Volume 22 | Issue 2 Article 5

1976

National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research: Research on the Fetus

David W. Louisell

NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH: RESEARCH ON THE FETUS

DISSENTING STATEMENT OF COMMISSIONER DAVID W. LOUISELL†

I am compelled to disagree with the Commission's Recommendations (and the reasoning and definitions on which they are based) insofar as they succumb to the error of sacrificing the interests of innocent human life to a postulated social need. I fear this is the inevitable result of Recommendations (5) and (6). These would permit nontherapeutic research on the fetus in anticipation of abortion and during the abortion procedure, and on a living infant after abortion when the infant is considered nonviable, even though such research is precluded by recognized norms governing human research in general. Although the Commission uses adroit language to minimize the appearance of violating standard norms, no facile verbal formula can avoid the reality that under these Recommendations the fetus and nonviable infant will be subjected to nontherapeutic research from which other humans are protected.

I disagree with regret, not only because of the Commission's zealous efforts but also because there is significant good in its Report especially its showing that much of the research in this area is therapeutic for the individuals involved, both born and unborn, and hence of unquestioned morality when based on prudent medical judgment. The Report also makes clear that some research, even though nontherapeutic, is merely observational or otherwise without significant risk to the subject, and therefore is within standard human research norms and as unexceptional morally as it is useful scientifically.

But the good in much of the Report cannot blind me to its departure from our society's most basic moral commitment: the essential equality of all human beings. For me the lessons of history are too poignant, and those of this century too fresh, to ignore another violation of human integrity and autonomy by subjecting unconsenting human beings, whether or not viable, to harmful research even for laudable scientific purposes.

Admittedly, the Supreme Court's rationale in its abortion decisions of 1973 — *Roe v. Wade* and *Doe v. Bolton,* 310 U.S. 113, 179 —

---

† Elizabeth Josselyn Boalt Professor of Law, University of California, Berkeley.

has given this Commission an all but impossible task. For many see in that rationale a total negation of fetal rights, absolutely so for the first two trimesters and substantially so for the third. The confusion is understandable, rooted as it is in the Court's invocation of the specially constructed legal fiction of "potential" human life, its acceptance of the notion that human life must be "meaningful" in order to be deserving of legal protection, and its resuscitation of the concept of partial human personhood, which had been thought dead in American society since the demise of the *Dredd Scott* decision. Little wonder that intelligent people are asking: how can one who has no right to life itself have the lesser right of precluding experimentation on his or her person?

It seems to me that there are at least two compelling answers to the notion that *Roe* and *Doe* have placed fetal experimentation, and experimentation on noviable infants, altogether outside the established protections for human experimentation. First, while we must abide the Court's mandate in a particular case on the issues actually decided even though the decision is wrong and in fact only an exercise of "raw judicial power" (White, J., dissenting in *Roe* and *Doe*), this does not mean we should extend an erroneous rationale to other situations. To the contrary, while seeking to have the wrong corrected by the Court itself, or by the public, the citizen should resist its extension to other contexts. As Abraham Lincoln, discussing the *Dredd Scott* decision, put it:

> "(T)he candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant that they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal." (4 Basler, The Collected Works of Abraham Lincoln 262, 268 (1963).)

Thus even if the Court had intended by its *Roe* and *Doe* rationale to exclude the unborn, and newly born nonviable infants, from all legal protection including that against harmful experimentation, I can see no legal principle which would justify, let alone require, passive submission to such a breach of our moral tradition and commitment.

Secondly, the Court in *Roe* and *Doe* did not have before it, and presumably did not intend to pass upon and did not in fact pass upon, the question of experimentation on the fetus or born infant. Certainly that question was not directly involved in those cases. Granting the fullest intendment to those decisions possibly arguable, it seems to me

that the woman's new-found constitutional right of privacy is fulfilled upon having the fetus aborted. If an infant survives the abortion, there is hardly an additional right of privacy to then have him or her killed or harmed in any way, including harm by experimentation impermissible under standard norms. At least *Roe* and *Doe* should not be assumed to recognize such a right. And while the Court's unfortunate language respecting "potential" and "meaningful" life is thought by some to imply a total abandonment of *in utero* life for all legal purposes, at least for the first two trimesters, such a conclusion would so starkly confront our social, legal, and moral traditions that I think we should not assume it. To the contrary we should assume that the language was limited by the abortion context in which used and was not intended to effect a departure from the limits on human experimentation universally recognized at least in principle.

A shorthand way, developed during the Commission's deliberations, of stating the principle that would adhere to recognized human experimentation norms and that should be recommended in place of Recommendation (5) is: No research should be permitted on a fetus-to-be-aborted that would not be permitted on one to go to term. This principle is essential if all of the unborn are to have the protection of recognized limits on human experimentation. Any lesser protection violates the automony and integrity of the fetus, and even a decision to have an abortion cannot justify ignoring this fact. There is not only the practical problem of a possible change of mind by the pregnant woman. For me, the chief vice of Recommendation (5) is that it permits an escape hatch from human experimentation principles merely by decision of a national ethical review body. No principled basis for an exception has been, nor in my judgment can be, formulated. The argument that the fetus-to-be-aborted "will die anyway" proves too much. All of us "will die anyway." A woman's decision to have an abortion, however protected by *Roe* and *Doe* in the interests of her privacy or freedom of her own body, does not change the nature or quality of fetal life.

Recommendation (6) concerns what is now called the "nonviable fetus *ex utero*" but which up to now has been known by the law, and I think by society generally, as an infant, however premature. This Recommendation is unacceptable to me because, on approval of a national review body, it makes certain infants up to five months gestational age potential research material, provided the mother who has of course consented to the abortion, also consents to the experimentation and the father has not objected. In my judgment all infants, however premature or inevitable their death, are within the norms governing human experi-

mentation generally. We do not subject the aged dying to unconsented experimentation, nor should we the youthful dying.

Both Recommendations (5) and (6) have the additional vice of giving the researcher a vested interest in the actual effectuation of a particular abortion, and society a vested interest in permissive abortion in general.

I would, therefore, turn aside any approval, even in science's name, that would by euphemism or other verbal device, subject any unconsenting human being, born or unborn, to harmful research, even that intended to be good for society. Scientific purposes might be served by nontherapeutic research on retarded children, or brain dissection of the old who have ceased to lead "meaningful" lives, but such research is not proposed — at least not yet. As George Bernard Shaw put it in *The Doctor's Dilemma:* "No man is allowed to put his mother in the stove because he desires to know how long an adult woman will survive the temperature of 500 degrees Fahrenheit, no matter how important or interesting that particular addition to the store of human knowledge may be." Is it the mere youth of the fetus that is thought to foreclose the full protection of established human experimentation norms? Such reasoning would imply that a child is less deserving of protection than an adult. But reason, our tradition, and the U.N. Declaration of Human Rights all speak to the contrary, emphasizing the need of special protection for the young.

Even if I were to approach my task as a Commissioner from a utilitarian viewpoint only, I would have to say that on the record here I am not convinced that an adequate showing has been made of the necessity for nontherapeutic fetal experimentation in the scientific or social interest. The Commission's reliance is on the Battelle Report and its reliance is misplaced. The relevant Congressional mandate was to conduct an investigation and study of the alternative means for achieving the purposes of fetal research (P.L. 93–348, July 12, 1974, Sec. 202(b); National Research Act).

As Commissioner Robert E. Cooke, M.D., who is sophisticated in research procedures, pointed out in his Critique of the Battelle Report: "The only true objective approach beyond question, since scientists make [the analysis of the necessity for nontherapeutic fetal research], is to collect information and analyze past research accomplishments with the intention of *disproving, not proving* the hypothesis that research utilizing the living human fetus nonbeneficially is necessary." The Battelle Report seems to me not in accord with the Congressional intention in that it proceeds from a viewpoint opposite to that quoted, and is really an effort to prove the indispensability of nontherapeutic

research. In any event, if that is its purpose, it fails to achieve it, for most of what it claims to have been necessary could be justified as therapeutic research or at least as noninvasive of the fetus (e.g., probably amniocentesis). In view of the haste with which this statement must be prepared if it is to accompany the Commission's Report, rather than enlarge upon these views now I refer both to the Cooke Critique and the Battelle Report itself both of which I am informed will be a part of or appended to the Commission's Report.

An emotional plea was made at the Commission's hearings not to acknowledge limitations on experimentation that would inhibit the court-granted permissive abortion. However, until its last meeting, I think the Commission for the most part admirably resisted the temptation to distort its purpose by pro-abortion advocacy. But at the last meeting, without prior preparation or discussion, it adopted Recommendation (12) promotive of research on abortion techniques. This I feel is not germane to our task, is imprudent and certainly was not adequately considered.

Finally, I do not think that the Commission should urge lifting the moratorium on fetal research as stated in Recommendation (16). To the extent that duration of the moratorium is controlled by Section 213 of the National Research Act, the subject is beyond our control and we ought not assume authority that is not ours. This is matter not for us and not, ultimately, for any administrative official, but for Congress. If the American people as a democratic society really intend to withdraw from the fetus and nonviable infant the protection of the established principles governing human experimentation, that action I feel should come from the Congress of the United States, in the absence of a practical way to have a national vote. Assuming that any representative voice is adequate to bespeak so basic and drastic a change in the public philosophy of the United States, it could only be the voice of Congress. Of course there is no reason why the Secretary of DHEW cannot immediately make clear that no researcher need stand in fear of therapeutic research.

As noted at the outset, the Commission's work has achieved some good results in reducing the possibilities of manifest abuses and thereby according a measure of protection to humans at risk by reason of research. That it has not been more successful is in my judgment not due so much to the Commission's failings as to the harsh and pervasive reality that American society is itself at risk — the risk of losing its dedication "to the proposition that all men are created equal." We may have to learn once again that when the bell tolls for the lost rights of any human being, even the politically weakest, it tolls for all.