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# Abortion: Law, Religion and Society

by Paul Custodio Bube

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*This essay examines some ways that legal, religious and social issues are intertwined in the abortion issue. It begins with a critical examination of the argument by Peter S. Wenz, in *Abortion Rights as Religious Freedom*, that judgments regarding the personhood of the pre-twenty-week-old fetus rest on religious beliefs. Hence, the legal right to abortion can be grounded in the constitutional protection of religious freedom. The essay then shifts to an overview of three religious approaches to abortion: the first condemns abortion as a violation of the sacred value of the fetus as a person; the second allows for the tragic choice of abortion in cases where the needs and rights of a woman conflict with the value of the fetus; the third reinterprets the question of abortion in the broader context of the character of our society, whether in communitarian or in feminist terms.*

Few issues in American society create the rancor or the polarization that abortion does. The nation is engaged in an agonizing struggle to arrive at a legal and moral consensus on whether a woman has a right to an abortion. Indeed, one ethicist has characterized our "current situation as a genuine state of civil war" (Harrison, 1). Although many hoped the 1973 Supreme Court decision in *Roe v. Wade*, which declared that women have a fundamental legal right to abortion, would establish a working truce, that decision has, rightly or wrongly, become symbolic of the tangled legal and ethical issues which continue to be contested.

In this essay I will examine some of the current thinking about the ways that legal, religious and social issues are intertwined in the abortion issue. A great deal of my focus will be on a book by Peter S. Wenz, *Abortion Rights as Religious Freedom*, which offers a unique perspective on the relationship between law and religion in the abortion discussion. The remainder of the essay looks at some implications of Wenz's position for religious thinking about abortion and society.

## Abortion, Law and Religious Freedom

Any attempt to disentangle the issues contested in the abortion dispute must start by distinguishing the legal controversy from the ethical controversy and recognizing how they are related. The legal

controversy over abortion tends to focus on the validity of the view raised in *Roe v. Wade* that the Constitution guarantees a right to privacy which, in turn, grounds a woman's right to choose what medical procedures she wants done on her body, free from state interference. The ethical controversy arises from the question of whether or when the fetus is considered a person with the same rights, especially the "right to life," as other acknowledged persons.<sup>1</sup> Anti-abortion legal theorists commonly assume it can be demonstrated that there is no fundamental constitutional grounding for a right to privacy, and thus each state legislature is free to regulate access to abortion so long as other constitutional rights are not violated. Anti-abortion ethicists commonly assume it can be demonstrated that the fetus is a person with a right to life, and thus our legal system must respect that right by restricting abortion.

In his argument for abortion rights, Peter S. Wenz, a professor of philosophy and legal studies at Sangamon State University, accepts much of the legal and ethical analyses found in anti-abortion thinkers, but he questions their assumptions. While agreeing with anti-abortion legal theorists that there is no valid constitutional grounding for the right to privacy, Wenz disagrees that there is no constitutional grounding for the right of a woman to obtain an abortion. He follows conservative legal scholars like Robert Bork who argue that *Roe v. Wade's* protection of abortion rights cannot be grounded in a right to privacy because the right to privacy is nowhere explicitly cited in the Constitution. In fact, much of Wenz's book is an argument against so-called "liberal" theories of constitutional interpretation which allow for discovery of implicit rights

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(such as the right to privacy) in the Constitution. He favors a more moderate interpretation theory which acknowledges only explicit constitutional rights while advocating that such rights be interpreted broadly enough to reflect their evolving rather than their original meanings (see especially 8-14). However, unlike many of the conservative legal scholars Wenz draws upon, he thinks constitutional grounding for *Roe v. Wade* can be found in the first amendment protections of freedom of religion.

Wenz argues that although it may be valid for anti-abortion ethicists to hold that the fetus is a person, it is just as valid to hold that the fetus—at least prior to twenty weeks—is not a person. Indeed, he argues that appeal to a metaphysical or religious interpretation of biological facts is basic to the question of whether the pre-twenty-week-old fetus (a “young fetus”) is a person. Whether or not one

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thinks the fetus is a person is essentially a religious belief, and the imposition of religious beliefs and practices is prohibited by the first amendment to the Constitution; hence he maintains that the right to abortion can be grounded in the constitutional guarantee of religious freedom.

Wenz's view that the status of the fetus cannot be established by appeal to biological evidence alone is certainly not new. Daniel Callahan made the point more than twenty years ago that “the kinds of problems which appear in any attempt to decide upon the beginning of life suggest that no one position can be either proved or disproved from biological evidence alone” (168). What Wenz does is to demonstrate the significance of Callahan's insight in the legal arena. It is worth noting that Wenz is not making the claim that people with strong religious beliefs tend to argue that the fetus is a person and that the Court must view the issue as a religious controversy. If that were the thrust of his argument, then the Court could not uphold the constitutionality of any law which coincided with an individual's religious beliefs, for example, “laws against murder and fraud, and those designed to feed the hungry and house the poor” (82). Rather, Wenz analyzes arguments supporting the belief that the young fetus is a person with a right to life to show they are fundamentally “religious” insofar as they are “structurally and epistemologically identical to arguments about the existence of God” (161). Put dif-

ferently, Wenz is saying that any claim about the status of the young fetus is the type of claim that finally has no “secular justification,” but only a religious justification (82).

Wenz's distinction between “secular” and “religious” is drawn from an examination of the way the terms “religion,” “religious” and “religious belief” have been used in the history of Supreme Court reasoning. The distinction he derives is first of all “epistemological,” meaning, “how we gain knowledge and how we support our claims to knowledge” (113). Secular beliefs grow out of common-sense knowledge and the scientific method which makes technology possible (112). In contrast, religious beliefs, such as belief in the existence of God, cannot be justified by appeals to “common sense, science, technology or accepted scientific methodologies” (112-113). The distinction is also “functional” insofar as secular beliefs include values considered essential to the functioning of our democratic society (112), whereas the acceptance or non-acceptance of religious beliefs is not essential to the functioning of our society (136). Thus, secular beliefs can be justified by appeal to publicly accepted evidence or socially essential consequences, whereas religious beliefs can never be conclusively justified or demonstrated as necessary to social functioning.<sup>2</sup>

As an illustration of Wenz's distinction, consider three beliefs: the belief in the hypothesis of global warming; the belief that women have a right to vote; and the belief that God exists. Belief in the

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global warming hypothesis, even if controversial, is secular because, in principle, it can be verified or falsified by scientific evidence. The belief that women have a right to vote is secular because it is essential to the functioning of modern, democratic society.<sup>3</sup> However, belief in the existence of God is religious because, as anyone familiar with the history of philosophical “proofs” for the existence of God will readily point out, the arguments against such proofs seem just as valid as those for it (see 167 ff.). Moreover, belief in God is not necessary to the functioning of American society. Although many religious people might believe that their ideal

of society would be destroyed if all Americans were to become atheists, they would still have to acknowledge that social cooperation necessary to a democratic system is possible even for atheists.<sup>4</sup>

In analyzing claims about the personhood of the fetus, Wenz argues that although it can be established strictly on secular grounds that a fetus after twenty-eight weeks' gestation is a person with a right to life, it cannot be established on secular grounds that a young fetus prior to twenty weeks' gestation is a person because belief in the person-

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*The need for religious and moral discussions is important because law indicates only what is permitted, not what should be done.*

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hood of a young fetus is inherently like belief in God. Why does Wenz set the beginning of personhood at twenty weeks? Starting with the safe *legal* assumption that a newborn is a person with a right to life, Wenz points out that Americans' conception of rights (as reflected in constitutional history) suggests that "we do not believe [anyone's] right to life [varies] with . . . physical location . . . [nor one's] temporary dependency on external life-support systems . . . [nor one's] size and strength" (177-178). A fetus which is twenty-eight weeks old differs from a newborn primarily in location, temporary dependency on external life-support, size and strength, because it has "developed all the basic physiological systems that characterize newborns and other people" (178). Therefore, it follows that the older fetus has the same rights as a newborn, including the right to life. Prior to twenty weeks' gestation, however, a fetus has not developed the basic physiological systems which are found in a newborn, for instance, neither the lungs nor the neocortex of the brain are functional (174). Thus, a young fetus does differ in a significant, secularly verifiable way from a newborn.

Consequently, the question of whether a young fetus is a person must be established by appeal to other evidence.<sup>5</sup> The evidence supporting or countering the claim that the younger fetus is a person with a right to life, like the evidence supporting or countering belief in the existence of God, is inconclusive (see 170 ff.). Those who argue that a young fetus is a person because it has a human genetic code are countered by those who argue that a nec-

essary condition for personhood is not by itself a sufficient condition. After all, more than 40 percent of all fertilized ova are spontaneously discharged before implantation on the uterine wall. Are these human deaths? (61) Those who argue that any distinction made along the continuum from zygote to newborn is arbitrary, are countered by those who point out that although there is a continuum between an acorn and an oak tree, it does not follow that they have the same status (171). After all, someone who destroys a neighbor's acorn is certainly not guilty of a crime of the same magnitude as cutting down a neighbor's twenty foot oak tree. Thus, like arguments about the existence of God, the arguments and counter-arguments about the status of the young fetus go on and on without promise of an agreed upon method for resolving them.

Moreover, American society is able to function without settling the issue of the personhood of the young fetus. Indeed, Wenz suggests that if the personhood of the fetus were legally recognized at the time of conception, the implications would seriously disrupt society. To note only a few examples cited by Wenz: if a zygote has a legal right to life, scarce medical resources would need to be redirected to improve the rate of implantation (astronomically raising the incidence of birth defects); miscarriages would require proper funeral arrange-

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ments; census statistics (and thus political representation) would have to be changed; use of intrauterine devices (IUDs) would have to be outlawed as murder (with a deadly weapon?); and a woman suspected of using an IUD would thereby be a murder suspect and thus be subject to having her menstrual flow "searched" for the presence of the murder victim (61-65).

The first amendment to the Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The implication of Wenz's argument is that if belief about the personhood of the young fetus is a religious belief, the state is prohibited by the first amendment from enacting laws which would require one to accept that belief. Since a state's prohibition of abortion during the first

twenty weeks of pregnancy can be justified only by appeal to the personhood of the fetus, the state would *de facto* be requiring conformity to a religious belief—a violation of the establishment clause of the first amendment. On the other side, one of the dramatic conclusions of Wenz's argument, which should find some favor among those who oppose

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abortion rights, is that abortion after twenty-eight weeks of gestation should be treated in the legal system in exactly the same way as killing any other person. (Between twenty and twenty-eight weeks, regulation of abortion should be left to legislative discretion.) Thus, the only exception for a late-term abortion is to save the life of the mother, that is, self-defense.

Wenz's book offers more than just a thorough argument that there is constitutional grounding in the first amendment for the right to abortion prior to twenty weeks of fetal life. He also provides the reader with a primer in constitutional interpretation, with particular emphasis on the history of interpretation behind the *Roe v. Wade* decision and the first amendment guarantees of freedom of religion. Whether or not one agrees with Wenz's views on how to interpret the Constitution, one must acknowledge that the moderate-to-conservative views of interpretation have gained ascendancy among the current Supreme Court justices and are likely to dominate Supreme Court interpretation for the foreseeable future. Hence, the book deserves a close reading by those who are interested in understanding current constitutional theory in general, as well as those who are eager to find an eminently reasonable approach to the complex legal issues connected with abortion rights.

### **Religious Views on Abortion**

It is important to emphasize that Wenz's argument is first and foremost a *constitutional* argument. Although I think it is highly suggestive for further philosophical discussion on the abortion issue, there is only so much we can expect from a constitutional argument. Indeed, even if we were to agree that Wenz has settled the legal debate over abortion

rights, we are still left with the religious issue about the status of the young fetus and what *moral* obligations we might owe the young fetus. To whatever extent the legal issues surrounding abortion are "settled," the need for religious and moral discussions is all the more important because the law indicates only what is *permitted*, not what *should* be done. Even if religious dialogue tends to be inconclusive, it nonetheless challenges us to work out a moral vision that extends beyond the austere boundaries of the law and which can guide us precisely where the law must remain silent. Hence, it may be worth calling attention to some of the more prominent religious positions in the discussion about the status of the fetus and the right to abortion found among American Christian thinkers.

Certainly the most well-known position in the Christian discussion is that a fetus is a human person with a right to life from the moment of conception. One of the most articulate defenders of this so-called "conservative" position is John T. Noonan, who in his essay "An Almost Absolute Value in History," argues that to draw the line of personhood at any place other than conception, when the fetus receives a human genetic code, would be arbitrary or unclear. Criticisms of this position are well known, and since some are cited above I will not comment on them. Perhaps most interestingly, Noonan's position has contributed to a broader moral vision by becoming the basis for a "consistent ethic of life," sometimes called a "seamless garment" ethic. An influential proponent of this ethic is Joseph Cardinal Bernardin. Bernardin argues that recognition of the sacred character of human life must extend beyond the single issue of abortion. A

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true "pro-life" position must also address the problems associated with militarism, human rights, world hunger, homelessness, education and access to health care among others. Such a seamless ethic not only transcends political boundaries between liberal and conservative, it has succeeded in converting some anti-abortion activists to oppose the death penalty and defense spending, while also attracting anti-war activists to take up the anti-abortion cause.

Some Christian thinkers maintain a "moderate" position that while not all fetuses are persons, all fetuses have value to some degree. Christians who hold some version of this position recognize various stages in fetal development as determinative of per-

sonhood, with the most often cited being some version of viability. Regardless of where the threshold is recognized, most of those who hold this position argue that while abortion may be permissible before the fetus reaches this point, it should never be done casually because the young fetus is nonetheless a valuable entity and a potential person. This position often cites Exodus 21:22-25 as support:

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*A fundamental question asks, "What sort of community should we be for women facing unwanted pregnancies?"*

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When people who are fighting injure a pregnant woman so that there is a miscarriage, and yet no further harm follows, the one responsible shall be fined what the woman's husband demands, paying as much as the judges determine. If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe (*New Revised Standard Version*).

The passage suggests that a fetus has value, because one who kills the fetus has to pay a fine. However, the fetus is not viewed as having the same value as the pregnant woman, since one who kills her must forfeit his or her life.

The moderate position affirms a woman's right to terminate a pregnancy but asks her to be aware of the tragic dimensions of her choice. Although the choice may be right and good within a given context, it nonetheless results in some loss of value (cf. Cobb, 86; Callahan, 169 ff.). This perspective has come to have increasing influence in the pastoral guidelines developed in a number of mainline Protestant churches. The United Methodist Church, for example, states in its 1988 Book of Discipline,

Our belief in the sanctity of unborn human life makes us reluctant to approve abortion. But we are equally bound to respect the sacredness of the life and well-being of the mother, for whom devastating damage may result from an unacceptable pregnancy. In continuity with past Christian teaching, we recognize tragic conflicts of life with life that may justify abortion (71).

Thus, while this perspective holds that abortion may be justifiable in earlier stages of pregnancy

when the fetus is not yet considered a person, it also holds that even a fetus which is not a person is a potential person which has increasing value as it develops. Even when abortion is moral it is still a tragic choice.

Although these two approaches characterize the greater part of Christian discussion about abortion, there is a growing number of Christian thinkers who suggest that framing the problem of abortion in terms of the status of the fetus diverts us from more important religious dimensions of the issue.

William F. May has suggested that bioethics has neglected the underlying religious dimensions of moral decision making. His analysis in *The Patient's Ordeal* of the suffering endured by catastrophically ill patients could easily apply to a woman who has just discovered she is pregnant against her expectations and wishes:

Before illness the patient identifies with her body, with her community, and with the ultimate. The self does not float free behind these identities; it does not draw its life from itself. The self is ecstatic; it pitches itself out beyond itself and identifies in all sorts of ways, wittingly and unwittingly, with these three, depending heavily and daily upon each. Whatever separates the self from these identities imposes upon the self the shudder of death (9).

Similarly, a woman facing an unwanted or unintended pregnancy often finds her relationship with her body, her community and God severely breached. Her sense of self is threatened unless her

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community and her religious tradition provide hope for "new life," that is, a worthwhile sense of self beyond the breach. Those who urge her to carry the fetus to term must be willing to help her to a new, life-giving identity: a supportive relationship with her body, her community and God. From this perspective the fundamental question raised by abortion is not about the status of the fetus or even the rights of the woman; rather, the question asks, "What sort of community or society should we be for those facing unwanted or unintended pregnancies?"

With the exception of a diminishing number of conservative Roman Catholic thinkers who continue to abhor contraception, there is remarkable agreement among Christian ethicists engaged in the abortion discussion that a life-affirming society

would have the conditions for greater procreative choice, including safe and reliable means of contraception, which would preclude the necessity for frequent abortions. Men and women would share responsibility not only for procreative choice, including contraception, but also for the overall well-being of children, and there would be no sexual violence or sexual abuse. In such a utopian world, where women's lives were really valued . . . it probably would be possible to adhere to an ethic which affirmed that abortions should be resorted to only *in extremis*, to save a mother's life. The frequent trade-off between fetal life and a woman's life, a trade-off no one welcomes, then would be less often necessary. . . . Our society would be better off if we collectively turned our attention to ways in which abortion might be minimized (Harrison, 18).

This vision is shared across a wide spectrum of Christian ethics. It is affirmed by those such as Beverly Wildung Harrison (author of the quotation) who promote a feminist position that the right to abortion is closely tied to a woman's right to be recognized as a free, competent moral agent (195), and by those such as Stanley Hauerwas (196-211) who take a fairly conservative view toward abortion. Generally, Hauerwas and Harrison disagree less on their religious visions of an ideal society than on what is wrong with the present society, including the church, and how we might move toward a vision of society and church that would mitigate the desire or need for abortion.

Hauerwas thinks that attempts at resolving the abortion issue by appeal to the status of the fetus are misguided because "there is no theological means to determine when life begins" (288). He argues that abortion is symptomatic of a deeper problem which Christians must address: the failure of an individualistic, liberal society to achieve moral consensus and nurture the conviction that life is worth living (209). Christians should not primarily (if at all) respond to abortion through political activism, but through the church's vision of an alternative community which sees "the role of parent [as] one we all share." Such a nurturing community would affirm the goodness of having children so that those with unwanted or unintended pregnancies will want to carry them to term (229).

Although Harrison would not object to the church providing such communities, she argues that the strategy of alternative communities does not address what she sees as the problem underlying abortion: patriarchy. The patriarchal nature of society and the church diminishes the status of women by taking away women's ability to make procreative choices. Societal or ecclesiastical restrictions on abortion deny that women are rational, moral agents capable of making decisions about all aspects of their existence, including whether to reproduce. For Harrison, the right to abortion is a key means, not the end, of creating the social change necessary to overcome patriarchy in society and the church (4 ff.).

In spite of their significant differences, both Hauerwas and Harrison are concerned to show that abortion is not just a moral issue; it is fundamentally religious and social, and therefore requires a new mode of community. For Hauerwas, a new community can be formed only in small settings (the church) and created by those who recognize life as a gift of hope from God. For Harrison, community must include all levels of church and society, and emerges only as patriarchy is confronted and eradicated.

## Conclusion

A growing number of thinkers believes that the religious issue we must talk about is what kind of community we are going to be for the woman dealing with an unwanted or unexpected pregnancy. We must ask not only whether fetuses are persons, but also what sort of persons *we* are.

Although current religious discussion about abortion is closer to "civil war" than civil dialogue, it is nonetheless necessary and fruitful in challenging us to examine our deepest assumptions about the meaning and purpose of our lives together, which is probably the most profound and pervasive level where social and political change can occur.

## References

1. I say the ethical controversy has "largely" hinged on the question regarding the moral status of the fetus because the status of the fetus is most often the question considered in ethical writings as well as popular public debate about abortion. However, as I will note later, a significant number of feminist thinkers is questioning the assumption that the status of the fetus is the central issue. Instead, they argue that before asking about the intrinsic value of the fetus we must first consider the intrinsic value of "the well-being of a woman and the value of her life plan" (Harrison, 16).

2. It is important to recognize that Wenz's definition of religion is not primarily philosophical or theological, al-

though it could be supported on those grounds (cf. Ian Barbour's *Religion in an Age of Science*, San Francisco: Harper Collins, 1989). Rather, it derives from a descriptive analysis of the function of the terms "religion," "religious" and "religious belief" in Supreme Court rulings.

3. There can be disagreements about secular beliefs such as global warming. But, in principle, these disagreements can be publicly evaluated by those with an understanding of scientific methodology and access to relevant data. A belief about women's right to vote is secular insofar as our social arrangements would be undermined without acknowledging it. In the case of secular values, such as women's right to vote, public agreement may not have always been present but emerged over time as our social arrangements have changed, for example, with women's access to education and growing participation in the economy.

4. Although some sociological analyses, such as Robert Bellah's view of the function of civil religion in America, might be construed as "proof" that belief in God does serve an essential social purpose, the fact is that such a sociological "proof" is itself easily countered by alternative, equally valid hypotheses and so remains at least partially outside the realm of the secular as defined by Wenz. See Robert Bellah's *Beyond Belief: Essays on Religion in a Post-Traditional World*, New York: Harper and Row, 1970.

5. Since experts disagree on exactly which week (between the twentieth and twenty-eighth) the fetus acquires all the basic physiological systems found in newborns, Wenz sees twenty weeks as the earliest point at which a secular argument can be made that the fetus is a person. He purposefully avoids appeal to the criterion of viability for grounding the personhood of the fetus. Wenz thinks the viability criterion is unclear: if viability means the ability to survive without the life-support of the mother, it could be argued that viability does not occur until well after birth, particularly when there is no access to modern medical technology. If medical technology continues to develop as it has, viability could occur from conception, implying that the fertilized eggs in a test tube should be treated as persons. Wenz's criterion of similarity is independent of the caprices of medical technology and rests upon secular assumptions. Interestingly, Wenz's criterion ascribes personhood to the fetus at about the same time that the criterion of viability is usually applied, sometime between the twentieth and twenty-eighth week.

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