Modernity, the Judiciary and Christian Benevolence towards the Unborn

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"Gonna hook me up to that great big suction pump, and bust that little piece of dust that's growing deep inside of me."[1]

Samevatting

Idees het gevolge, en dit is veral oor benaderings rakende die ongeborene waar. Hierdie artikel ondersoek die hedendaagse minagtende houding teenoor die ongeborene. Daar word ook in hierdie verband gepoog om moontlike invloede voortspruitend uit die modernisme te vind. Die regbank is in vele opsigte 'n akkurate beeld van nie alleen die waardes

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1 Mary Prankster, an American musician performing on 22 April 2001 at the NOW (National Organization for Women) Abortion Rights Rally called *The emergency march for women's lives organized to counter 'numerous attacks on women and really all people under the Bush administration'*: Loretta Kane, NOW national spokesperson, quoted in Martin, 2001. It is this statement by Mary Prankster which served as a substantial catalyst towards tackling a topic such as is presented by this article. This article should serve as a small step towards a better understanding of why a prominent part of the contemporary world is so dismissive (openly) towards the unborn, and what Christian insights towards benevolence tell us to do about all of this.

wat oor die algemeen deur 'n spesifieke gemeenskap ondersteun word nie, maar ook van die waardes wat deur die modernisme onderhou word. 'n Analise van die regsteorieë rakende die ongeborene soos in die Verenigde State van Amerika gevolg, 'n land wat die Recthstaats-idee versimboliseer, toon duidelik dat 'n sensitiewe, menslike en welwillende benadering ontbreek. As remedie vir hierdie toestand, word ook gepoog om die Christelike bydrae tot 'n sensitiewe, menslike en welwillende benadering teenoor die ongeborene te bevorder. Hierdie kan nuttig wees om die hedendaagse beweging verteenwoordigend van 'n gewilde minagtende houding (ook as gevolg van apatie) (hetsy vanaf 'n regs- of sosiale sy) teenoor die ongeborene in baie gemeenskappe teen te staan.

1. Introduction

Much of the abortion debate boils down to the questions of: "What is a human being?" and "Does 'it' have intrinsic worth"? How one approaches these questions determines the boundaries both of benevolence and civility, two integral constituents of a civilized, democratic and constitutional dispensation. As recently as half a century ago, coming up with a definition of "human being" would not have been a difficult task. However, when looking at contemporary approaches to the unborn, one needs to question the moral validity of a contemporary paradigm which proclaims the importance and inherent dignity of *all* human beings.[2] A dismissive attitude toward the unborn should be viewed as a prismatic and poignant example of callousness toward life in general (Perry, 2007:64).[3] This is (among others) also reflected especially in the American judiciary.[4] According to the Catholic Bishop's pastoral letter on warfare, violence accepted *in any form*[5] as commonplace, dulls mankind's sensitivities (Perry, 2007:64). Irrespective of one's personal view on the status of the unborn, images of broken limbs, punctured skulls and bleeding bodies reflect some or other form

2 In fact, even efforts aimed towards the legal protection of animals are gaining in popularity. From a South African jurisprudential perspective, see in this regard, David Bilchitz's, "Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals", *South African journal of human rights*, Vol. 25, (2009), 38-72.

3 M. Cathleen Kaveny, the John P. Murphy Foundation Professor of Law at the University of Notre Dame Law School holds this view.

4 By this it is not intimated that there are no voices at all within the United States' judiciary that support more emphasis on the protection of the unborn. From especially the 1973 *Roe v Wade* decision, abortion on demand was given legal authority by the courts, see Beckwith & Geisler 1991:49-53.

5 Authors' emphasis.

6 This is also why, within many societies of the modern-day world where abortion is so freely allowed, there are indications that such same societies attach some value to the unborn; for example, some employers exclude pregnant women from jobs that may pose a threat to the unborn; the recovering of

of violence that touches one's heart, irrespective of who or what one is.[6] Nonetheless, what we find generally in many societies and in the jurisprudence of such societies, is an approach which is ambivalent in regard to the status of the unborn. This excludes the approach to be taken towards the unborn pertaining to 'hard cases', such as rape, incest, ectopic pregnancies or major deformity (and deformity threatening the life of the mother) or any other instances where the mother's or the unborn's health is substantially at risk. Rather, what is of concern for purposes of this article is the general insensitivity towards the unborn regarding abortion chosen purely along utilitarian lines to satisfy the interests of the individual in contexts excluding the said 'hard cases'.[7] The utilitarian approach allows man to look to abortion as a necessary evil needed to "eliminate overpopulation, child abuse, feminization of poverty, illegitimacy" (Mansfield, Hopfer & Marteau, 1999:810). In other words, the approach towards the unborn becomes totally pragmatic, and in the process, benevolence, sensitivity and respect are neglected. Charles Rice rightly states that the experience of the twentieth century shows that utilitarianism and legal positivism offer no hope for a restoration of a principled respect for the right to life (Rice, 1989:552-553).

This article firstly emphasises the negation of the unborn within modernity[8], after which some basic traits of the *modernistic* currents flowing from the Enlightenment are presented in order to explain some *potential* causes for today's popular stance towards a substantial pro-abortion ideology. This includes a critical look specifically at the US judiciary regarding the status of the unborn (also emphasising contrasting approaches in legal paradigms which were at a time more religiously monolithic in nature). Although the judiciary (within mainly the US context) has become one of the beacons of the protection of human dignity, it does promote an arbitrary and insensitive approach towards the unborn,[9] which in turn reflects society's negation (whether direct or indirect) of the unborn.

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damages for personal injuries wrongfully inflicted on the unborn; efforts to warn against the damaging effects of drinking and smoking during pregnancy; emotions by parents on hearing that pregnancy has been initiated; the crime of feticide in some countries; and the recognition by tort law of the unborn child's rights from the moment of conception. Regarding the latter see Rice 1989:27-28.

7 It is doubted whether most abortions are due to the said 'hard' cases, especially in developed countries. Here it is also important to state that, although there may be much sensitivity towards the unborn within various societies, there is a substantially enough 'ambivalence' to merit serious concern.

8 'Modernity' for purposes of this article, refers to a post-Descartes period in Western philosophical thinking reflective of a cosmology which is characterised by anti-religious sentiment, a prominent faith in science, individualism, humanism, the prioritisation of pragmatism and utilitarianism, physical progress, moral relativism and the superiority of rationality

9 There are exceptions however, such as the views by Justice Scalia, which are dealt with later on in this article (albeit briefly).

Secondly, a Christian understanding based on benevolence (and implicated ideas), sensitivity and humaneness towards *all* of humanity is observed.[10] In so doing, an argument is also presented which supports the inclusion of religion in the public sphere, especially on matters so fundamental and near to what we as human beings really are. Therefore, this investigation generally proposes a re-consideration of those contemporary approaches which reflect insensitivity towards the unborn, whilst simultaneously vindicating Christianity's contribution towards a humane and caring environment in its sensitivity towards the status of the unborn.

2. Modernity and the unborn

In contemporary society, the negation of the unborn is evidenced in many ways besides the serious issues such as rape, incest, ectopic pregnancies, major deformity (and deformity threatening the mother's life), or substantial health risks to the mother or the unborn. One example is the many abortions resulting from intimate relationships that have gone awry. Then there is the drastic reduction in the number of children born with Down's syndrome over recent years, primarily due to legal abortions performed once the potential parents discover that their baby, if born, would be likely to have the condition (Mansfield *et al*., 1999:808-812).[11] As one researcher remarked, "We're not eradicating the disease. We've just gotten better at eradicating people with the disease."[12] A further example is the sex-selective abortions taking place in places such as India, where, as soon as it is found that the unborn is a female, an abortion is on the cards. In the US, while physicians are now prevented from aborting a baby using the intact dilation and extraction procedure,[13] they are still permitted to

10 Note that this goes beyond biblical arguments with more specific or direct references to the unborn. Much has already been written in this regard. Here the emphasis is mainly on 'benevolence' and 'humaneness'.

11 There are also many instances where advice is given to parents to terminate pregnancies where the unborn has a terminal illness. In this regard Colson states: "… what those involved in perinatal hospices realize is that allowing the child to live out his or her brief life, instead of persuading parents to play an active role in the child's death, will help prevent feelings of guilt". See Colson:2009.

12 Paige Cunningham, Executive Director of the Centre for Bioethics and Human Dignity.

13 The technical description of the procedure is: "In the usual intact D&E the fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass. […] Haskell explained the next step as follows: "At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and 'hooks' the shoulders of the fetus with the index and ring fingers (palm down). While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger. [T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing

use a hysterotomy[14] and non-intact dilation and evacuation[15 16]. These procedures are in some ways even more gruesome than an intact dilation and extraction. This insensitivity is further reflected in the highest echelons of academia. In this regard, Harvard Constitutional Law Professor Laurence Tribe, writing some twelve years after *Roe v. Wade*[17], finally conceded: "the more people have learned about the fetus as a growing being with brain waves and familiar human features, the stronger have been the feeling of many that the women's freedom is pitted against a genuine baby's life" (Smolin 1988:405). However, according to David Smolin, Tribe argues that even if it is fully true that pre-viable fetuses are full human beings, it should not change the result in *Roe*. While the Court claimed that States could not protect pre-viable fetuses because there is no consensus on their status, Tribe is arguing that, even if we all agreed that fetuses are full human beings, we must allow women to kill them (Smolin, 1988:405-406).[18] On further analysis of this approach, Tribe is simply proclaiming

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it completely from the patient." ((H. R. Rep. No. 108-58, p3 (2003), *Gonzales*: 550 U. S. at 138)). The more heart wrenching description came from the nurse, "Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms – everything but the head. The doctor kept the head right inside the uterus … The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp . . . He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used", ibid. at 138-139.

14 "A hysterotomy is exactly the same as a Cesarean section with one difference – in a Cesarean section the operation is usually performed to save the life of the baby, whereas a hysterotomy is performed to kill the baby. These babies look very much like other babies except that they are small and weigh, for example, about two pounds at the end of a twenty-four week pregnancy. They are truly alive, but they are allowed to die through neglect or sometimes killed by a direct act" (Schaeffer, 1982:299).

15 For a non-intact dilation and evacuation abortion procedure: "After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed" (See *Gonzales*: 550 U. S. at 135-136).

16 *Gonzales*: 550 U. S. at 147. "The act is inapplicable to abortions that do not involve vaginal delivery." See for example, *Carhart v. Gonzales,* 413 F.3d 791, 793-794 (8th Cir. 2005) and Stenberg v. Carhart, 530 U.S. 914 (2000).

17 410 U. S. 113 (1973) – United States Supreme Court decision creating a woman's right to choose abortion.

18 Perry observes that philosopher, Peter Singer, a staunch pro-choicer, has (similar to Tribe) acknowledged that, "the early embryo is a 'human life'. Embryos formed from the sperm and eggs of human beings are certainly human, no matter how early in their development they may

that being genetically human is no longer enough to guarantee legal protection.[19] This culture presents a seemingly diametrically opposed contradiction between the current insensitivities towards the unborn as human beings and the growing sensitivities toward efforts jurisprudentially and otherwise to spare the life of a murderer, preserve the environment, and protect the rights of women, children, and animals. University of Texas Philosopher, Jay Budziszewski, states that:

> First we were to approve of killing unborn babies, then babies in process of birth; next came newborns with physical defects, now newborns in perfect health … First we were to approve of suicide, then to approve of assisting it. Now we are to approve of a *requirement* to assist it … First we were to approve of killing the sick and unconscious, then of killing the conscious and consenting. Now we are to approve of killing the conscious and *protesting*, for in the United States, doctors starved and dehydrated stroke patient Marjorie Nighbert to death despite her pleading 'I'm hungry', 'I'm thirsty', 'Please feed me' … (Budziszewski, 1999:20-21)

In striving toward this ideal world, this place where disease is conquered and where persons no longer have to face unpleasantness, pain, or death, the unborn, the mentally disabled, the terminally ill, the elderly, and anyone who reminds the world of these inescapable parts of life, are sacrificed. As a result we find the practice of eugenics, which is "the science of improving the population by controlled breeding for desirable characteristics" (Fowler, Fowler & Thompson, 1995:9). Very popular in the twentieth century, today this is much less loudly trumpeted, though it lies behind many of the 'quality of life' arguments. Nobel Prize winner, Dr Francis Crick, explains in his book, *The origin of the genetic code*, a eugenic reason for the promotion of abortion:

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be. They are of the species Homo Sapiens, and not of any other species. We can tell when they are alive, and when they have died. So long as they are alive, they are human life". Notwithstanding, Singer is a staunch supporter of abortion (Perry, 2007:131-132).

19 Does the following perhaps reflect a historical antecedent and analogy? Political Science professor of the University of Berlin, Carl Schmitt, who later supported the Nazis, stated, "not every being with a human face is human". This phrase became a slogan which was often used in Nazi circles when denouncing the idea of universal human rights (see Perry, 2007:67). Much has been written about the medical ethics of Weimar prior to the rise of the Nazis. What is clear is that the medical ethics which allowed the termination of "lives not worth living" in relation to the retarded became readily adapted to the Nazi programme for the extermination of "sub-human" races. See Henry Friedlander's, *The origins of Nazi genocide: from euthanasia to the final solution*, in which he quotes the work by Binding & Hoche (eminent German Scholars of the 1920s) namely *Die Freigabe der Vernichtung lebensunwertens Lebens: Ihr Mass und Ihre Form* (Leipzig: Verlag von Felix Meiner, 1920), excerpt available at: http://www.nizkor.org/ftp.cgi/people/ftp.py?people//f/friedlander.henry/binding-hoche-01(accessed 2009, Dec. 1). Interestingly, Germany, conscious of its past, has been reticent to allow any "right" to abortion due to its wish to protect human life at all stages.

> It is not acceptable at the moment to discuss who should be parents of the next generations, who should be born, and who should have children. There's a general feeling that, if we are all nice to each other, and if everybody has 2.3 children, everything will pan out. I don't think that is true […] Some group of people should decide that *some* people should have more children, and some should have fewer […] You have to decide who is to be born.[20]

Today, with increasing frequency, that decision of 'who is to be born' is being made with dramatic consequences for women. China, for example, has a worrying track-record regarding the application of abortion along 'gender selective' lines.[21] Fearful of over-population, China adopted the one-child-per-family policy, forcing women to have abortions or undergo sterilisation after the birth of their first child (Kim, 2007). That policy was the realisation of eugenicist Dr Alan Guttmacher's[22] statement that "Each country will have to decide its own form of coercion, and determine how it is to be employed."[23] As recently as 7 July 2009, Justice Ginsberg admitted that advocates for legalising abortion had a eugenic aim behind *Roe v. Wade.* Commenting on her surprise when the Supreme Court in *Harris v. McRae*[24] upheld the Hyde Amendment, which forbids the use of Medicaid for abortions, she said in a recent New York Times interview: "Frankly I had thought that at the time Roe was decided, there was a concern about population growth and *particularly growth in populations that we don't want to have too many of.* So that Roe would be then set up for Medicaid funding for abortion."[25]

Darwin believed that if the undesirables could be prevented from reproducing, then society would be more productive, more healthy and closer to the enlightenment ideal man.[26] This speech sounds eerily similar to that of National-

20 Francis Crick, *The origin of the genetic code* (cited in Schaeffer, 1982:234). Emphasis is the authors'.

21 See, for example, *Human rights,* as reported in *Time,* 15 September 1995 quoted in Lee, 2001:294.

22 President of Planned Parenthood – World Population (1962-1973).

23 Alan Guttmacher, *Medical world news*, (6 June 1969), 11, quoted in Chesterton, 2000:10.

24 448 U. S. 297 (1980) – United States Supreme Court case holding that due process did not confer entitlement to federal funds to realise protected rights.

25 Justice Ruth Bader Ginsburg, quoted in Bazelon, 2009: (http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html?pagewanted=4&_r=48ref=magazine, (accessed 7 September 2009). The emphasis in the quote was added.

26 Charles Darwin's relative, Leonard Darwin, stated to the Cambridge University Eugenics Society (1912): "Hence it is to be hoped that in the more enlightened future, a system will also be established for the examination of the family history of all those placed on the register as being unquestionably mentally abnormal, especially as regards the criminality, insanity, ill-health and pauperism of their relatives, and not omitting to note cases of marked ability. If all this were done it can hardly be doubted that many strains would be discovered which no one could deny ought to die out in the interest of the nation" (Leonard Darwin, speech to the *Cambridge University Eugenics Society*, 1912 quoted in Chesterton, 2000:17).

Socialist Nazi Germany which legalised abortion in 1931 and later implemented its 'racial eugenics' programme of human genetic engineering (Lee, 2001:294). In Canberra, the National Health and Medical Research Council stated that "it is quite in order to experiment on dying human fetuses not yet dead" (Lee, 2001:287). According to Nigel Cameron, the direction in which such a statement ultimately leads is: "If the unwanted unborn can be painlessly experimented to death for the good of science – there will come a time when the born as well as the unborn, the unloved handicapped infant, the aged and the infirm, anyone whom nobody wants […] and maybe you and I among them – will be fodder for science and its experiments."[27] While this may sound absurd, history has proven that if the ideology is put in place, then nothing is outside of the realm of possibility.

Is there no sign of respect towards the unborn from those more affiliated to a pro-choice approach? In the United States abortion language accommodates the unborn not as a human being, but as the property of the mother to do with as she will until viability.[28] In the United States, at the point of viability, the state is allowed to have an interest in preserving 'meaningful' potential human life, but may not necessarily restrict all abortions.[29] The 'health of the mother exception' must always be attended to, and as the Supreme Court has defined health of the mother in *Doe*[30], the exception is broad enough to cover basically any concern (physical, mental, economic, family) a woman might have to make the unborn available for termination until the very end of labour.[31] In any event, viability does not serve as a real restriction.

Looking back at history, some explanation can be attempted for this present state of affairs. During sixteenth-century Europe, with the birth of modernity, the

27 Cameron, *Life and work* quoted in Lee, 2001:288.

28 Basically viability refers to the stage when the fetus is capable of surviving outside the body of the mother or where medical technology can sustain the unborn outside the body of the mother. Viability is established at *approximately* the beginning of the third trimester (six months after conception). For a critical look at the relevance of viability in the abortion debate, see De Freitas, 2005:136-138. Also, in the words of Perry: "Why should we think that one lacks inherent dignity just because one cannot yet survive outside the womb in which one has been gestating … It bears emphasis, then, that some of us who affirm that human fetuses, pre-viable as well as post-viable, have inherent dignity do so simply because we can discern no good reason – no non-arbitrary reason – not to affirm it, given that we *already* affirm that all born human beings have inherent dignity" (Perry, 2007:58).

29 There are many countries whose abortion legislation prioritises the protection of the fetus from six months after conception (and six months is approximately when viability is established).

30 *Doe v. Bolton* 410 U. S. 179, 1973.

31 Ibid., 410 U. S. at 192.

gradual establishment of States and a growing pre-occupation with science and economic demands, Christianity started shifting towards the background, superseded by a new ideology. This trend eventually distanced itself from the Christian confessional social and political paradigm, eventually having a profound effect on man's vision of himself and of his neighbour. Schaeffer sums up the utopian dream of the Enlightenment in five words: "reason, nature, happiness, progress, and liberty" (Schaeffer, 1982:148).

With the proper understanding of man, of how to motivate, control, and improve him, the Enlightenment philosophers believed that each subsequent generation would live happier, more fulfilled and more benevolent lives (Capaldi, 1967:19). According to Kantian thinking, "laws that have true obligation attached to them […] have their expression in the agency of an autonomous will freely exercising practical reason" (Hochstrasser, 2000:198). In terms of this view, people act in obedience to these laws by their *own choice* because the law lines up with *their* understanding of logic. According to Julien Offray de La Mettrie, "Man is but an animal, made up of a number of springs, which are all put in motion by each other."[32] La Mettrie felt that the end goal of life is happiness, "and since sensation is the essential quality of living beings, the sensual pleasures are the basis of happiness" (La Mettrie, 1796:156-157). The good in life would be to seek the most comfort or pleasure and to avoid at all costs the pains inherent in life. With the pleasure and pain motif, man's loyalty began to lie with a pursuit of pleasure, comfort, and materialism. Philosophers, in their optimism, felt that everyone pursuing his/her own comfort would combine and create a better, more humane world than the one ruled by Christianity. This was the world, the individual, they strove to create. Sadly, it was not the world their premises brought forth. The effect and defect of modernity is revealed both in the inability of our legal system to maintain a method of discourse by which it can morally condemn and legally prevent confusion regarding the status of the unborn, and also in the increasingly brutal manner in which abortion *on demand* is defended (Smolin, 1988:404).[33] The judiciary is in many instances a good example of this over-emphasis on individual interest and insensitivity towards the unborn. The judiciary is given a mandate by society in general to decide on the 'rightness' or 'wrongness' of issues, and therefore the judiciary reflects the dominant social values of a given society – and in the process reflects traits similar to those represented by a modernistic philosophy.

32 La Mettrie, *L'Homme machine*, quoted in Cobban, 1960:116.
33 Emphasis is the authors'.

3. A judiciary beyond jurisdiction

Efforts at establishing the Rule of Law, with the judiciary as a 'neutral' application of the law with values and principles affiliated to a democratic and free society, is to be appreciated. However, many countries are beginning to look to the court system (both nationally and internationally) to be the keeper of morality, the guarder of the gates, and the final voice on various issues, including abortion – the public believing that if the justices deem something legal, then it is also good to turn to the courts for instructions on how to live and on the views they should adopt in the above debates. The US judiciary is a prime example where the courts play a major role in serving as authority regarding the legal status of the unborn.

In *Planned Parenthood v. Casey*,[34] the US Supreme Court demonstrates its desire to retain its position of power, reflecting that this is more important than reconsidering the plight of the unborn even when the United States Department of Justice asks.[35] Legislators often look to the judiciary to solve contentious issues so that they do not have to take a stand which would alienate a large number of their constituents. Yet this is not wise. Justice Scalia points out the stupidity in allowing the judiciary to amass such power and to decide such vitally important issues when he says, "the point at which life becomes 'worthless' and the point at

34 505 U. S. 833 (1992).

35 "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*... its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. […] But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure … So to overrule under fire in the absence of the most compelling reason to re-examine a watershed decision would subvert the Court's legitimacy beyond any serious question. […] The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure. The Court's duty in the present cases is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the *Fourteenth amendment*. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe's* essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe's* original decision, and we do so today", Casey at 867-869 (also seemingly suggesting if there hadn't been such pressure, the court would have been free to overrule, but because people vigorously protested the decision the court could not even consider looking at the plight of the unborn).

which the means necessary to preserve it become 'extraordinary' or 'inappropriate', are neither set forth in the Constitution nor known to the nine justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory."[36] Yet on the abortion issue, most of the decisions *have* been left to the courts which have demonstrated a shocking lack of sensitivity (especially in the US) towards the unborn.[37]

Judges and academics often attempt to mask their insensitivity behind the guise that they are pursuing a neutral course: they are not deciding the really tough questions, however – an approach which contradicts the optimism in opposing issues related to the death penalty, the criminalisation of feticide, and cloning, to name but a few. Pluralists often claim that since it is "above their pay grade to decide when life begins",[38] the government should remain neutral and give equal respect and concern to both those who feel the fetus is a human baby and those who think that it is not fully human until its birth. Budziszewski dispatches that notion by showing the failure of attempted neutrality:

> We don't say that it's alright to fire bullets into a crowded room because I might not hit anyone; we say that because I might hit someone, I'd better

36 Justice Scalia concurring in *Cruzan v. Missouri Department of Health* 497 U. S. 261, 293 (1990).

37 Congress found, among other things, that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited", *Gonzales v. Carhart* 550 US 124 (2007) at 141 – and yet, the judges upheld several of the procedures. Although this article focuses on the US judiciary regarding the unborn, it by no means implies that the judiciary in many other countries have not and are not doing similar (or the same).

38 Associated Press (referring to when President Barack Obama was a presidential candidate) states: "Obama says he was too flip on the abortion issue: He says the question about when a baby is entitled to human rights is 'tough'.", 7 September 2008 MSNBC, http://www.msnbc.msn.com/id/26593948/, (accessed 2009, July 16). His running mate, Joe Biden's answer in the same article is even more troubling: "I'm prepared as a matter of faith to accept that life begins at the moment of conception. But that is my judgment … For me to impose that judgment on everyone else who is equally and maybe even more devout than I am seems to me is inappropriate in a pluralistic society." Abraham Lincoln's analysis of Stephen Douglas' similar statement about slavery holds true for Biden's as well; simply substitute the word "abortion" for "slavery" in the following passage: Douglas maintained that although he personally believed slavery was wrong, he did not believe that the Federal Government should eliminate slavery and impose its judgment that slavery was wrong on all the states which should be able to come to their own conclusions about slavery. Lincoln replied, "When Judge Douglas says 'he don't care whether slavery is voted up or down', […] he cannot thus argue logically if he sees anything wrong in it; […] … When Judge Douglas says that whoever, or whatever community, wants slaves, they have a right to have them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that anybody has a right to do wrong.", *The collected works of Abraham Lincoln,* Roy P. Basler (Ed.) (New Brunswick, NJ: Rutgers University Press, 1953), 3:256-257, as quoted in Arkes, 1986:24.

> not. So instead of saying that 'I can kill the baby because he might not be human', why don't we say that 'since he might be human I shouldn't'? (Budziszewski, 2006:16).

Budziszewski's argument illuminates where the neutralist does not accurately give equal respect to both views, and that law and policy fail to remain neutral (as well as fail in their sense of benevolence and humaneness). As Budziszewski states, "while claiming to reconcile competing views without deciding which one is true, it [the neutralist] covertly supposes the truth of one of them but spares itself the trouble of demonstration" (Budziszewski, 2006:17).[39] As Budziszewski shows, attempts to remain neutral are a lost cause. The government's choice is not between deciding the issue and remaining neutral; rather it is between covertly or overtly endorsing one theory of personhood over another. Sadly, to date, many judges have chosen the covert theory that lacks sensitivity and benevolence towards others under the guise of remaining neutral. Neutrality can in fact lead to substantial insensitivity.

It is appropriate to refer to the judicial apathy in America, as its judges have taken the most liberal insensitive approach towards the unborn of any 'civilized nation' in the world. Also, American jurisprudence regarding the unborn has been contagious towards other jurisdictions as well as towards abortion jurisprudence. John Noonan succinctly summarises the American situation: "By virtue of its opinions, human life has less protection in the United States than any country of the Western World."[40] Because of the combination of two decisions handed down together in 1973 (*Roe* and *Doe*), the United States Senate Judiciary committee concluded that "no significant legal barriers of any kind whatsoever exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy".[41] Some of the Justices have decided that it is up to every individual to decide whether the unborn deserves a chance at life because "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[42] However, a person may not decide that under their 'personal belief

39 Also see Budziszewski, 2009:173-176 for an outstanding argument for the dismantling of 'neutrality'.

40 John T. Noonan, Jr., Why a Constitutional Amendment?, *Human Life Review* 1:28 (1975) as quoted in Schaeffer, 1982:294-295.

41 Report, Committee on the Judiciary, U.S. Senate, on Senate Resolution 3, 98th Congress, 98-149, 7 June 1983, 6, quoted in Beckwith & Geisler, 1991:49.

42 Casey at 852. Does this ring a bell with the relativism postulated by Thomas Hobbes: "Whatsoever is the object of any man's appetite or desire, that is it which he for his part calleth

in the mystery of life and their own concept of meaning and existence', an African American person is not a human and so he can kill him without fearing repercussions from the state. This passage seems only to work for the judges when they apply it to the unborn.

Historically, the judiciary was not always so disinclined or confused on how to define personhood.[43] In *Doe v. Clark* (decided in 1795) the court interpreted the ordinary meaning of the word 'children' in a will, to include a child still in the womb.[44] In *Thelluson v. Woodford*,[45] the court declared that unborn children as such are 'entitled to all the privileges of other persons'. Blackstone's 1809 commentaries explain that not only do children have rights, but that parents have duties toward their offspring:

> The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. *By begetting them therefore, they have entered into a voluntary obligation, to endeavour, so far as in them lies, that the life which they have bestowed shall be supported and preserved*. And thus the children will have a perfect *right* of receiving maintenance from their parents (Blackstone Vol. 1, Ch. xvi:1809).

As science made advances, laws in England and America kept pace with the discoveries. For example, "after the discovery of the human ovum in 1827, the British Parliament in 1837 enacted a new abortion statute effectively protecting unborn children even from the moment of conception" (Lee, 2001:271). A New York Statute of 1829 made it a charge of manslaughter for any abortionist who

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good; and the object of his hate and aversion, *evil* […] there being nothing simply and absolutely so; nor any common rule of good and evil, to be taken from the nature of objects themselves", *Leviathan,* Part I. ch. vi. quoted in Cobban, 1960:76. Budziswesk aptly also comments: "The right to define one's own existence ends up as an effort to define other people's non-existence" and, referring to Rommen's, *The natural law: A study in legal and social history and philosophy*, Budziszewski adds: "Rommen would lay the blame for the *Planned Parenthood v. Casey* decision on the Enlightenment's concept of natural rights" (Budziszewski, 1999:2-3).

43 This confusion is not only with respect to the US judiciary, but also with respect to the judiciary in many other countries.

44 *Doe v. Clarke* (2H. BI. 399-126 *Eng. Rep.* 617). Contrast *Doe v. Clarke* with the California Supreme Court's unwillingness in 1970 to declare a fetus beaten to death in its mother's womb a child, so that the man could be convicted of murder, *Keeler v. Superior Ct. of Amador,* 470 P.2d 617 (1970).

45 *Thelluson v. Woodford* (4 Ves. 277, 31-31 Eng. Rep. 117) as mentioned in Lee, 2001:271.

caused the death of a quickened child, unless the reason was to preserve the life of the mother. These statutes indicate that the states considered abortion something that needed to be prevented and that the unborn had value. In 1969, Thomas F Lambert Jr (editor-in-chief of the American Trial Lawyers' Association) wrote, in an article titled "The legal rights of the fetus", about the legal rights the fetus possessed from conception. Lambert referred to the 1946 case, *Bonbrest v. Kotz* (Lee, 2001:271). There "a trial court held that an infant born alive had a cause of action for prenatal harm suffered while in a viable state – in that case, brain damage caused by an obstetrician. The court persuasively reasoned that the unborn child was a separate biological (and hence legal) entity from the mother" (Lambert, 1969:370, 383 & 385). In *Sinkler v. Kneale*[46], Justice Bok wrote that "medical authorities have long recognized that a child was in existence from the moment of conception" – in existence as an individual human being distinct from his or her mother, "and not merely a part of its mother's body" until some unspecified time after conception. The medical field also provided historical grounds for opposing the legalisation of abortion. The original *Hippocratic oath* required doctors to swear: "I will not give to a woman a plessary to produce abortion."[47] It was not until the early nineteen-sixties that the *Hippocratic oath* underwent a revision which removed the clause about abortion.[48]

4. A Christian approach towards the unborn and humanity

From a Christian point of view, much has been written on the status of the unborn against the background of Scriptural references directly implicating the unborn. This includes research regarding in-depth analysis on the relationship between the unborn and the meaning of 'life' as well as the implications that an understanding of the 'Image of God' has on the status of the unborn. This investigation, among others, seeks to add to such discussion, by promoting the Christian contribution towards a sensitive, humane and benevolent approach towards the unborn. In the aforementioned sections on modernity and the judiciary, it is clear that a sensitive, humane and benevolent approach is lacking in many jurisdictions; jurisdictions which have moved from a Christian ethos to a liberal, dominant non-religious

46 164 A. 2d 93 (Pa. 1960) 26-27 NACCA L.J. 143-46.

47 See *Hippocratic oath* quoted in Lee, 2001:271.

48 See Dique, referred to in Lee, 2001:278. In 1948, the *Declaration of Geneva* was adopted by the General Assembly of the World Medical Organization, and began to be used in medical school graduation ceremonies. The new *Declaration* contained less of an adamant rejection of abortion stating simply: "I will maintain the utmost respect for human life – from the time of conception. Even under threat, I will not use my medical knowledge contrary to the laws of humanity", Lee, 2001:278.

ethos. Some Christian postulations on sensitivity, humaneness and benevolence in the context of the unborn could prove useful in countering the contemporary tide of a popular dismissive (also as a result of much apathy) attitude (be it legal or social) towards the unborn in many societies.

With increasing frequency, social and legal pressures require Christians to check their beliefs at the entrance to the public square when engaging in dialogue on any issue. According to Smolin, the establishment of religious ghettos has become the order of the day. Establishment liberalism has long lent a sympathetic ear to those to its ideological left, while holding in contempt those on the ideological and, especially, religious right (Smolin, 1988:406). John Rawls' much-lauded work, *A theory of justice*, synthesises in Kantian natural-law terminology, the relativist view that particular conceptions of the good, including moral and religious absolutisms, must by definition be excluded when constructing the theoretical basis of the modern, liberal, democratic state" (Smolin, 1988:402). This should not be the case.

We are reminded that, according to modern-day thinking, although the idea of human rights is of recent origin, the notion of the immutable rights of individuals goes back to the Christian belief in the autonomous status and irreplaceable value of the human personality (Perry, 2007:146). Man is created in God's image,[49] and God declared him to be "very good".[50] Being thus *Imago Dei* gives humans inherent dignity. Men are not just blobs of cells which have evolved out of primordial soup, but people created and given life as a gift. Men are loved by their Creator, even to the point where He was willing to die for their sins that they might have life.[51] If the Creator loved His creation enough to die for him to have life, "then an emphasis on the right to life is congruent with the Biblical view on the holiness of life and the calling of man to protect, preserve, and expand life."[52] Human life, however, is not just valuable because it is created and loved. It possesses inalienable dignity and worth because of its unique calling to "live in loving fellowship with the triune God for all eternity" (De Freitas [quoting Davis], 2006:177). Because the rights men enjoy as a result of their dignity and worth "are divine gifts of God, there is no room for self-aggrandisement of man's rights

49 "So God created man in his own image, in the image of God he created him, male and female he created them.", Genesis 1:27 (NIV)

50 Genesis 1:31 (NIV)

51 "For God so loved the world [humanity] that He gave His one and only Son, that whoever believes in Him shall not perish, but have eternal life." John 3:16 (NIV).

52 R.K. Wüstenburg, *A theology of life: Dietrich Bonhoeffer's religionless Christianity*, quoted in Vorster, 2006:59.

or a humanistic reveling in our human rights" (Raath, 2006:108-109). Thus, the Christian understanding of natural rights does not create selfish pride and entitlement as a purely humanist definition would. According to J.M. Vorster, throughout the history of Christian ethics, theologians emphasised the importance of the law for ethical behaviour and also the fact that love is the fulfillment of the law. This is of particular interest for the current global human rights debate, where, after a century of widespread oppression, genocide, ethnic cleansing and the gross exploitation of people by way of social structures and political policies, the human rights debate has become more potent. Vorster adds that the human right is none other than the unfurling of the individual's life as a result of his worthiness as a human being created in the image of God (Vorster, 2006:62-63). This understanding has substantial implications in regard to a benevolent and sensitive approach towards the unborn.

Along with being created in God's image, Christians believe that man is immortal and that due to the effects of sin he will one day either ascend to heaven or descend to hell. This places a burden on Christians to demonstrate benevolence to 'those' around them so that they might represent Christ to a hurting world. C.S. Lewis expands on this idea of why one should love one's neighbour and promote his or her good[53]:

> It is a serious thing to live in a society of possible gods and goddesses, to remember that the dullest and most uninteresting person you talk to may one day be a creature which, if you saw it now, you would be strongly tempted to worship … All day long we are, in some degree, helping each other to one or other of these destinations. It is in the light of these overwhelming possibilities, it is with awe and the circumspection proper to them, that we should conduct all our dealings with one another, all friendships, all loves, all play, all politics. There are no *ordinary* people. You have never met a mere mortal […] Next to the Blessed sacrament itself, your neighbor is the holiest object presented to your senses (Lewis 2000:45-46).

Also regarding the rights/duty relationship, Christianity has much to offer, which in turn assists substantially towards a deeper understanding of benevolence towards one's 'neighbour'. Social benevolence works for the common good, because, while orthodox Christianity provides humans with unalienable rights, it also provides them with corresponding duties, and the two are inseparable. Christians believe humans have rights to discharge duties: "To speak of one

53 Which, by implication, includes the unborn.

without the other is ultimately destructive. Rights without duties to guide them quickly become claims of self-indulgence. Duties without rights to discharge them quickly become sources of deep guilt" (Raath [quoting John Witte], 2006:106). Raath summarises that "natural right is a gift of God, inscribed on man's heart in the kingdom of creation for *serving God and one's neighbor* through love. Human rights are fundamentally rights of love to be maintained for the glory of God" (Raath, 2006:122).[54] Mankind has an inherent right to serve, not to be served. Yet in today's culture, citizens want all the expanded rights the law will grant them, without any responsibility or corresponding duties that belong with those rights. This has eventually led to an insensitivity towards the unborn, and therefore towards mankind.

Raath points to the fact that Luther, in his commentary on Romans, reflects on the essence of benevolence and its impact on the failings of mankind: because rights and laws should be rights and laws of love, those who are strong are to uphold the weak and promote their good. These are not the requirements of a man driven by selfish ambition to amass the most happiness, comfort, or materials. Instead, it is the requirement of the principle of charity, which "obliges individuals to renounce their own right generously and to prefer not to offend other's rights rather than to exercise their own" (Raath, 2006:114-115). So, although a woman 'may' have a right to choose, under this principle of charity she would choose not to offend her unborn child's right to life by exercising the right to choose, even if the government says it is legal. Indeed Luther further says that "the principle should be maintained that where love and rights are in conflict, love determines" (Raath, 2006:117). This principle of charity and social benevolence shows great respect to other members of humanity and when applied to the government, it serves to protect the rights of the citizens from government infringement. It "obliges rulers to bear their own fallibility in mind, to receive enlightenment and to discuss all the aspects of instances where individuals feel offended" (Raath, 2006:120).

From a Christian point of view, there is no distinction between *biology* and *personhood*, between *biology* and *being human*, and between *body* and *human being*. This in turn also enriches the meaning of true benevolence in the sense of 'caring for the entity as is' without fragmenting such an entity into personal and non-personal characteristics. Robert George refers to the secular understanding of the human person as an essentially non-bodily being who inhabits a non-personal body. This approach forms part of the secularist's view that, in contrast to the view that an embryo, a retarded child or a comatose person has value and dignity,

54 Emphasis is the authors'.

the secularist will rather attach an *instrumental purpose* to the purpose to which their lives can be put. In other words, the secularist's test would be what the embryo, retarded child or the comatose person "can do, how they feel, how they make us feel, or what we judge their 'quality' of life to be" (George, 2001:8).[55] This view (which contrasts with the Judeo-Christian view, which sees the human person as a dynamic unity of body, mind, and spirit) sees the 'person' as the conscious and desiring 'self' as distinct from the body which may exist (as in the case of pre- and post-conscious human beings) as a merely 'biological', and, thus, sub-personal, reality. According to George, this dualist understanding makes nonsense of the experience all of us have in our activities of being dynamically unified actors – "of being, that is, embodied persons and not persons who merely 'inhabit' our bodies and direct them as extrinsic instruments under our control" (George, 2001:9).[56] Do we distinguish between the body of a dog and any other character that a dog might have, in our opposition against cruelty to animals?[57] This also has implications for benevolence directed at the 'being' due to its

55 This is similar to the position in contemporary secular ethics which is of the view that the unborn are not capable of reasoning, complex communication and so forth (and therefore need to enjoy protection). Budziszewski explains that the ruling tendency in this type of ethics is to concede that there are such things as persons, but to define them in terms of their functions or capacities, in the words of Budziszewski: "not by what they *are*, the image of God, but by what they can *do*. According to Budziszewski, this functional approach to personhood, namely that 'they *are* their functions' blows the core right out of the moral code, Budziszewski adding that: "By contrast, if I am a person then I am *by nature* a rights-bearer, *by nature* a proper subject of absolute regard – not because of what I can do, but because of what I am" (Budziszewski 2002:11).

56 George also states: "… one rationally concludes that the body, far from being a non-personal and indeed sub-personal instrument at the direction and disposal of the conscious and desiring 'self', is irreducibly part of the personal reality of the human being. It is properly understood, therefore, as fully sharing in the dignity – the intrinsic worth – of the person and deserving the respect due to persons precisely as such", ibid., 10. This also applies, for example, to a four-month-old 'fetus' versus a one-week-old baby.

57 George comments that the dualistic understanding of the human being as a non-bodily person (that is, the self-aware, conscious, and desiring 'self') who inhabits and uses as a mere instrument a non-personal body, is philosophically untenable in that: "It renders inexplicable the unity in complexity which one experiences in everything one consciously does. It speaks as if there were … a non-bodily person and a non-personal living body. But neither of these can one recognize as oneself. One's living body is intrinsic, not merely instrumental to one's personal life. Each of us has a human life (not a vegetable life plus an animal life plus a human life); when it is flourishing that life includes all one's vital functions including speech, deliberation, and choice; when gravely impaired it lacks some of those functions without ceasing to be the life of the person so impaired" (see George, 2001:42). According to George, traditional ethics is on solid ground then in refusing to distinguish between, on the one hand, a class of human beings who are to count as 'persons', and, on the other, 'pre-' or 'post-personal' human beings who are relegated to the status of 'merely biologically human nonpersons'" (see George, 2001:42). This once again also applies as much to the four-month-old 'fetus' as it does to the one-week-old baby.

'beingness' – one does not need to refer to intellectual or scientific arguments to prove that, for example, both white and black persons are human beings.

5. Conclusion

Francine Rivers notes that with abortion: "we are eliminating all our opportunities to show compassion" and posits that without compassion, humanity is destroyed (Rivers, 1997:316-17). In observing modernity and the judiciary, one finds a shocking lack of sensitivity towards the unborn. This restrictive definition of personhood, being human, or life, starts society and culture on a dangerous path. Modern society is rather harsh on religion, especially regarding religion's representation in matters of public significance, which includes views on the legality or illegality of abortion. Not only does a substantial part of contemporary society ignore injustices perpetrated against the unborn, but it also goes to great lengths to refuse the religious an opportunity to voice their opinion on the matter, a fundamentalist trait contradictory to the values of a modern paradigm. Christian[58] approaches to humanity and the realisation of the value of each individual life provided the impetus for the creation of movements fighting for the abolition of slavery in England and the United States, and the civil rights movement in the United States. Today, the ideology fuels the International Justice Mission's fight to end underage human trafficking and bonded slavery, euthanasia, and infanticide. Christianity's affiliation with benevolence towards all of mankind (hereby also including the unborn) has much to teach a contemporary society which is generally averse to anything religious. In the process, universal values such as benevolence and humaneness are violated, as reflected in the dismissive approach by many persons and societal structures regarding their approaches towards the unborn. The authors are of the view that this article will serve as a small step towards a better understanding not only of how we got to Mary Prankster's staunch dismissiveness towards the unborn, but also of how such a situation can be countered by unveiling enriching Christian insights regarding true benevolence towards *all* of humanity.

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58 There is no doubt that there is an admired majoritarian camp within Christianity that strongly supports the recognition of the unborn from fertilisation to birth. Also see George, 2001:66-67.

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