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COST-BENEFIT ETHICS: THE UTILITARIAN APPROACH TO FETAL RESEARCH*

*An analysis of papers presented to the National Commission for
the Protection of Human Subjects of Biomedical and
Behavioral Research*¹

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IN THESE DAYS of ever-expanding government regulation it has become virtually impossible to keep up with the administrative rulings, court decisions, and legislative decrees, let alone be familiar with the many debates surrounding them. The National Institute of Health regulations on human research are a case in point;² the recently published text of the papers dealing with the ethical issues in fetal research presented to the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (the Commission) is almost two inches thick.³ Yet in spite of its size, the tome is worth reading, for documents such as these have a way of reflecting the *zeitgeist*. Furthermore, a close examination provides reasons for serious

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1. This article is a logical sequel to Professor Harold O. J. Brown's article in the *Human Life Review*. See Brown, *Fetal Research II: The Ethical Questions*, HUMAN LIFE REV., Fall 1975, at 118. Professor Brown observes that the DHEW regulations on fetal research (see 45 C.F.R. §§ 46.201-211 (1976)) are based upon utilitarian, cost-benefit ethics, and he concludes:

As indicated, the HEW paper on the protection of human subjects really operates within a framework of utilitarian assumptions. The end justifies the means. If useful techniques and information for some, presumably a larger number, of individuals can be obtained by utilizing — even to the point of using up — others, particularly if such others are unwanted, what need is there to agonize on the moral and ethical justifiability of such utilization? As we have noted, this argument is not presented *expressis verbis*, no doubt because in those terms it would be found too cruel to accept, and in part because even those who in fact act as though they believed it are not conscious that it is the basis of their motivation.

Brown, *supra* at 127.

By looking closely at the newly published papers presented to the National Commission that aided in formulating the regulations on fetal research, we now find Professor Brown's last supposition — namely, that the utilitarian argument he cites was operating only at the unconscious level — all too charitable.

2. See 45 C.F.R. §§ 46.101-301 (1976).

3. See generally NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, *Appendix to Report and Recommendations: Research on the Fetus* (DHEW Pub. No. (OS) 76-128, 1975) [hereinafter cited as *Appendix*].

concern: the prevalent attitude — as spelled out by the various contributing scholars⁴ — is that *wanted fetuses* “as a class” should not be denied the fruits of research performed at the expense of *unwanted fetuses*. Since the ominous moral implications of such a position were left virtually untouched in the few papers sympathetic to a more principled point of view, the result is a most disturbing document based on a “cost-benefit ethics” that openly defies traditional morality.

The first paper, written by Dr. Maurice J. Mahoney,⁵ praises the many accomplishments in fetal research and warns that “[t]o eliminate the participation of human fetuses from experimentation because they are unable to consent, denies fetuses as a class the right to benefit from medical progress and directly contradicts the presumption that the human fetus is a legitimate participant in the human community.”⁶ It seems best to ignore Dr. Mahoney’s subsequent statement that in the human community “all individuals participate in human experimentation without their consent at all times.”⁷ Insofar as the fetus’ mother participates in involuntary experimentation in any case, this latter statement of Dr. Mahoney would make it impossible for a fetus *not* to be experimented upon and would therefore render the earlier statement quite unnecessary. In effect, Dr. Mahoney suggests it is a privilege not only to benefit from such research but also to be actively involved in it as a participant.

Dr. Mark Lappé echoes this belief,⁸ but first he defines the utilitarian equation at stake: The “costs” of doing fetal research are to be counterbalanced by the good resulting from such research.⁹ When the fetus involved in research is an abortus (whether before, during, or after abortion), the ultimate fate of the research subject is *death*.¹⁰ Therefore, the beneficiaries of such research are not “fetuses as a class” but fetuses minus the already-doomed research subjects. The doomed fetuses, however, are presumably still better off for having served science. Participation in an experiment, Dr. Lappé believes, can “enable

4. A complete list of the contributing scholars can be found in the table of contents of the *Appendix*. *Appendix*, *supra* note 3. It should be noted that the papers published in the *Appendix* were not written by the members of the Commission.

5. Mahoney, *The Nature and Extent of Research Involving Living Human Fetuses*, *Appendix*, *supra* note 3, at 1-1. At the time his paper was delivered to the Commission, Dr. Mahoney was Associate Professor of Human Genetics and Pediatrics at the Yale University School of Medicine.

6. *Id.* at 1-31.

7. *Id.*

8. See Lappé, *Balancing Obligations to the Living Human Fetus with the Needs for Experimentation*, *Appendix*, *supra* note 3, at 4-1, 4-6 to 4-7. At the time his paper was delivered to the Commission Dr. Lappé was Associate for Biological Sciences, Institute for Society, Ethics, and the Life Sciences, Hastings Center.

9. See *id.* at 4-5 to 4-7.

10. Dr. Lappé implicitly acknowledges this fate. See *id.* at 4-7 to 4-8.

that death” to which they would succumb in any case, as abortuses.¹¹ The privilege of being sacrificed, then, is part of the “good” in the cost-benefit equation.

Not everyone would agree that dying as a human guinea pig is ennobling, and Reverend Joseph F. Fletcher does not insist on that point.¹² He simply suggests that legislation on fetal research is merely a matter of the greatest good for the greatest number. He writes:

This ethical question — to whom do we owe our prior obligation, *to the few or the many, the one or the several?* — affects live research. Absolutizing or tabooing fetal life, even when a fetus is not wanted, is an obvious form of radical individualism (selfishness and narcissism), because it would deny the research use of a live fetus which could provide lifesaving substances for living persons or yield lifesaving information.¹³

Without asking how often an unwanted fetus is *killed* as a result of “selfishness and narcissism,” I will merely reiterate the utilitarian dictum as Reverend Fletcher sees it: the good of the greatest number wins out in an ethical dilemma. We “owe our prior obligation” to the many at the expense of the few. The same position is implicit in Dr. Richard Wasserstrom’s proposal that governmental ethical boards be established to determine the importance of information obtained from a particular research project “concerning the prevention of harm or the treatment of illness in *other* human beings” prior to approval.¹⁴ Neither scholar minces words: the good of human beings *other than* the experimental subjects is the objective of research on abortuses.

Although my characterization of their view may sound a bit harsh, it is nonetheless warranted. For while Reverend Fletcher’s heart bleeds for the good of the many, he rejects the very humanness of the few. Thus “a fetus is ‘precious’ or ‘has value’ when its potentiality is wanted” — and specifically “this means when it is wanted by the progenitors, not by somebody else,”¹⁵ including, we assume, relatives or other members of society, as well as potential adoptive parents. The converse follows easily: if it is not wanted, the fetus has no ethical value and no rights. Viability then becomes irrelevant, for as Reverend

11. *Id.* at 4–7.

12. See Fletcher, *Fetal Research: An Ethical Appraisal, Appendix, supra* note 3, at 3–1. At the time his paper was delivered to the Commission, Reverend Fletcher was Visiting Professor of Medical Ethics at the University of Virginia.

13. See *id.* at 3–12 (emphasis added).

14. Wasserstrom, *Ethical Issues Involved in Experimentation on the Nonviable Human Fetus, Appendix, supra* note 3, at 9–1, 9–9 (emphasis added). At the time his paper was delivered to the Commission, Dr. Wasserstrom was Professor of Law and Philosophy at the University of California at Los Angeles.

15. See Fletcher, *supra* note 12, at 3–3.

Fletcher believes, it is purely a function of technology.¹⁶ Thus, even when the age and viability of a fetus is no longer an issue, and even when any fetus can be rescued by appropriate medical intervention, fetal research must proceed. "The question is not whether a fetus has vital signs but whether it should be brought to live birth. If not, surely research and experimentation are in order."¹⁷ Dr. Sissela Bok concurs with this conclusion: "The word 'humanity' . . . has different meanings in terms of the reasons to protect life, in early *unwanted* pregnancies as distinguished from other contexts."¹⁸ That is, two relatively similar fetuses (identical in age, weight, and health) differ in "humanity" depending on whether they happen to be wanted by their respective mothers. I submit that such a view of "humanity" is not only morally outrageous, but it is ontological rubbish.¹⁹

No less disturbing is the inability or unwillingness, on the part of those contributing scholars who do not really approve of the utilitarian bias, to oppose that point of view. Reverend Richard A. McCormick (Professor of Christian Ethics, Kennedy Institute, Georgetown University) is fully aware of the present climate and writes: "Our culture is one where technology, even medical, is highly esteemed; moral judgments tend to collapse into pragmatic cost-benefit calculations."²⁰ Unfortunately, while Father McCormick deplors this attitude, he apparently does not oppose it on any rigorously principled basis. Instead, he emerges in favor of fetal research with rather weak provisos. For instance, he believes that in such research "there must be no discernible risk for the fetus or mother, or, if the fetus is dying, there is no added pain or discomfort."²¹ But pain and discomfort are not the main or

16. Reverend Fletcher writes that "[v]iability is sure to be pushed back until its relevance to speculations about humanness and personhood will have become absurd." *Id.* at 3-5.

17. *Id.*

18. Bok, *Fetal Research and the Value of Life, Appendix, supra* note 3, at 2-1, 2-7. At the time her paper was delivered to the Commission, Dr. Bok was Lecturer in Medical Ethics at Radcliffe Institute and in the Harvard-MIT Program on Health and Technology.

19. Dr. Bok has written elsewhere that "[w]e must abandon . . . a definition of humanity capable of showing us who has the right to live." Bok, *Ethical Problems of Abortion*, 2 HASTINGS CENTER STUDIES 33, 41 (1974). Dr. Bok also noted that the fetal cells "cannot feel the anguish of pain connected with death." *Id.* at 43; see Bok, *supra* note 18, at 2-7. John P. Wilson, LL.B. (Associate Dean and Director of the Legal Studies Institute of Boston University) agrees with Dr. Bok, and thus he does not "recoil at the thought that it [the fetus] be the subject of experimentation." Wilson, *A Report on Legal Issues Involved in Research on the Fetus, Appendix, supra* note 3, at 14-1, 14-18.

20. McCormick, *Experimentation on the Fetus: Policy Proposals, Appendix, supra* note 3, at 2-1, 2-9 to 2-10. At the time his paper was delivered to the Commission, Reverend McCormick was Professor of Christian Ethics, Kennedy Institute, Georgetown University.

21. *Id.* at 2-10.

even the relevant considerations here; rather, the problem centers around the very use of unwanted fetuses for the benefit of other, wanted fetuses. Is such practice legitimate? Father McCormick does not deny it.

Neither does Dr. Paul Ramsey, although his own position is difficult to discern from his paper.²² While he "tend[s] to believe that any use of the fetal subject, children, the unconscious, the dying, or the condemned would be an abuse,"²³ at the same time he allows "that there may be degrees of 'no discernible risk' that closely approximate [his] position" on fetal research.²⁴ Leaving aside, again, the question of what "discernible risk" could mean to an abortus (or any subject soon to die), it is clear that Professor Ramsey does not argue that abortus research is unjustified in principle. He claims that "we need measurable limits [of fetal viability] beyond which [abortus research] clearly is not [justified],"²⁵ thus implicitly allowing that the previable infant is a legitimate potential subject of fetal experimentation.²⁶ In spite of Professor Ramsey's otherwise commendably strong opposition to unlimited research on aborted fetuses in his paper to the Commission,²⁷ there is no head-on confrontation with this utilitarian position.

Indeed, none of the scholars presenting reports to the Commission actually oppose fetal research — not even Rabbi Seymour Siegel, his

22. See Ramsey, *Moral Issues in Fetal Research, Appendix, supra* note 3, at 6-1. At the time his paper was delivered to the Commission, Dr. Ramsey was Professor of Religion, Princeton University.

23. *Id.* at 6-11.

24. *Id.*

25. *Id.* at 6-4; see *id.* at 6-1.

26. On this point there are similarities between Professor Ramsey's position and that of Dr. Stephen E. Toulmin (Professor of Social Thought and Philosophy, University of Chicago), who writes:

[W]hile there may be reasons for laying down some definite upper-size limit, above which aborted fetuses may not be made the subject of any experimentation, it will probably be necessary also to balance off "risks" and "benefits" further, by establishing guidelines governing what types of procedures may or may not be undertaken on fetuses at different stages of development below that upper limit.

Toulmin, *Fetal Experimentation: Moral Issues and Institutional Controls, Appendix, supra* note 3, at 10-1, 10-15. Professor Toulmin's article was primarily intended to be a review of the papers considered by the Commission. *Id.* at 10-1. Nevertheless, his own viewpoint, which he identifies as the "moderate consensus" (*id.*), is not antipathetic to the utilitarian outlook. He sees the "substantive problem" before the Commission to be "one of striking such a balance between the risks to which the fetus, the mother, and society would be exposed as a result of nontherapeutic fetal experimentation, and the benefits that would presumably accrue to medical science, and to humanity at large." *Id.* at 10-8 to 10-9.

27. See generally Ramsey, *supra* note 22, at 6-6 to 6-11. For a full statement of Professor Ramsey's thoughts on fetal research, see P. RAMSEY, *THE ETHICS OF FETAL RESEARCH* (1975), reprinted in part in Ramsey, *Medical Ethics Skewed by the Abortion Issue*, *HUMAN LIFE REV.*, Winter 1976, at 74.

“bias toward life”²⁸ notwithstanding. To be sure, Rabbi Siegel’s position is not utilitarian in any obvious fashion. Nevertheless, his argument contains assumptions and concepts that subtly but irrevocably undermine the principled, ethical position. In his paper, Rabbi Siegel implies that people sometimes lose the right to life and, presumably, the right not to be experimented upon — as do for example aggressors in a war.²⁹ “In the same way,” he continues, “the fetus’ right to our concern for its life is mitigated when the fetus threatens someone else’s life or health.”³⁰ The two key concepts in trouble here are “threaten” and “health.” Surely there is a difference between the “threat” from a rational, voluntary agent and from a fetus whose ability to make rational decisions is obviously nonexistent? The fetus is not responsible for its own conception — someone else is; usually at least one parent. It cannot, strictly speaking, “threaten” anyone in the way a warrior threatens an enemy, for a fetus is not an agent. It therefore seems absurd to ask that a fetus pay with its life for an alleged “threat” of which it is logically incapable. The persons responsible for its conception are the causally efficacious agents, the individuals whose actions led to the fetus’ very existence. Thus, insofar as the mother is responsible for the conception, in consistent ethical language it can be said that *she* threatened herself. Moreover, the concept of “health,” which Rabbi Siegel left undefined, could also use elucidation. Whether a genuine threat to someone’s “health” exists as a consequence of a child’s birth is often very questionable. A woman may elect to have a “therapeutic” abortion for the flimsiest of reasons. If *she* says it is necessary for her health, are we to take her word for it? The moral picture becomes blurred. I suggest that Rabbi Siegel’s approach manages to distort if not nullify the very meaning of aggression which presupposes a precise concept of “threat” by rational, purposeful agents. If anyone claims that for the sake of his “health” another individual — in particular, one incapable of choice or action — must be sacrificed, what have we gained? Rabbi Siegel’s view is ultimately no less dangerous to morality than the cost-benefit approach. In short, while it may appear as if Rabbi Siegel’s “bias for life” is anti-utilitarian (and he certainly believes that research on fetuses or even on abortuses should not harm the research subject),³¹ nevertheless, by arguing in favor of

28. Siegel, *Experimentation on Fetuses Which Are Judged to be Nonviable*, *Appendix, supra* note 3, at 7-1. At the time his paper was delivered to the Commission, Rabbi Siegel was Professor of Theology and Ethics and Rabbinic Thought at the Jewish Theological Seminary in New York.

29. *Id.* at 7-3.

30. *Id.*

31. *Id.* at 7-7.

some abortions as he does, he opens the theoretical avenue for anyone willing to depart from a principled position.

Thus, the argument of the utilitarian majority prevails, with all too little dissent.³² Dr. LeRoy Walters recognizes that "in a pluralistic society [policymaking] seeks to accommodate a variety of belief-systems and interests" and he believes that indeed it should.³³ Prohibiting fetal research would not be permissible under the circumstances, and he apparently believes that compromise must be sought. But with compromise an ethical Pandora's box is opened.

In general, a cost-benefit approach to morality is antithetical to the concept of inalienable individual rights, to the sanctity of life, and to a freedom of choice respectful of others' humanity (including that of the fetus). The proposition that the morally relevant difference between a legitimate and an illegitimate research subject is whether its parents want it to live is most disturbing — indeed, ominous. What principle is left to protect the unwanted old, the terminally ill, or the social reject? Are not all rights in jeopardy? Can this be "ethics"? Reverend Fletcher is, again, straightforward: "Medicine must be delivered from the kinds of ethics which follow principles when following them means

32. While this article does not deal with the purely factual papers presented to the Commission, I cannot resist the temptation to comment upon the seemingly innocuous taxonomic article by Leon Kass, M.D., Ph.D. (Research Professor on Bioethics at the Kennedy Institute, and Associate Professor of Neurology and Philosophy at Georgetown University) on viability. Kass, *Determining Death and Viability in Fetuses and Abortuses*, *Appendix*, *supra* note 3, at 11-1. Dr. Kass writes as follows:

[E]ven after the different classes are distinguished and defined, the proper "class" identification of each individual fetus will be necessary in order correctly to formulate the concrete ethical issues regarding its disposition and use. In short, discussion of the ethical issues, about classes or individuals, can only begin after the nature of the experimental subject is clarified.

Id. On the contrary, one might argue that individuals are best considered as members of Kant's Kingdom of Ends — each in a class by himself. See I. KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 100-02 (H. Paton trans. 1964).

33. Walters, *Ethical and Public Policy Issues in Fetal Research*, *Appendix*, *supra* note 3, at 8-1, 8-10. For reasons why "pluralism" has no place in dealing with ethical issues in fetal research, see Brown, *supra* note 1, at 124-27. At the time his paper was delivered to the Commission, Dr. Walters was Director of the Center for Bioethics, Kennedy Institute, Georgetown University.

Unlike Professor Brown, Professor A. M. Capron (Associate Professor, University of Pennsylvania Law School) apparently believes that the scope of morality has tended to be exaggerated. In particular, he believes that the issue of whether research on nonviable fetuses *ex utero* ought to be permitted is not even a legal question — nor, presumably, a moral one — but is, rather, "a policy judgment to be reached on the basis of one's perception of the relative importance of the interests of the fetus, parents and society." Capron, *The Law Relating to Experimentation with the Fetus*, *Appendix*, *supra* note 3, at 13-1, 13-2. Professor Capron's article is a very informative document regarding the legal issues involved in fetal research. To be sure his article was not intended to be a philosophical essay, nevertheless I wish to take exception to Professor Capron's implication as to the range of issues which may be called "moral." As noted at the outset, the case of fetal research is a paradigmatic subject for moral concern. See text accompanying notes 2-5 *supra*.

we have to condemn and nullify the acquisition of useful know-how in medicine's effort to save and improve human life."³⁴ In other words, *some* human lives can be risked at the expense of *other* lives. Reverend Fletcher continues: "If 'principles' block medicine's healing task, so much the worse for such principles."³⁵ This is indeed shocking. If these are the words of an "ethicist," what can we expect from the technocrats? Such a statement is not without grave implications for the future of morality in this society. For once we have abandoned principle, what is left to defend any human rights?

By way of epilogue, it would be useful to look at the final recommendations of the Commission,³⁶ which are the topics of the present Symposium. It should come as no great surprise that several recommendations, namely, those dealing with nontherapeutic research on the fetus *in utero*,³⁷ the section on the nonviable fetus *ex utero*, and the fetus during abortion³⁸ and even the section on nontherapeutic research on the possibly viable infant,³⁹ contain the following proviso: such experimentation should be allowed only if its "purpose . . . is the development of important medical knowledge that cannot be obtained by alternative means."⁴⁰ These words, far from being accidental, are at the core of the new recommendations and the new regulations.

But what is "important" medical knowledge? Important to whom? To the experimenter on a lucrative grant? To "future generations"? To the wanted babies? To the "racially pure"? As for the condition that such medical knowledge be unavailable "by alternate means," this conceivably could justify nontherapeutic research on any selected group of people, since no other group, by experimental definition, could provide the knowledge (whether this be the terminally ill, the mentally ill, the diabetic, etc.).

In conclusion, the utilitarian bias evident in the papers presented to the Commission has infiltrated the recommendations of the Commission, at the expense of a principled ethical stand. Judging from the arguments involved here and their implications, the worst is yet to come.

34. Fletcher, *supra* note 12, at 3-12.

35. *Id.*

36. NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIO-MEDICAL AND BEHAVIORAL RESEARCH, REPORT AND RECOMMENDATIONS: RESEARCH ON THE FETUS (DHEW Pub. No. (OS) 76-127, 1976), also printed in 40 Fed. Reg. 33,530 (1975) (partially codified in 45 C.F.R. §§ 46.101-301 (1976)). For the reader's convenience, chapters VIII and IX of the *Commission's Report* are reprinted in this symposium at pp. 300-24, and unless otherwise indicated, all citations to the *Commission's Report* refer to these pages.

37. *Id.* at 311-12.

38. *Id.* at 312.

39. *Id.* at 312-13.

40. *Id.* at 311-12.