the
dying person (a value-judgment that has a scientific and medical ba-
sis), can one not also make a similar value-judgment with respect
to the human being and the human person at the inception of life?

III - THE HUMAN BEING AND
THE HUMAN PERSON AT CONCEPTION

When the fetus becomes in fact a human being, or is to be so con-
sidered, is probably the most crucial problem in the abortion debate.
Though the answers provided range all the way from the moment of con-
ception to the moment of birth, producing in the process three major
schools of thought, it is fairly well acknowledged that what starts the
human being on his way is the fertilization of the female egg by the
male sperm.12

29 (1968) 699-700. Emphasis is mine. See also, Peter Hebblethwaite, S.J., et
Daniel Callahan, Abortion: Law, Choice and Morality (New York: MacMillan,
‘The Medical, Moral and Legal Implications of Recent Medical Advances’
(A Symposium), Villanova Law Review, Summer 1968; Church Assembly Board
for Social Responsibility, Decisions About Life and Death (London: Church
Information Office, Westminster, 1965), pp.9-12; Roger Troisfontaines, S.J.,
‘Protection de la vie ou respect de la personne?’, Annales de Droit, XXXI
(1971) 391-406; Rudolph Ehrensing, ‘When is it really Abortion?’, National

12 As classified by Callahan, op.cit., pp.377-401, the three schools of thought
which concentrate their attention on the beginning of the human being or human
life and the point at which that human being ought to be valued as such are the
following:

(a) The Genetic School which draws both lines immediately at conception,
when the sperm fertilizes the egg; thus fertilization marks the beginning of the
human being and it is also at this point that it should be valued and protected
with the full force of morality and the law;
In the context of these considerations, the fertilized egg might not be a human person in the sense briefly outlined above. But, and this is a genetic fact, the fertilized egg contains in seed form the adult: whatever the adult will be, right down to the colour of his eyes and hair, the shape of his nose, etc., is determined the moment the sperm penetrates the nucleus of the egg, a moment (in time and in the process of fetal development) known as conception or fertilization. However, the fact has to be faced that the fertilized egg is not the adult. Whether or not it is an entity with full human rights is the contentious moral and

(b) The Development School which accepts fertilization as establishing the genetic basis for the human being, but assigns significant weight to the development process of the fetus, depending on the quality and stage or degree of fetal development: thus the human being might be said to begin (with value assigned accordingly), at 'quickening' or when the brain begins to function or later still at viability.

(c) The Social Consequences School which reinterprets, not necessarily denies, the genetic and biological constitution of the human being and concentrates its attention on the social consequences of abortion decisions. More often than not, in the view of its adherents the morality of abortion begs the question. In any case, it is argued that the biological data do not necessarily dictate a definition of who in fact is human and who is not. It is contended that 'humanness' should be defined in such a way as not to make abortion equivalent to destroying a human being: thus definitions of the human being would depend on a number of factors and so would the value to be assigned to the fetus: e.g., what women with an unwanted pregnancy think about their particular pregnancy, what an unwanted child means to them and their family, etc. Fetal rights, if any, are superseded by women's and families' rights.

13 Drawing the line at implantation (or impregnation) and not at fertilization as decisively marking the beginning of the human being are, among others, Paul Ramsey, Life or Death: Ethics and Options (Seattle: University of Washington Press, 1968), pp. 61-62; 'Points in Deciding about Abortion', in John T. Noonan, Jr., (Ed.), The Morality of Abortion (Cambridge: Harvard University Press, 1970), p. 67; André Hellegers, 'A Look at Abortion', National Catholic Reporter, March 1, 1967, p. 4. This school of thought, which is really a variation of the genetic school, has a strong argument in its favour. Ramsey et al. argue that in the case of identical twins the egg splits on implantation (which occurs some seven days after fertilization, i.e., after the fertilized egg has travelled down the fallopian tubes and has nestled itself inside the womb) so that if fertilization cannot be said to mark the beginning of identical twins (as it does in the case of the single human being), implantation certainly does. Though splitting is completed at about the same time as implantation, it is existentially distinct from implantation as a process.
legal issue. No geneticist and biologist as such will commit himself to saying that it is, nor will they assist the philosopher and legislator in their arduous task of assigning such a value to the fertilized egg, now a zygote.

As the zygote develops by metabolism, the EEG instruments have been able to capture the brain activity of the embryo even as early as eight weeks after conception. This does not necessarily mean that the brain has not started functioning until the embryo is eight weeks old. It probably means that the EEG is not sensitive enough to capture the brain movements earlier. However, it could also well mean that though in the early stages of fetal development the brain, the material organ of the intellect — or what Plato calls 'the philosopher-king of the soul' — is present in the form of a developing cell or aggregate of cells, there is no brain activity at all. One might then further suggest that conceivably the brain starts functioning in response to the stirrings of the intellect at a given moment in the development of the fetus and that this moment occurs some eight weeks after conception. On the evidence available, the contrary is harder to demonstrate. In this case, at conception (or at implantation) and until such time as the brain begins to function, we would have the human being (or perhaps more accurately, an entity having human life and human nature); at eight weeks or the moment the brain begins to function we would have the human person. To this effect, distinguishing between 'a human life' and 'a human person' (the demarcation line being 'the existence of a living human brain in some form'), Rudolph Ehrensing observes that 'the presence of human life does not necessarily mean that a human person is present'.

Roy U. Schenk, who argues along the same lines, claims that the fetus changes from a potential to an actual human person when, following a continuous series of developmental stages, it ultimately passes through a level of complexity 'at which self-awareness becomes possible'.

De Raeymaeker's own thinking on the problem is very close to this line of reasoning. In his discussion on subsistence or the formal constituent of person, De Raeymaeker makes the point that 'the subsistence of a human being is revealed by means of his conscious life. This activity is deliberate, free, and independent; it is sufficient unto itself. We call

14 Ehrensing, op.cit., p. 4.
it a "personal" activity; every man is a person.\textsuperscript{16} In support, he draws on contemporary philosophy and experimental psychology which link the notion of personality with that of consciousness.\textsuperscript{17}

If these hypotheses are acceptable (based as they are on the premises outlined so far they should appear plausible), then could we not possibly say that while abortion, performed in the first eight weeks of pregnancy or anyway before any brain activity can be detected, may indeed terminate the existence of a human being, it does not destroy a human person? If this could be the case, then could we not possibly admit a hierarchy of values and priorities when, morally and legally, we are confronted with serious conflicts of rights between the mother and the fetus?

IV - MEDIATE AND IMMEDIATE ANIMATION

Some answers to the last set of questions are found in history. It was, in fact, an analogous theory that in the past had been proposed and somehow or other found workable, both in philosophy and theology as well as in canon and criminal law, the major difference being that the problem was viewed from a peculiarly different perspective and, consequently, a different terminology was used. At this stage, a brief, though sketchy, historical survey might be helpful.

Some 2500 years ago, both Plato and Aristotle repeatedly referred to abortion in clear and unmistakeable terms not only as a common practice of their times but also as something that should normally be allowed and even prescribed both for reasons of state as well as for eugenic purposes. In almost the same breath that Plato advocated euthanasia for 'those who are not naturally good in body and soul' and 'those of the inferior part, and anyone of the others who may be born defective, they will put away as is proper in some mysterious, unknown place', he did not hesitate to decree and demand that no child be allowed to be born when its parents had passed the age limit prescribed by law for procreative purposes. He did not deny the people of his Republic sexual intercourse, but he did decree that effective contraceptive measures should be used and abortion was considered one such

\textsuperscript{16}De Raeymaeker, \textit{op.cit.}, pp. 240-241.

\textsuperscript{17}\textit{Ibid.}, pp. 17-20, 241.
Carrying on the Greek practice with regard to abortion and the Platonic inadmissibility into the perfect state of imperfect children, Aristotle supported abortion but with a difference and he should be credited for having initiated speculation on the moral value of embryonic life on the basis of biological data. Despite the fact that he considered abortion to be justified when the parents had contributed the state-prescribed quota of children, he added that should it be procured at all, 'let abortion be procured before sense and life have begun. What may or may not be lawfully done in these cases depends on the state of life and sensation'. In Aristotle’s philosophy, abortion was not a matter of indifference. It was rather a matter conditioned by the actual presence of 'life and sensation'.

Aristotle had advanced the theory of successive animation: at conception (and until some time after implantation), the soul of the embryo is vegetative only; as the embryo grows, the vegetative soul is informed by the sensitive or animal soul, eventually by the rational. In the process of this three-stage development of fetal formation and animation, a further distinction was made affecting the date of rational animation of the male and female embryos: the male fetus was said to have rational life within forty days following conception, while the period of pre-animation of the female fetus was thought to be twice as long. Aristotle’s theory envisaged the male and female fetuses to be animated or endowed with a rational soul within these periods respec-

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20 The Aristotelian phrase, 'before sense and life have begun', is not coextensive with conception or fertilization nor is it equivalent to viability and much less to birth. It is generally interchangeable with what is traditionally known as 'quickening'. Quickening referred to the child’s movements inside the womb and was considered to occur some time from the eighth to the twelfth week of pregnancy. I shall come back to this phenomenon shortly.

21 What is here suggested is not that man has three souls but rather that man’s soul manifests three operations: vegetation, sensation and rationality, with rationality, in the process of fetal development, manifested last.
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tively, just as soon as they were formed or ready to receive it.\textsuperscript{22}

Though the terms 'formed' and 'animate', and their respective contraries 'unformed' and 'inanimate', are to an extent interchangeable, there is a difference between them: the 'formed' fetus was one which had sufficiently developed with recognizable human features. When this point in fetal development was reached, the fetus was said to have become 'animate', i.e., once the fetus was 'formed', it received its rational soul and, as an immediate result of this reception, the fetus stirred, moved, kicked in the womb — or to use the popular term, 'quickened'! In other words, the unborn child quickened with joy, as it were, on receiving the rational soul, and it received the rational soul only when it was formed. It was thus that 'formation' and 'animation' came to be accepted as synonymous.

Whatever one might think of the theory, it was in any case a genuine attempt (which eventually proved workable) to establish some very sharp differences between the initial, later and intermittent stages in the development of the fetus, resulting in different values to be assigned to it.\textsuperscript{23}

In fact, the Aristoclean doctrine prevailed for centuries and was largely instrumental in shaping the Church’s and Western society’s policies towards abortion. Indeed, until just over a hundred years ago,

\textsuperscript{22}History of Animals, 7.3.583b. Hippocrates fixed the two periods at 32 and 42 days respectively. The Roman jurists, for practical purposes, selected the 40th day as the date of animation for both sexes. The Stoics did not consider the fetus animate until it breathed at birth. Cf. Hippocrates, 'The Nature of the Child', in Francis Adams (Ed.), The Genuine Works of Hippocrates (London: Bailliere, Tindall & Cox, 1939); Plutarch, Morals, III:230; Digest of Justinian, 48.19.38.5; 48.8.8. Joseph Palazzini, Ius Fetus ad Vitam (Rome: Urbaniana, 1943), p.19.

\textsuperscript{23}Concerning this matter, John T. Noonan, Jr., 'An Almost Absolute Value in History', in Noonan, op.cit., pp. 5-6, writes: 'This belief as to the time of formation of the fetus would suggest that there is no sensation before the fortieth day. Moreover, referring to growth in the early stages of the gestation of an animal, Aristotle speaks of its 'nutritive soul', a soul which would be like that of a plant (The Generation of Animals, 2.5.714a); and the original state of animals is not sleep, but something resembling sleep, a state which plants are in (5.1). On the other hand, this nutritive soul has the capacity for using heat and cold as its 'instruments' (ibid.). Where male and female are sentient, what the male contributes to generation is a 'sentient soul' (2.5.741b). The animal 'first and foremost lives because it can feel' (The Soul, 2.2.431b). . .'
specifically until 1869, the Church had accepted the Aristotelian theory and some of her ablest theologians, including St. Augustine and St. Thomas Aquinas, had argued that the embryo received its rational soul not immediately on conception but only after the embryo had gone through its vegetative-sensitive process. To use technical language, they argued for mediate, not immediate, animation.

The theory also provided the basis for the English common law rule to the effect that the unborn child became a human being at 'quickening', the moment at which the pregnant woman felt life or movement within her, possibly because, as Glanville Williams puts it, not without a touch of sarcasm, 'it was easy to imagine that the animus, life or soul, entered the body of the unborn infant when it turned or moved in the womb'.

St. Augustine found some justification for it in the Septuagint translation of Exodus XXI: 22-23, on the basis of which he drew the distinction between the animate and inanimate fetus, applying it as follows:

The body is created before the soul. The embryo, before it is endowed with a soul, is informatus, and its destruction by human agency is to be punished with a fine. The embryo formatus is endowed with a soul; it is an animate being; its destruction is murder and is to be punished with death ... Because the great question about the soul is not to be hastily decided by unargued and rash judgment, the law does not provide that the act pertains to homicide, for there cannot yet be said to be a live soul in a body that lacks sensation when it is not formed in flesh and so not yet endowed with sense.

Subsequently, mainly on the strength and authority of St. Augustine's and St. Jerome's interpretations of this biblical text, the distinction was canonically accepted by Pope Innocent III (1211), declaring abortion of the animate fetus to be punishable as homicide while no pun-

26 Epistles, 121.4; On Ecclesiastes, 2.5.
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ishment was envisaged for aborting the inanimate fetus. He did not commit himself as to the time of animation.27

St. Thomas, a staunch supporter of Aristotle’s philosophy, revived the theory28 and, though he considered abortion ‘grave peccatum et inter maleficia computandum’,29 he argued for mediate animation so strongly that he claimed that, before rational animation, abortion did not involve the same kind of sin as is involved after rational animation, for between ‘what is seed and what is not seed is determined by sensation and movement’.30 In this respect, he even suggested that

27Support for the distinction was also found in Canon Aliquando in Decretum Gratiani (1140), E. Friedberg (Ed.), Corpus juris canonici (Leipzig, 1879-1881), 2.32.2.7, which had incorporated Augustine’s distinction between the animate and inanimate fetus, decreeing that abortion is not murder if the soul had not yet been infused.

The Decretum Gratiani was a compilation of the then existing legislative measures collected and arranged systematically by Gratian, a professor at Bologna. This compilation was eventually codified as Gratian’s Decretals with addendas by St. Raymond of Pennafort. This new collection is known as the Decretals of Gregory IX who officially confirmed and promulgated it in 1234. Cf. Gregory IX, Decretals, whose Canon Sicut Ex, in Friedberg, op.cit., 5.12.20, corresponds to Gratian’s Canon Aliquando. Gregory’s Decretals, however, added another Canon, Si Aliquis, 5.12.5, derived from a tenth century penitential. Si Aliquis had specified that the penalty for homicide was applicable to contraception and abortion, regardless of the stage of fetal development. The implicit contradiction was interpreted to mean that while abortion is morally wrong, the canonical penalties should vary according to the stage of fetal development.

28S. Th., I, q. 76, a. 3; q. 77, a. 7; q. 118, a. 2, ad 2.

29IV Sent., d. 31.

30Explaining why Aristotle, Politics, VII: 1334b6-1337a7, had accepted abortion as a lesser evil, St. Thomas’s commentary, In Libros Politicorum Expositio, XII: 1241, states: ‘Sed quia datum est pueros non reservari ad vitam, declarat, si necesse sit istud fieri, qualiter cum minori culpa fiet: dicens, quod si aliquibus coniugatis fiant plures quam sit determinatum a lege, et ne­ cessae eos exterminari, magis procurandum est fieri abortum antequam sensus et vita insint quam cum infuerint, homicida a lege reputatur; et magis peccant; semen enim et non semen determinatur per sensum et motum. Sic igitur Aristoteles non dicit secundum intentionem suam, quod debent exterminari aliqui nati; sed secundum legem gentium; nec quod procurandus sit abortus absolute, sed si intericiaryi sunt ab aliquibus, magis faciendum est hoc ante sensum et vitam, non sicut bonum secundum se, sed sicut minus malum’. (Emphasis is mine).
'before the infusion of the rational soul, dead embryos will not rise again',\textsuperscript{31} and will not, consequently, enjoy the communion of saints. However, he was equally clear in stating that there was actual homicide when an ensouled embryo was killed.\textsuperscript{32}

Notwithstanding this theological support of Aristotle's theory and some justification for it in the Bible, some of the earlier Church Councils and Fathers had made no such distinctions — whether between the animate and inanimate fetus or whether between the moral and canon law — and had condemned all abortion as murder, regardless of the stage of fetal development.\textsuperscript{33} And so, in an attempt to bring to an end whatever uncertainties existed about the Church's position with regard to abortion (the distinction had made abortion relatively easier to justify canonically, if not morally), Sixtus V went back to the early Conciliar decrees and writings of the Fathers and through his Apostolic Constitution, \textit{Effraenatam} (October 29, 1588), retracted the then prevailing distinctions and theories and condemned all abortion regardless of the day or week it took place and not only renewed all previous censures directed against procurers of abortion (including the mother) but also inflicted severer spiritual and temporal punishments (including excommunication reserved to the Holy See) on all who in any way

This passage is significant in that, in Aristotle's view, abortion was not a positive good; accepting it as a lesser evil further required that if it should be procured at all, it had better be procured during the course of the first trimester, before sense and life have begun. Though it does not necessarily follow that this commentary reflects St. Thomas's position on the problem (this part of the Commentary was actually completed by Peter of Alvernia), it is not inconsistent with St. Thomas's philosophy on abortion and the theory of mediate and immediate animation.

\textsuperscript{31} \textit{IV Sent.}, d. 44, q. 1, a. 2.
\textsuperscript{32} S. \textit{Th.}, II-II, q. 64, a. 8, ad 2.
\textsuperscript{33} Cf. J.D. Mansi, \textit{Amplissima Collectio Conciliorum} (Paris, 1901-1927): Council of Elvira (313), Canon 53; Ancyra (314), Canon 21; Lerida (524) Canon 2; Constantinople (in Trullo, 706), Canon 91. Among the early Christian writings which condemned abortion are: the Didache (or Teaching of the Twelve Apostles), 2:2; the \textit{Epistle of Barnabas}, 19:5; the \textit{Apocalypse of Peter}. Among the writings of the Fathers are: Clement of Alexandria, \textit{Pedagogus}, 2.10.96.1; Athenagoras, \textit{Embassy for the Christians}, PG.6.919; Tertullian, \textit{Apologeticum ad nationes}, 1:15; Basil of Cappadocia, \textit{Letters}, 188, PG.32.672. See also R.J. Huser, \textit{The Crime of Abortion in Canon Law} (Washington, D.C.: Catholic University of America, 1942), pp.33-39.
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advised, procured or helped to procure abortion for any reason whatever. Thus aborting even an embryo into which Mediaeval theology in concert with Greek biology and philosophy had not yet infused a soul was regarded as murder and carried the same penalties as abortion procured at a later stage.\(^3^4\)

All too soon, however, the Sixtine Constitution gave rise to a number of practical problems, particularly in view of the penalty of excommunication which was reserved to the Holy See. Apart from that, it implicitly condemned the then prevailing theological opinion that abortion of the inanimate fetus to save the mother’s life was permissible.\(^3^5\) Furthermore, there was the inescapable fact that public opinion and popular practice had been so strongly (and conveniently) impressed by the suggestion that in the first trimester of pregnancy the mother carried a ‘soul-less’ embryo that the culture had come to accept early abortion with impunity.

Mainly because of these reasons, the Sixtine position aroused such great dissension and misunderstandings that Sixtus’ successor, Gregory XIV, through his milder Constitution, \textit{Sedes Apostolica} (May 31, 1591), reversed the Sixtine prohibition and restored the original distinction between the earlier and later stages of fetal development, condemning abortion as murder only in the case of the animate fetus. The force of the Gregorian Constitution lay in its greatly renewed stress of the distinction between the animate and inanimate fetus. Furthermore, he lifted the reservation to the Holy See of the excommunication penalty and delegated it to the local bishops. As far as abortion of the inanimate fetus was concerned, all the penalties were revoked and the


\(^3^5\) Among the casuists and theologians who during this period (1450-1750) were attempting to strike a moral balance between fetal and maternal rights were: Tomas Sanchez, S.J., \textit{De sancto matrimonii sacramento} (Antwerp, 1626), IX:20.9:224; Pedro de Ledesma, O.P., \textit{De magno matrimoniae sacramento} (Venice, 1595), LX:1.4; Leonard Lessius, S.J., \textit{De justitia et jure} (Lyons, 1653), II:9.2:58; Alphonsus de Liguori, \textit{Theologia Moralis}, in \textit{Opera Omnia}, L. Gaudé (Ed.), (Rome, 1905), III:394.
state of the question was remitted to what it had been before Sixtus, 'perinde ac si eadem constitutio in hujusmodi parte numquam emanasset!'\textsuperscript{36}

At this point, it is well to recall that the Church's acceptance of this distinction did not make any difference to her moral position with regard to abortion. The moral worth of abortion did not exclusively depend on the theory of fetal ensoulment and the distinctions simply arose from it. Acceptance of the distinctions simply meant that, canonically, the Church saw some variation in the analysis of the act. It involved a sharp distinction between moral law (as the Church understood it and proclaimed it) and canon law and its penalties. But, of course, if this aspect of the problem had not been so nebulously and erratically handled, it is quite conceivable that the moral problem would have been considerably minimized.

Be that as it may, the whole debate was given the Gordian knot treatment by Pius IX whose \textit{Apostolicae Sedis} (October 12, 1869) proclaimed the Church's position reiterating no less than the Sixtine position of 1588. By deleting the qualification \textit{animatus}, he implicitly abolished the distinction between the animate and inanimate fetus and with it the highly controversial question, considered insoluble in practical terms, as to when the fetus is endowed with a rational soul. The penalty of excommunication was extended to all abortions, no matter what stage of gestation was involved, and to all who knowingly and freely render the necessary formal assistance and cooperation in the performance of the act, who delegate another to perform the operation and who order the act to be performed, not excluding the mother. These provisions were eventually incorporated in the \textit{Code of Canon Law} (Canon 2350) which came into effect on May 19, 1918, under Benedict XV. Since then, the Church has restated her position on numerous occasions, in numerous forms.\textsuperscript{37}

With regard to the English common law rule concerning abortion, it


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should be interesting to note that the law in England evolved in an almost parallel fashion to the vicissitudes of canon law. Again, only the briefest of outlines can be attempted here and one hopes that no injustice to the multifaceted issues involved will be committed in the process.

Western society's attitude towards abortion has generally been inspired by what until the recent past had been the universal Christian moral consensus that abortion was as much a moral as a social wrong. Accordingly, the law particularly in such countries as were affected by Judaeo-Christian ethics – including England, the U.S., Canada and Continental Europe – had traditionally upheld the value of fetal life by seeking to reinforce its moral value through criminal sanctions. The prohibition was further strengthened by medical ethics and fear of social scandal.

Until 1803, the legal opposition to abortion in England had been founded on both common and canon law and was confined to the period after the fetus had quickened. Before quickening, however, it appears, to have been no crime at all. Actually, the law was silent with regard to abortion before quickening. The law's silence has been interpreted to mean that 'women enjoyed a common-law liberty to terminate at will an unwanted pregnancy', a situation that endured from 1327 to 1803. 38

The first reference to abortion in English criminal law is found in Bracton, judge, commentator of English criminal law and a contemporary of St. Thomas. 39 Incorporating Gregory IX's Canon Sicut Ex (Gratian's Aliquando), 40 Bracton specified that aborting a woman by blow or poison is homicide if the fetus is 'formed' and 'especially en-


39 Like most of the lawyers of his time, Henry de Bracton (d.1268) was a priest and held several ecclesiastical appointments in the Diocese of Exeter. His best known works are Note Book, a collection of cases, edited by Frederic Maitland (London, 1887), and Treatise on the Laws of England, edited by George Woodbine (London, 1915-22), 2 vols. Cf. 'The Bracton Memorial', Law Times, 155 (1923) 302-303; W.S. Holdsworth, A History of English Law (London: Methuen, 1936), according to whom Bracton's works were without equal until Blackstone composed his Commentaries five centuries later.

40 See supra, note 27.
souled'. Bracton's rule provided the foundation for the English common law rule and subsequent legislation to the effect that human life begins and the fetus becomes a human being in law at quickening. Five centuries later, in 1765, Blackstone would put it as follows: 'Life is the immediate gift of God, a right inherent by nature in every individual and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb'.

Though it was hardly enforced, such was the law in England until 1803 when, under George III, the law was put on a statutory basis and in the process lost the distinction between abortion before and after quickening. Consequently, all abortion was outlawed, the only penal provision that survived being that abortion before quickening was not punishable so severely as abortion after quickening. (In this respect, it paralleled Gregory XIV's *Sedes Apostolica* of 1591). Thus, administering poison to cause and procure miscarriage of any woman 'then quick with child' became a felony punishable by death; whereas attempting by drug or instrument to procure the miscarriage of any woman 'not being or not being proved to be quick with child' became a felony punishable by fine, imprisonment, pillory, whipping or transportation.

This change in attitude towards abortion was of great significance. It was probably the first time anywhere that abortion before quickening began to be legally considered as a criminal offence. And it was nineteenth century England that blazed the trail.

In actual practice, the moment at which quickening occurred varied, of course, from woman to woman and from pregnancy to another. It was at any rate the moment every pregnant woman looked forward to with joy ... or apprehension! The medical profession itself was divided over the time as to when a fetus is said to quicken but in at least one case (*Rex v. Phillips, 1812*), the court ruled that a fetus is quick when

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43 *George III* c. 58.
44 So popular was this belief that it became a parlour game of sorts whenever a pregnant woman happened to be around. To cite one such instance: at a New Year's Eve party in 1662, Samuel Pepys, observing how Lady Castlemaine twitched, thought it quite amusing to report in his Diary: 'Lady Castlemaine quickened at my Lord Gerard's dinner'.
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the mother feels it move,45 which was not much help anyway since some doctors questioned the medical significance of the event and others tended to interpret the statute so flexibly as to apply it to any stage of pregnancy or to whenever it pleased the mother to disclose that she had felt life within her!46 Quickening, in fact, has long since been recognised for what it really is: a mere psychological and physiological reaction on the part of the pregnant woman when she becomes aware of fetal movement within her.

It all too soon became clear that a change in the law was due and before too long, with the enactment of the Offences Against the Person Act (1861),47 the abortion law in England underwent further revision, in the course of which it lost the death penalty and the quickening distinction which had implicitly been retained by the 1803 statute and explicitly upheld by the courts. It is upon this Act that until recently the British, American and Canadian laws on abortion largely rested.

Among other things, this Act established that any unlawful interference with pregnancy is criminal regardless of the period of gestation. It further established a uniform maximum penalty of up to and including imprisonment for life. In particular, the Act covered two instances: (a) where a pregnant woman uses any means with intent to procure her own miscarriage; and (b) where anyone else unlawfully uses any means with such intent whether the woman was pregnant or not. The Act was particularly far-reaching in that it considered a crime not only the actual procuring of abortion (as eventually required by the canon law code), but also the mere attempt to procure abortion, making 'intent' a sufficient element for the offence. It was immaterial that both the attempt and the woman herself turned not to be 'fruitless', i.e., the attempt proved unsuccessful and, particularly where someone other than the woman herself was involved, the woman was not pregnant.48 In these respects, the 1861 Act provided clearer guidance that

47 Sections 58-59.
48 Among the means specified in the statute are: 'Any instrument' and 'poison or other noxious thing'. But in Rex v. Spicer (1955), concerning an abortion attempted by the manipulation of the hand, the jury were charged that: 'Whether
abortion was unlawful, for whatever reason and whether or not it was performed by a skilled obstetrician, the knitting-needle abortionist or the woman herself.

The subsequent vicissitudes of the 1861 Act and its widely divergent interpretations by both the medical and legal professions as well as by the courts are not of immediate concern to us and I shall, therefore, not go into any further excursions in this area. 49

So perhaps at this time I should switch back to the Aristotelian doctrine on mediate and immediate animation. Though the distinction between abortion before and after quickening has since been recognized as being far too subjective to offer any realistic and reliable guidance, the closely-related problem of animation has not been completely abandoned.

Despite the fact that the theory of immediate animation had, after the ringing declarations of Pius IX's Apostolicae Sedis, become the commonly accepted theological opinion, Arthur Vermeersch, S.J., among others, remained an ardent advocate of the mediate animation theory, maintaining that 'no solid arguments' can support the immediate infusion of the soul. 50 After all, any commonly accepted opinion is not this act does or does not produce a miscarriage does not matter. Whether it was a method which could or could not produce a miscarriage does not matter. The question is, what did he intend to do when he did the acts which were admitted by him in the witness box? Cf. Martin's Criminal Code of Canada (Toronto: Canada Law Book, Ltd., 1969), p. 256.

49 The carefully-worded Act of 1861 contained the term 'unlawfully' ('Whoever shall unlawfully ...'). Its real significance was not specified in and by the Act and both the medical and legal professions understood it to imply that some abortions might be lawful after all. But which abortions were lawful and which unlawful were by no means spelled out. The very serious abuses that followed this substantial doubt were rectified 68 years later, when the Infant Life Preservation Act (1929) came into being. The 1861 and 1929 Acts were tested in the history-making Rex v. Bourne (1938). For the abortion law reform movement, the 'Bourne Principle', which the Court established, was a major landmark. Eventually, through the adoption of the Medical Termination of Pregnancy Bill (1967) — in actual fact, this Bill consists of a series of subsections (i.e., exceptions) to Sections 58-59 of the 1861 Act — abortion became available to one and all for what someone called 'the price of a bus ticket!'

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necessarily the right one, nor does it in any way nullify a contrary opinion. For all one knows, the truth may well lie with the dissidents.

Following the Venneersch line of thought today are two notable Jesuits, Joseph Donceel and Thomas Wassmer, who, among other things, suggest that the theory could well provide us with some practical guidelines.

On the basis of hylomorphism to which the Aristodean-Thomistic tradition (not excluding the Church) is committed, Donceel argues that the hylomorphic conception of man is inconsistent with immediate animation. He claims that it is a metaphysical incompatibility for the rational soul, as the substantial form of a real human body, to be present when the human body is not real but only virtually present in the cell or aggregate of cells. Since the soul can only animate an actual human body, Donceel argues that some degree of corporal organization and development is necessary before the embryo can receive a rational soul. And he concludes in somewhat solemn terms: 'With St. Thomas I teach that at the moment of conception there originates a vegetative organism that will slowly evolve into a sentient organism to become, at moment I cannot determine, a rational organism, a real human being'. However, he does suggest that the beginning of brain activity might be such a moment.51

In support of mediate animation, Wassmer closely follows Donceel's line of thought: He writes:

If we really understand the meaning of substantial form, we would more likely question its presence at the moment of conception and consider that it gives determination to this specific entity only when this entity has a real human body, an inchoative human body and not just a virtual human body ... The presence of the rational soul from the moment of conception is more compatible with a theory of Cartesian dualism in which the soul is present as a complete principle and operating more properly as an efficient cause. However, if the

ience', The Dublin Review, 241 (1967) 295, finds the theory of mediate animation 'reasonably attractive'. For a comprehensive survey of the major theories concerning this problem, see V.F. Andriuska, Abortion (even from the moment of conception) is a Criminal Offence (Quebec: Université Laval, 1941), pp. 4-93.

soul is not the formal cause of the body but only the efficient cause in the cells, the question may be raised why it has to be a rational efficient cause. This speculation is congruous with a Cartesian dualism but hardly acceptable to a hylomorphic conception of man that was proclaimed by the Council of Vienne.

Wassmer mentions further: (a) the phenomenon of identical twins resulting from one ovum, fertilized by one sperm — which would seem to exclude animation immediately on conception, though not immediately on implantation (in which case, the zygote as it travels down the fallopian tube is without a rational soul); and (b) the possibility that embryologists might yet succeed in splitting the fertilized ovum just as they have artificially divided the fertilized ova of lower organisms. 'If success is found in these experiments', he writes, 'What is to be said about the spirituality, the non-divisibility of the rational principle, present there from the very moment of conception as the substantial form of the body?'

V – CONCLUSION

To return, if I may, to my proposition and express it interrogatively as follows: if we can speak of a union, a hypostatic union, between the divine person and the human being without saying that the divine person was also a human person; if we could possibly speak, as has been suggested, of a difference between the human being and the human person during the process of death, may we not also speak, on the basis of mediate and immediate animation, of a difference between the human being and the human person at the beginning of life — the demarcation point being the moment the brain begins to function (which can be ascertained quite reliably by electronic instruments, prior to any approval of any abortion requests, and independently of the mother's disclosure of quickening) — in which case, can we not also say that abortion performed prior to the detection of brain activity does not destroy a human person?

There are no easy answers and before I bring my discussion to a close, I should perhaps point out what by this time should have become

53 Ibid., p. 417.
obvious, namely, that these considerations have by no means been submitted to settle the highly controversial question in the abortion debate as to whether or not the theory of mediate and immediate animation is a valid one, nor whether the fetus is an individually distinct entity having human life, nor indeed whether or not it is a human being or a human person. My main concern has rather been to provide a base from which to speculate and argue in good faith as to whether or not there might be a stage in fetal development at which it can be said that the product of conception need not, in its initial stages, be assigned the absolute or almost absolute value we have traditionally endowed it with.

Whichever view is upheld concerning these seemingly unanswerable questions, there would still remain one vital issue to be resolved: the fetus must never be denied its right to life arbitrarily. The fetus has acquired that right by gift and therefore, if fetal life should be taken, the burden of proof (that his or her values and rights have a greater claim to recognition and may, therefore, override those of the fetus) lies with him or her who would take life. It is not a decision that can be taken lightly. But it may well be a decision that could be taken with moral impunity. As Wassmer observes: ‘Catholic moralists have not so absolutized and polarized life that, where there was doubt of its presence, other values have not permitted its forfeiture’.

Consequently, one could make a firm but compassionate ethico-legal case for the mother in mortal or near-mortal conflict or in circumstances equivalent to it. In an area which is so shrouded in and clouded with uncertainty, speculation and value-judgments, it would not be an unwise choice to open the windows of one’s mind and heart to let in a little fresh air. As in the past, that choice will be made no less wisely, no less responsibly.

P.J. MICALLEF

54 Ibid., p. 418.