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VALUE-LADEN CASUISTRY

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THROUGH THE EYES OF PARADIGMS: VALUE-LADEN CASUISTRY

By

David William Montgomery

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ABSTRACT

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Casuistry has become a useful tool for moral analysis in the medical ethics arena. The application of casuistry has, however, been quite varied. Drawing upon historical sources from casuists of the Jewish and Roman Catholic traditions, I suggest that the contemporary divergences in casuistry are, in part, a result of the value differences of these groups. Analyzing casuistries relating to the question of abortion, I propose that prior knowledge of a group's values may shed light on the types of paradigms that are selected and in turn effect the outcome of the casuistry. But, the casuistry itself is not principle-free as many contemporary casuists would like to suggest.

For my mother, my father, and my sister --
Three pillars of strength.

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The work of this thesis has been somewhat of a group experience. Although the actual research and writing was my responsibility, the burdens and joys of my work were shared by many. As inadequate of a "thank you" it may be, I would like to recognize and acknowledge my appreciation for the contributions made by a number of individuals that surpassed the expectations of friendship.

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Lastly, I wish to acknowledge my mother, my father, and my sister, Jennifer. Their encouragement and support was utilized every step of the way. It is to them that I dedicate this thesis.

Those who stand outside all judgments of value cannot have any ground for preferring one of their own impulses to another except the emotional strength of that impulse (78).

C.S. Lewis
The Abolition of Man

TABLE OF CONTENTS

LIST OF FIGURES

INTRODUCTION

Given that casuistry is believed by some to be an esoteric thesis topic of questionable practical value, I should explain not only how I came to select this as a topic, but also the aspect in which I believe this topic to be relevant to a larger audience. My interest in casuistry lies in its historical roots in moral theology and its contemporary resurgence in medical ethics debates. This resurgence, however, has not gone uncontested. As I observed the contemporary casuistical debate, I became increasingly intrigued by the way in which this supposedly "history-free" secular contemporary casuistry seemed to reflect the values of certain members in society in ways similar to that of historical casuists.

Historically, casuistry was viewed within a religious context.[1] The values of the casuists distinctively determined the outcome of the casuistry. In light of those who suggest that casuistry can be practiced in an adiaphoric or morally neutral environment,[2] I will argue the opposite, that the values of the past are more prevalent in contemporary decision making than we often acknowledge.

The methodology employed is necessarily interdisciplinary

in the fields of history, philosophy, and, to some extent, religious studies. Understanding and evaluating the process of casuistry requires an appeal to a philosophical analysis; assessing the development of casuistry and the factors surrounding its prevalence and demise requires an historical investigation; and given that the process of casuistry is rooted in religion and the comparison of religious values, religious studies adds adjunct content. I have selected abortion as a common ground to compare casuistries because of the differences and similarities found between the casuistries. The analogies used to present an analysis of the casuistical argument are: 1)the issue of fetal status, 2)the issue of self-defense, and 3)the issue of maintaining reputation/ownership of property.

As noted earlier, the esoteric nature of casuistry requires an introduction that provides a definition from which the reader can begin. Although the focus of my definition, discussed in more detail later, is the argument by analogy, the Oxford English Dictionary provides a definition of casuistry which can serve as a starting point for our later discussion. Casuistry is

> that part of ethics which resolves cases of conscience, applying the general rules of religion and morality to particular instances in which circumstances alter cases or in which there appears to be a conflict of duties.[3]

This definition does not explain all of the nuances of casuistry, but it does allow the reader to jump to the heart of my argument and the way this thesis differs from any other

piece on casuistry. The problem that I address is whether contemporary casuistry as practiced in the form of analogous reasoning is independent of its historical past or if it is reliant on the historical values in deriving its outcomes. I argue that this new casuistry is not as independent of the past as contemporaries such as Jonsen and Toulmin would like to suggest; and, I argue that the values of certain groups are argued in ways similar to arguments of the past. The similarities are limited, however, and the differences are equally interesting. Based on these differences, the question then becomes to what extent can casuistry be constructed independent of principles with different starting premises? I conclude by arguing that casuistry cannot be viewed as principle-free, but that implicit principles have played important roles in both historical and contemporary casuistries.

CHAPTER 1

Casuistry: Its Reemergence and Its Importance

Within the past few years, and especially since the publication of The Abuse of Casuistry in 1988,[4] casuistry has become increasingly recognized as a useful tool in medical ethics. After a nearly 200 year hiatus from common public discourse, it has been revitalized in the medical ethics arena to deal with decisions in medicine that require immediate attention. In light of this reemergence in medical ethics casuistry became appealing on two fronts: First, as a reaction "against principle-based approaches to ethical problems," and second as a practical and pedagogical way of dealing with cases in medical ethics.[5]

Regarding the appeal of casuistry as a reaction against a principle-based approach, Tomlinson cites four reasons: a) there is no "single, defensible, overarching moral principle" that resolves cases and it is therefore only judgement that sways us one way or another; b) all we have is abstract truisms, i.e. there are no principles of application; c) ethical principles ignore history and custom; d) ethical theories do not tell us anything new.[6]

Casuistry differs from a principle-based approach in that a principle-based approach tries to solve a problem by appealing to principles of autonomy, nonmaleficence,

beneficence, and justice, among others.[7] In contrast, casuistry, in the estimation of some contemporary casuists, relies on previously accepted cases, rather than principles, to derive a morally acceptable solution.[8]

Regarding the practical and pedagogical centrality of the case, Tomlinson rightly suggests that cases have been central to medical ethics because they allow a context for the understanding of a problem.[9] To an extent, this context for understanding has fed the popularity of casuistry and the recognition of its practice.

Demise of Casuistry

Given what is perceived as a recent reemergence of casuistry, the factors surrounding the demise of casuistry become important in understanding the historical relevance of past casuistry to contemporary casuistry. Viewed as one of the dominant modes of moral and ethical problem solving within the Roman Catholic Church, it was largely the abuses of power and unfavorable public opinion that resulted in casuistry being forced into seclusion. While ostracized from public forums, casuistry continued to be utilized as a penance subscribing pedagogical device within seminaries.[10]

Although there are many reasons casuistry became unfashionable, at least three stand out as the most obvious: 1) the creative prose of Blaise Pascal and other authors in bringing the abuses of casuistry to the public; 2) the

emergence of papal authority and the hierarchy of casuistry within the papacy; and 3) the Protestant Reformation and the insistence of Protestants to do away with anything Catholic.[11] By further examining the causes of casuistry's demise, we can get a better understanding not only of how prevalent casuistry was, but also how the pejorative connotation of the term is not directed at the nature but the practice of casuistry. It becomes necessary to expand upon these reasons leading to casuistry's downfall not only to show the prevalence of casuistry, but also to attempt to answer whether it is the nature of casuistry or the environment in which it is practiced that makes the difference.

If it is the environment that leads to differences in the practice of casuistry, a better understanding of the environment in which the influence of casuistry evolved can be instrumental in understanding whether casuistry is being done in a similar moral environment. Although the answer appears to be an obvious "no", the similarities between historical and contemporary casuistry, to be discussed later, suggest certain similarities in moral environments. Understanding the history will allow us to evaluate the functions in a like environment with the past and whether, as Jonsen and Toulmin seem to suggest, the time is right for the reemergence of a new and independent casuistry.

Critics of Casuistry

Casuistry's most influential opponent was the

mathematician and physicist Blaise Pascal. In 1657 he anonymously published The Provincial Letters, which brought into question the use of casuistry.[12] Pascal, in calling for the cessation of the practice of casuistry, highlighted the abuses of casuists and criticized the laxist practice employed by some casuists.[13]

Attacks such as Pascal's led the general public to develop a dislike for the practice of casuistry. This intellectual contempt was reinforced by later authors such as Molière, who in his 1664 play "Tartuffe" mocked the bigotry and hypocrisy within the church and discouraged an acceptance of casuistry that was careless in appearance.[14] Tartuffe, the cleric in Molière's play, displays the corruption of the church with comments like: "The public scandal is what constitutes the offense: sins sinned in secret are no sins at all."[15] This suggests self-serving and crooked church, or at least members of the church which were responsible for carrying out the rulings of the church. Near the end of the play, when the officer comes to take Tartuffe away, it is said that "the long history of his dark crimes would fill volumes,"[16] a possible reference to the long and extensive tradition of casuistry which was known to "fill volumes."

Montesquieu's 1721 Persian Letters, which was added to the Vatican Index of banned books in 1761, also attacked casuistry. In Letter 57, Usbek writes to Rhedi about his encounter with a casuist. Usbek is told by the casuist that

> it is not the action that makes the crime, but whether the person committing it knows or not. If someone does something wrong while being able to believe that it is not wrong, he has clear conscience, and since there is an infinite number of equivocal actions[,] a casuist can give them the degree of goodness which they lack by declaring them good.[17]

Usbek bristles at the ease that "these casuists" dismiss sin. He leaves the monk by expressing his dismay with such behavior towards his God, asserting that a moral God would condemn such abuses.

Rica, in one of his letters, discusses the actions of the casuists at a library even more pointedly than Usbek:

> Here you see the casuists, who bring the secrets of the night out into the light of day; who, in imagination, create every monstrosity that the demon of love can produce, put them together, compare them, and think about them endlessly; and it is lucky for them if their emotions do not get involved, or even become the accomplices of all these perversions, so openly described and so nakedly portrayed.[18]

Montesquieu sets forth his opinion regarding the status of casuistical analysis; his popular sarcasm further distanced casuistry from mainstream public acceptance.

Building upon this, Adam Smith, best known for his economic theories, attacks the misuse of language employed by casuists. As Smith wrote in his Theory of Moral Sentiments (1759):

> 'Books of casuistry are generally useless as they are commonly tiresome.... That frivolous accuracy which they attempted to introduce into subjects which do not admit of it, almost necessarily betrayed them into... dangerous errors,' and at the same time they abounded 'in abstruse and metaphysical distinctions....'[19]

Smith, in his agreement with other rhetoricians, displays his

frustration with casuistry. He has become tired of the frivolity and unscrutinizing errors of casuistry and suggests that it would be best if casuistry were set aside. Even the opponents of contemporary casuistry seem to echo their forbearers view regarding the uselessness of casuistry.[20]

These attacks on casuistry by influential individuals certainly aided the demise of casuistry, but were unlikely the sole cause. The reaction to Jewish casuistry is not found to be nearly as prevalent as that to the Catholic casuistry and therefore the attacks that we see are primarily against the Catholics.[21] In part, these attacks can be viewed as a reaction against the Roman Catholic Church structure and papal authority.

Papal Authority and the Protestant Reformation

Despite the increase in monarchy during the Middle Ages, the Catholic church viewed its rule as universal because all individuals could potentially be Christians.[22] This belief of universality required some aspects of uniformity if papal rulings were to be effective. Casuistry served as an excellent way to provide such uniformity in making decisions that could be emulated at the most local of levels. Passing down decisions to local priests allowed the views of the papacy to be reflected in the life of everyday men and women.

As the above section suggests, rhetoricians picked-up on abuses carried out in the name of the church. And as the conditions became right for a viable alternative to Roman

Catholicism,[23] the approach of the casuists came into question. Thus, another factor contributing to the decrease of casuistry might have been its association with Catholicism and a method of transferring papal rulings. For example, English Protestants initially rejected casuistry because it was so much a part of Catholicism.[24] And although Anglican priests brought back the use of casuistry upon the perceived moral void in its absence, the public sentiment was already against casuistry, or at least the casuistry discussed by the critics of it.

Having provided a brief background of the social climate of casuistry in the 17th and 18th centuries, we are now ready to examine a contemporary rendering of casuistry. We will look at the similarities and differences between the historical and contemporary casuistries to see if they function in a similar moral climate; a moral climate which might lead to difficulties similar to those experienced by historical casuists.

Contemporary Interpretation of Casuistry

With the 1988 publication of Albert R. Jonsen and Stephen Toulmin's The Abuse of Casuistry: A History of Moral Reasoning, the topic of casuistry was resurrected and has become a subject of ongoing discussion. Jonsen and Toulmin described casuistry as a six step process of ranking and filing cases,[25] but failed to provide a clear methodology for

the utilization of casuistry within clinical ethics. To fill this gap in methodology, Jonsen, in a later article, describes three features of what a clinical casuistry should look like:

> 1) Morphology -- That aspect of a "case that reveals the invariant structure of the particular case whatever its contingent features, and also the invariant forms of argument relevant to any case of the same sort."
>
> 2) Taxonomy -- "Situates the instant case in a series of similar cases, allowing the similarities and differences between an instant case and a paradigm case to dictate the moral judgment about the instant case."
>
> 3) Kinetics -- "An understanding of the way in which one case imparts a kind of moral movement to other cases, that is, different and sometimes unprecedented circumstances may move certain marginal or exceptional cases to the level of paradigm cases."[26]

The evaluation of this methodology has received mixed reviews[27] and been followed by critiques of casuistry that differ in methodology slightly from that of Jonsen.[28] We do, however, begin to get a better idea of how we would start to analyze a case in a casuistical manner. To firm up this understanding, I will discuss a more general view of casuistry in the following section.

Before doing that, however, I would like to return to the discussion of casuistry as presented by Jonsen and Toulmin. Having structured their six steps of casuistry, they provided a definition which was used by Jonsen in describing his methods for clinical casuistry.

> The analysis of moral issues, using procedures of reasoning based on paradigms and analogies, leading to the formulation of expert opinions about the existence and stringency of particular moral obligations, framed in terms of rules or maxims that are general but not universal or invariable, since they hold good with

> certainty only in the typical conditions of the agent and circumstances of action.[29]

I find this definition of casuistry quite palatable and even applaud the broadness of its meaning, i.e. there is very little which this definition could not embrace. But as I suggested earlier, it appears to neglect the importance of group values or the values of the casuist doing the casuistry.

Revised Definition of Casuistry

Within this section, I will present a somewhat simplified definition of casuistry and proceed to focus on the way in which the various analogies used by groups and individuals can be shown to reflect the values of the casuist. I will draw directly from the analogies used to show how certain values of the casuist become evident.

To begin, when I use the term paradigm,[30] I refer to something that is seen as a moral exemplar; viewed as a quasi-standard case that has been accepted as morally non-problematic; observed as a "classic" problem for which a model solution exists. I see paradigms as an extension or accepted application of a rule or group of related rules. It is through the use of paradigms that people have access to the application of the rules, i.e. people refer back to rules through paradigms. To clarify the relationship between paradigms and rules, consider the rule (which I will return to later in this section) of Exodus 20:13 "Thou shalt not murder." The rule is understood in relation to clear cases of

wanton homicide such as the killing of a defenseless old woman to steal ten dollars. This case serves as a paradigm to help explain the rule of Exodus 20:13. On the other hand, take a case where the same old woman is attacked by PCP-crazed thugs with pipes, but she defends herself by knocking them off with the .45 Magnum that she carries in her purse. Although it would be better had she been able to avoid killing the thugs, few, if any, would argue that she has acted wrongly in securing her well-being. Although it initially appears in violation of the rule against murder, this case of self-defense serves as a paradigm to help explain the circumstances under which exceptions to the rule apply.[31]

Paradigms are important to the understanding and application of a rule and are heavily used in casuistry. Casuistry is the process of applying an abstract moral law to a particular case that is morally difficult or problematic. That is, casuistry is applied morality or a form of moral case law. A casuist takes a generally accepted moral rule or truism and assesses whether a particular case/problem at-hand applies. This assessment is done by comparing the problematic case with previously determined paradigm cases that satisfactorily exemplifies the general rule. A casuist would help explain a case in question by referring to a paradigm case which most resembles the case at-hand, and the casuist would then suggest the most appropriate path of action. Casuistry may be diagramed as follows:

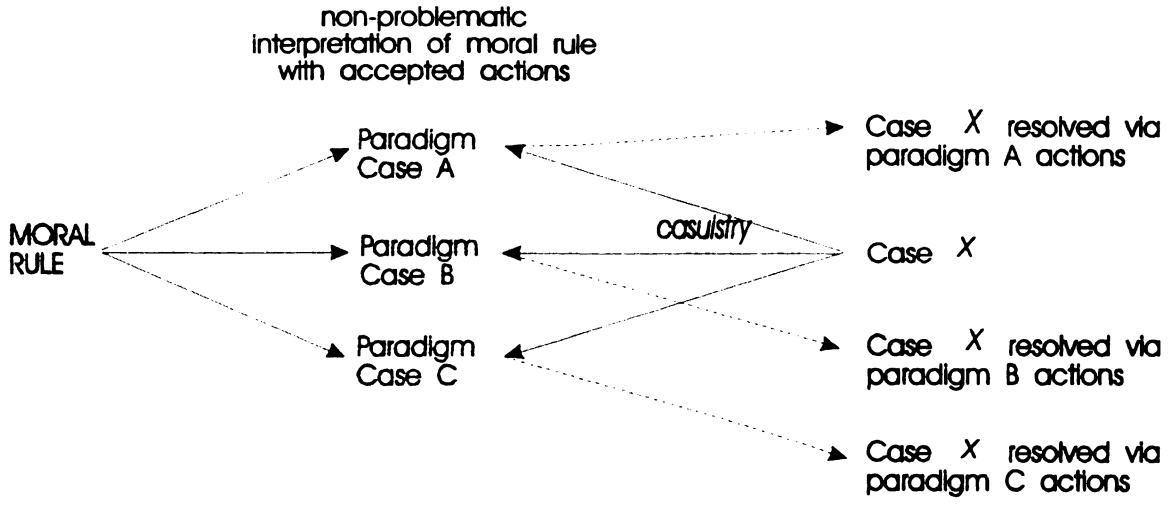

figure 1. General diagram of casuistry.

One begins with an accepted moral rule -- for example: Exodus 20:13 "Thou shalt not murder," or something to the effect that it is morally wrong to murder another individual. We develop interpretations of this moral rule over time that allow us to apply it to everyday life. With these non-problematic interpretations, we find certain accepted actions that can be agreed upon as being morally sanctioned. The paradigms or exemplar cases that provide understanding of the moral rule become points of reference in the practice of casuistry. To elaborate on the above example, one could have the general prohibition of murder (Exodus 20:13) as the moral rule. From this, one examines instances where there is killing, with the question being whether the killing is unjust as a form of murder or whether it is just and acceptable.

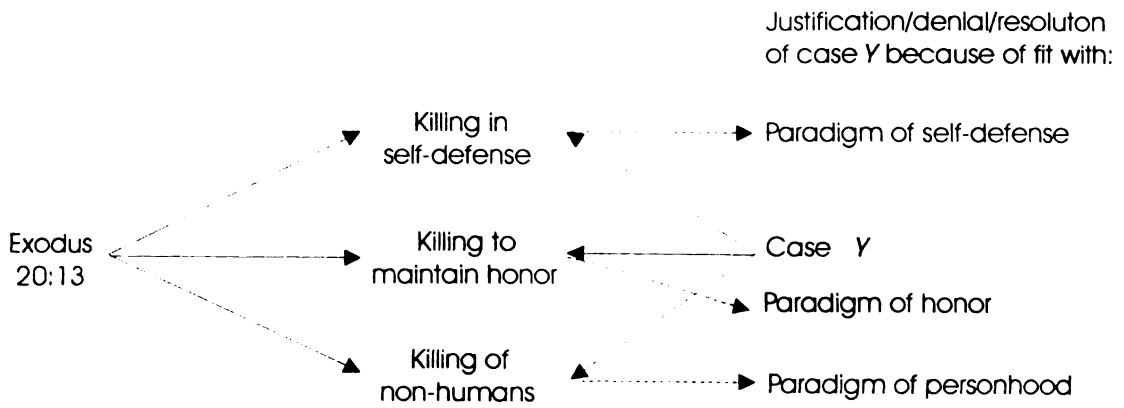

figure 2. Revised example of casuistry using Exodus 20:13.

Several maxims that relate to killing are: A) killing in self-defense; B) killing to maintain honor; C) killing of non-humans. The accepted paradigm case provides guidelines/examples to judge whether a case of killing is justified or unjustified. For example:

A) Killing in self-defense -- Individual D approaches E with a knife with the intention of killing E. This paradigm might suggest that the self-defense of E, which results in the death of D, is a justified form of killing. It would not, however, allow D to kill E.

B) Killing to maintain honor -- Given that individuals may protect their property, even if this protection results in the destruction of an attacker, so can individuals protect their honor, as honor is certainly more important than property.[32]

C) Killing of non-humans -- Given an innate specisim, it

is acceptable to take the life of an animal or other non-human entity.

Casuistry would take the case at hand, Case *Y* in the Figure 2, and referring back to paradigm cases which resemble Case *Y*, the individual would then follow the actions similar to those which had been accepted for the paradigm case which Case *Y* most resembles. If there is not a paradigm case which would be appropriate to follow, then Case *Y* could become a paradigm case in its own right, provided that there is moral consensus with regard to the actions to be carried out. This moral consensus could be achieved by non-casuistical means, but the employment of the newly-developed paradigm would be casuistical. When faced with a new dilemma, those with similar values may congregate and decide upon acceptable actions for resolving the new dilemma and, thus, further develop a casuistical network. In other words, the application of the moral rule is contextualized within society (in a Marxist framework, this sounds remarkably dialectical.[33])

As suggested earlier, the purpose of this section was not only to define the way I will be using casuistry but also to determine how similar the environment of contemporary casuistry is to that of our historical casuistry. Having done that, certain similarities and differences regarding the moral environment of the functioning casuistry can be delineated.

Similarities

• Many people today are still somewhat reluctant to embrace casuistry because of the pejorative aura it has acquired.

• Papal authority and the idea of transferring decisions through a casuistical hierarchy remains.

Differences

• Contemporary casuistry has primarily emerged within the medical ethics debate and, thus, appears to be more focused on such discussions. Historical casuistry encompassed almost all aspects of decision-making.

• Contemporary casuistry has been an attempt to secularize casuistry -- to appeal to generalities. It is unclear whether this can be accomplished given the value-laden nature of casuistry.

• The major difference, however, is undoubtably the public sentiment towards casuistry. As is evident from the popular nature of the historical attacks on casuistry, casuistry had been a prevalent mainstream concept. Now, however, few lay individuals are aware of the term's meaning let alone its application.

Therefore, in trying to evaluate casuistry's place within moral reasoning and whether it is the nature of casuistry or the environment in which it is practiced that makes the difference, I believe the answer to be that casuistry does belong in the contemporary arsenal of moral reasoning and that both the nature and the environment are important aspects of its development. It is the nature of casuistry to allow the

casuist to reach outcomes molded by his/her values, and although the contemporary environment seems quite different given the lack of mainstream knowledge about the topic, it seems sufficiently similar to allow one to understand its historical relative within this context. Thus, it would seem that the time is right for reemergence of casuistry so long as we recognize that it is not independent of the values of the casuist. To make this point clearer, I present a case study of abortion.

CHAPTER 2

Casuistry on Abortion: A Heuristic Device

I should make it clear from the very beginning that my purpose is not to argue "for" or "against" any particular position on the abortion question. Excessive amounts of literature have already been devoted to the subject.[34] I use abortion as a heuristic device to demonstrate different casuistical approaches to one particular topic.[35] Delineating the differences between a group's application of casuistry shows the inherent value-laden nature of such an approach along with the difficulty of reaching a consensus.

The abortion issue was discussed most frequently in terms of defining ensoulment[36] and issues of fetal status.[37] This discussion has been influential in molding later dialogues around self-defense and maintenance of honor/property ownership.

Historical Casuistry of Abortion

Early Sources and Development

Historical casuistry was primarily religiously-oriented or voiced within texts that presented values of religious groups (such as Judaism and Roman Catholicism.) Thus, a historical casuistry begins with early texts of the Bible and Talmudic commentaries. As certain themes emerge, I will

highlight them and return to them in the section on the contemporary casuistry of abortion.

Status/Ensoulment

The casuistical discussion of abortion begins with early Biblical and Talmudic commentaries. The status of the fetus[38] is found in Exodus 21:22-23:

> When men strive together, and hurt a woman with child, so that there is a miscarriage, and yet no harm follows, the one who hurt her shall be fined, according as the woman's husband shall lay upon him; and he shall pay as the judges determine. If any harm follows, then you shall give life for life,....

The Jewish interpretation of the above passage came to view the "hurt" as a miscarriage or loss of fruit and "no harm follows" to mean that the woman survived the miscarriage.[39] This case demonstrates a casuistry that, suggests either a hierarchy of status and/or certain gender-related duties. Elaborating, we find two cases: one in which the woman miscarries and survives; the other in which both the woman and the fetus are killed. In the first case, the attacker is liable for monetary compensation to the husband. The attacker has wronged, but action does not demand retribution in the form of taking his life for the life of the fetus. In the second case, however, the woman's life is enough to tip the scales against the attacker, thus demanding "life for life." "The Talmud explains[40] that the embryo is part of the mother's body and has no identity of its own since it is dependent for its life upon the body of the woman."[41] What these two courses of action seem to suggest is that: 1)the

life of the fetus is something that should not be taken, but 2)the fetus holds a status below that of other developed humans.

To help further understand the taking of fetal life, Jews refer to two other Pentateuchal passages:

> 1) When men fight with one another, and the wife of one draws near to rescue her husband from the hand of him who is beating him, and puts her hands on his private parts, then you shall cut off her hand; your eye shall have no pity. Deuteronomy 25:11-12.
>
> 2) You shall not go up and down as a slanderer among your people, and you shall not stand forth against the blood of your neighbor. Leviticus 19:16.

Although at first glance these passages appear to be unrelated to abortion; the Mishnah draws upon Deuteronomy and Leviticus to state: "These may be delivered at the cost of their lives he that pursues after his fellow man to kill him...."[42] This would suggest an argument of pursuit, which will be discussed more fully in the section on self-defense. But to bring it up here is to highlight the weak surface logic[43] that is asserted in passages of the Talmud such as Sanhedrin 72b and 73a which maintains that it is one's "duty to disable or even take the life of the assailant to protect the life of one's fellow man."[44] Although this coincides with Sanhedrin 87, neither of these two commentaries seem to connect with Deuteronomy 25:11-12. The passage from Leviticus says that it is wrong to act against the blood of your neighbor. The Sanhedrin allows you to protect yourself when being pursued by such wrongs. Deuteronomy 25, however, seems to present

another rung in the hierarchy of status mentioned earlier. We would expect that a wife going to aid her husband to be an obligation. Here, however, the woman becomes the villain. The reason for this could be related to either status of the woman and fetus, gender-related obligations, or a combination of both. First, the woman is considered inferior to man yet of more value than a fetus, creating a hierarchy of fetus, woman, man. The fetus receives the lowest status because it has no identity outside of the woman. A second possibility is that the woman has certain gender-related obligations which she cannot violate. For example, the reason that she is punished for touching the private parts of another may not be so much because of inferior status as it may be because she has a greater duty not to violate the taboo that comes with her sex. Furthermore, such gender-related duties may override duties to defend her husband or to defend herself. Another possibility to explain the above passages is found in a combination of the two above suggestions.

Within the Talmud, we do find one source of guidance that directly relates to abortion:

> A woman who is having difficulty in giving birth, it is permitted to cut up the child inside her womb and take it out limb by limb because her life takes precedence. However, if the greater part of the child has come out it must not be touched, because one life must not be taken to save another. Oholot 7:6.

The first part of this passage reaffirms the woman's life as being more important than that of the fetus. The second part is somewhat confusing, giving the casuist two ways to act with

regard to a difficult abortion: 1) if the fetus is endangering the life of the mother, then the life of the fetus may be taken because the rights of the fetus are not equal to those of the woman. In the second case, however, the fetus upon emergence of its greater part, gains rights equal to or greater than those of the woman. Why is this so?

Commenting on this, Sanhedrin 72b states that

> Once the child's head has come forth it may not be harmed, because one life may not be taken to save another. But why so? Is he not a pursuer with intent to kill? There it is different, for she is pursued by heaven.[45]

On the face of it, the importance of the "greater part" seems a bit odd. The concern seems to be focused around when a fetus "looks" like a child. With the emergence of the head or greater part, one can see that this growing organism "looks like us." Turning towards embryology to understand this, we see that the fetal period begins around the ninth week (before the ninth week is referred to as the embryonic period.) By the seventh week, we see that the fetus resembles a sexless E.T.[46] By the ninth to tenth weeks, we begin to see the development of sex-specific genitalia accompanied by a face that has human appearance.[47]

Rashi (1040-1105), the eminent Biblical and Talmudic commentator, explains the Talmudic passage (Sanhedrin 72b) as such:

> As long as the child did not come out into the world it is not called a living being and it is therefore permissible to take its life in order to save the life of its mother. Once the head of the child has come out, the

> child may not be harmed because it is considered as fully born, and one life may not be taken to save another.[48]

In this, our answer to the question of why the greater part is important, is revealed; prior to the emergence of the head, the fetus is not called a "living being." Upon the emergence of the greater part, we can distinguish it as a "living being."

In his responsa, Panim Me-iroth, Rabbi Meir Eisenstadt (1670-1744) posed the following case to help make sense of cases such as the above: "A woman had difficulty giving birth, and the child came out feet first. Is it permitted to cut up the child, limb by limb, in order to save the mother?"[49] Rabbi Eisenstadt and others tried to resolve this question by stating that "birth is constituted by the extrusion of the head or majority thereof, or in the case where the head came out last, the extrusion of the majority of the body."[50] It was decided that before the head emerges, the child (fetus) resembles a pursuer and the life of the mother would be more important than the fetus'. With the emergence of the head, God's plan becomes more clear and the child no longer represents a child pursuing to kill but now is an act of heaven that should not be avoided.[51] From this, it becomes clear when the life of the mother ceases to take precedence over the life of the fetus/emerging child.

Summing up what we have established to this point, Jews rely heavily upon the appearance of the fetus to determine its status. Before this appearance, the life of the fetus is of

less importance than that of the woman. Once the fetus has emerged and visibly resembles a child, then the life of the woman and the child are of similar value.

Catholics are less concerned with the status of the fetus than they are with the ensoulment of the fetus. Aristotle's view of ensoulment as a progression from a vegetative soul to an animal soul to a rational soul was very influential in forming early Christian thought about ensoulment.[52] By the seventeenth century, however, this was viewed as both imaginary and incomplete because there was no way to tell when souls changed. Paulo Zacchia, a seventeenth century Roman physician, argued that a rational soul was "infused in the first moment of conception."[53] Despite his belief in immediate infusion, Zacchia conceded that punishment should be milder for abortions occurring before 40 days post-conception.

St. Alfonso de Ligouri disagreed with Zacchia and felt it best to "rely on the Septuagint translation of Exodus, which Zacchia dismissed as 'a commentary' which was not Scripture, and to hold it 'certain' that there was not immediate ensoulment."[54] However, it was clear by the early 1700s that Zacchia's view was winning favor. This belief of immediate ensoulment gained support because of continued devotion to the Immaculate Conception, the belief that Christ, born of the Virgin Mary, was Christ (soul and all) at the instant of conception.[55] This idea of ensoulment had become so entrenched that by the mid-1800s, Pius IX had "proclaimed as

a dogma of the Catholic Church that Mary was set free from sin 'in the first instant of her conception.'"[56] With immediate ensoulment came, at the point of conception, the need for the protection of the fetus.

The rationale behind ensoulment and protection of the fetus at the point of conception is derived from natural law and a concern less with human image than with the soul and human potential. In brief, the Doctrine of Natural Law, which is of immense importance to Catholic theology, states that the best way to understand the will of God is to observe nature. What is natural is of God and should be followed.[57] For example, because reproduction and birth are considered to be natural acts in compliance with God's intention for humankind, natural law suggests that we should not interfere with the bringing to fruition of these acts. Thus, as the development of a fetus is the beginning of a natural progression towards birth, it should not be interfered with. When Catholics argue that ensoulment takes place at conception, the fetus assumes even greater moral value so as to forbid interference with allowing the soul to develop naturally. Beyond this aspect of ensoulment, is the paradigm of self-defense which is invoked at times when the paradigm of ensoulment does not coincide with the circumstances at hand.

The idea of when a fetus' life becomes equal to that of the woman is as important to Jews as when a fetus becomes ensouled is to Catholics. This difference accounts, in part,

for the differing approach of the historical casuistries. For Jews, the fetus becomes equal at the instance which we can recognize the fetus as like ourselves -- male or female with distinctively human characteristics. Once the fetus is viewed as a person, then it has rights like other persons. Catholics are more concerned with the time of ensoulment, or the time at which a fetus receives a soul from God.

Self-defense

The idea of self-defense was alluded to earlier in Rashi's discussion of pursuit related to Deuteronomy and Leviticus. Given that the status of the fetus is viewed by Jews as being inferior to developed humans, the idea of self-defense is important to prevent abuse of the fetus' inferior status. That is, just because the fetus is seen as less important than the mother, its potential accords it some moral value which one should not violate without justification. The limits of the fetus' claims to continued development revolve around pursuit, or the intentions of one to follow and harm another.

Although not a penal crime, Jews consider the destruction of a fetus prior to birth to be a serious moral offense; the status of the fetus does not permit such actions without cause.[58] Allowing pursuit to help explain when there is justifiable cause, we can begin to understand how a Jewish casuistry might work in placing the fetus within such a moral framework. Thus we can examine three different cases: 1) the

progressing fetus that poses no threat to the woman; 2) the life of the fetus threatening the woman; and 3) the greater part of the fetus having emerged, yet threatening the woman. A summarized Jewish response to these cases would allow abortion only in the second instance.[59]

Examining the first case where the fetus posses no threat to the woman, it should be pointed out that "with a few notable exceptions, Jewish authorities agree that, once conceived, a child has a right to live even if there is a chance for it to be born malformed or in poor health."[60] Thus, the fetus being a fetus results in a certain amount of protection, for as discussed earlier, pursuit does not yet enter the picture.[61] The latter two cases distinguish types of pursuit: one being pursuit by the fetus, the other being pursuit by God or nature.

In this second case, the life of the fetus threatening the woman, we find the fetus' pursuit of the woman to warrant defensive measures by the endangered woman. Oholot 7:6 allows abortion when the "woman is having difficulty in giving birth." The reason behind this is the secondary nature of the fetus. As Maimonides interprets the Mishnah's stance:

> This is moreover a negative commandment, the sages have ruled that if a woman with child is having difficulty in giving birth, the child inside her may be taken out either by drugs or by surgery, because it is regarded as one pursuing her and trying to kill her. But once its head has appeared, it must not be touched, for we may not set aside one human life to save another.[62]

The appearance of the head is more directly related to

the last part of Oholot 7:6 and to the third case, to be discussed next, but the implications of Oholot and Maimonides are: 1) an abortion must be in response to a threat to the woman's life and 2) the destruction of the fetus, although a grave offense, is not murder.[63] The limits of these threats to the woman's life, however, are not stated.

The seventeenth century Rabbi Israel Meir Mizrahi, on the other hand, argues that abortion would be permitted if it "was feared that the mother would otherwise suffer an attack of hysteria."[64] Although "the early 17th century scholar, Joseph Trani of Constantinople, regarded any abortion as lawful when performed in the interest of the mother's health, Isaac Lampronti, the Italian rabbi-physician of the first half of the eighteenth century, could see no justification for the induction of abortion if the mother's life was being attacked not by the child [but] by a disease afflicting her."[65] As indicated earlier, however, the argument changes with the emergence of the greater part of the fetus. Tifereth Israel[66] states that the argument of pursuit is completely inappropriate after the emergence of the head because it is an act of God if the child endangers the mother's life. There is no intention on the part of the child to kill the mother.[67]

The woman is being pursued by God and nature rather than the child. The distinction again relates to the status of the fetus. When the greater part has emerged, the fetus gains a status equal to the mother. Because of its relative

innocence, the mother is not to take its life as the actions of the child are seen as actions of God.

Having outlined the three senses in which the argument of pursuit can be thought of as applicable or not, let us turn to a problem presented by Rabbi Eliezer Deutsch (1850-1916) in his responsa entitled Peri Hasadeh:

> A woman who had been pregnant a few weeks began to spit blood. Expert physicians said she must drink a drug in order to bring about a miscarriage. Should she wait, it would become necessary to remove the child by cutting it up, endangering the life of the mother. Is it permissible to induce the miscarriage by means of the drug?[68]

Examining the case, we find that the woman is in danger and that the greater part of the fetus has not yet emerged. Recognizing this, we place this case in the second category above, the life of the fetus threatens the woman. Rabbi Deutsch concludes that such an abortion would be permitted for three reasons: "1) Until three months after conception there is not even a foetus. 2) No overt act is involved in this abortion. 3) The woman herself is doing it and it is thus an act of self-preservation."[69]

So far, we see that the Jewish casuistry of abortion illuminates a belief in status, a hierarchy of status with the woman above the fetus until the fetus gains birth, and the need for an abortion to be done in self-defense rather than on a whim.

Given the Catholic position on ensoulment at conception, the general ruling would be a prohibition of abortion.

Casuists, however, made use of special circumstances to find instances in which abortion might be acceptable. In part, acceptability was found through the application of the Doctrine of Double Effect (DDE). DDE allows one morally to carry out an action that has bad consequences which are secondary to the primary intention. In other words, one can do act A, even if it is known that outcome B is a negative result of act A. The primary and desired intention must, however, be outcome A of act A, and not outcome B.[70]

As noted earlier, throughout Catholic reasoning, we see reflections of Natural Law. Acknowledging the evils of contraception which forbade the interruption of the course of insemination, the Jesuit Tomás Sanchez (1550-1610) conceded that logically abortion would be forbidden. For as with the condemnation of contraception which interferes with God's natural plan of procreation, abortion is an obvious interference with the course of pregnancy.

Sanchez argued that rape could be one exception which would permit abortion, despite its interference with the course of pregnancy. The argument he set forth to allow this, gave the woman limited rights similar to a property owner. The victim of the rape had not solicited the semen and she was therefore not a voluntary possessor of it. Having limited rights, Sanchez argued that, providing that abortive action was taken immediately, the victim could lawfully expel the semen which she was holding contrary to her desires.[71] The

ability of the woman to do this was analogously viewed as being similar to "a property owner who was entitled to pursue and strike a thief until he had reached a safe place."[72]

But much like the Jewish view of the fetus pursuing the mother, there were limited grounds under which a property owner could pursue a thief or a woman could pursue to expel semen. For like a Jewish woman could no longer terminate a pursuing fetus once there was the emergence of the greater part, and a property owner could not strike a thief upon the thief's arrival at a safe place, the Catholic woman could not expel the fertilized egg once it had reached the safety of implantation on the uterine walls.

Leonard Lessius (1554-1623), a Belgian Jesuit, agreed with Sanchez about the wrongness of contraception,[73] which in his eyes made abortion even more abominable. He did not agree, however, with the manner by which Sanchez justified abortion in the case of rape. Lessius believed that the killing of the embryo was lawful provided that the "direct intention" was not to kill.[74] That is, "the intent to kill was indirect [per accidens] if the dominant purpose was to save her [the mother's] own life."[75] Invoking the DDE was the only way acceptably to allow the outcome of an abortion. Rights were not the issue. Although Sanchez foreshadows later contemporary discussions that argue casuisticly about rape in language of the rights of a "property owner", the views of Lessius with regard to rape, dominated the time period.

As alluded to earlier, the DDE was used to allow killing so long as it was an indirect result of some justifiable action, e.g. self-defense. Sanchez appealed to this doctrine in cases of abortion for therapeutic reasons. In cases where the mother would die if the abortion was not performed (and the fetus had not yet been ensouled), the fetus was seen as not being unjust, but merely dangerous. The fetus was not intentionally causing harm, but in the words of Sanchez, it "invades, and, as it were, attacks"[76] the woman. There would be a requirement of charity that the mother "sacrifice herself only if the child could be born and baptized and so assured of spiritual life,"[77] but the attacking of the fetus was likely to result in its own destruction. Thus, when both the woman and fetus are likely to die if no action is taken, the DDE was invoked to save at least one life.[78] This does not mean that DDE evaluates the situation to save the optimal number of lives. Rather, DDE allows one to pursue a course of action that might normally be forbidden if the action were evaluated solely on the outcome. DDE allows the action so long as the evil was not intended but a non-ideal result.

Implementing the Thomistic principle of Double Effect, the intention is not to kill the embryo, but rather to save the mother's life; as a result of saving the mother's life, the embryo is unintentionally killed. This is an act of self-defense, and not a direct act of killing. This saving of one life as opposed to the sacrifice of two is supported by

Sanchez's bull analogy:

> If a pregnant woman were attacked by a bull, she could run though running caused an abortion; so here she could use means necessary to save her life.[79]

In trying to escape the bull, her primary intention is to save her life. A secondary result is the abortion of the fetus. Similarly, if the life of the woman was being threatened, then primary actions could be taken to save the woman's life provided that the resulting abortion were secondary.

This is reaffirmed by St. Alfonso de' Liguori (1696-1787) who agreed that the justifiability of any act revolved around the mother's intention. Liguori's views were more rigid than those of Sanchez, stating that even in cases of rape, the "most common opinion" held that "it was never licit to expel the seed."[80] The fetus was neither a thief nor an aggressor for "the danger of death in childbirth was 'far distant,' the fetus was not a 'present aggressor,' and abortion was not justified to avert the danger."[81] Here, Liguori chooses not to utilize DDE and argues for protecting the fetus at all costs because of its innocence and possession of a soul at the point of conception. As the fetus progressed, it became more and more worthy of being saved.

Since it was forbidden to abort an early fetus, "so much less is it lawful to expel the fetus which is closer to human life."[82] In the end, Catholics saw a shift from acceptability under some circumstances, to a general prohibition based on the "most common opinion."[83] This "most

common opinion" was what was generally agreed upon and therefore "safer" and to be followed.[84]

In summary, for Jews what matters is how real the threat to life is from the view of a third party observer. For Catholics, we may view abortion from the standpoint of the mother and her intentions, i.e. doctrine of double effect: killing of a fetus as the result of removing a cancerous uterus versus the need for a craniotomy. In both, the intention is to save the mother's life and Jews would deem this as acceptable; for Catholics, in the former the killing of the fetus is accidental whereas in the latter, the killing is intentional and primary and thus frowned upon.

Maintenance of Honor

A final paradigm situation to demonstrate the value-laden nature of casuistry is that of our taking the life of a fetus to prevent tarnishing of the family name by out-of-wedlock or illegitimate births. Rabbi Yair Hayyim Bachrach (1639-1702), in his responsa Havoth Yair, presented the following case for analysis:

> A married woman committed adultery and became pregnant. She then had pangs of remorse, wanted to do penance, and asked whether she could swallow a drug in order to get rid of the "evil fruit" in her womb.[85]

Referring back to stages of development, Bachrach concludes that the fetus could theoretically be aborted because the life of the woman has greater status than that of the fetus. He warns, however, that it is best not to take such lives as society tends to frown upon such actions.[86]

Rabbi Emden, an eighteenth-century authority, believed that the capital guilt of the adulteress would also "forfeit the life of the fruit that she carried."[87] This would imply that it would not matter if the fetal life was taken, as Bachrach theoretically suggests. Others, however, maintained that there could be no distinction between a bastard and a legitimate fetus in this respect, and that any sanction to destroy such a product would open the floodgates to immorality and debauchery.[88]

What this suggests is that abortions prompted by the woman's desire to maintain the honor of her family name, should not be permitted. This reinforces the requirement that the woman's life be threatened in some sense.[89] Therefore, our understanding of historical Jewish casuistry is influenced by Jewish values of hierarchy and threat to the woman caused by a fetus of less moral value.

Given that Catholics developed a doctrine against abortion that became increasingly strict, few have argued for abortion to maintain honor. Sanchez, however, used the case of the fetus as attacker as his paradigm case for discussing abortion with regards to maintenance of honor. Having argued that self-defense allowed for the fetus to be aborted, Sanchez considered three extensions of this paradigm case.

1) "Suppose the girl had conceived in unlawful coitus and her relatives would probably kill her if they discovered that she was pregnant. Might she kill the fetus to save her life?"

In probability, Sanchez found this to be acceptable because the woman's life was in danger.[90]

2) "Suppose she was betrothed to one other than the man who had impregnated her, could not without scandal terminate the engagement, and ran the risk of bearing another's child to her husband. Could she avert the danger by destruction of the embryo?" Again, in probability, Sanchez found this to be acceptable for her life was in danger.[91]

3) A third case turned to by Sanchez involved the reputation of the girl. In this instance, it was believed that "if an abortion were merely to protect a girl's reputation, the peril was too remote, the fetus not an attacker,... abortion would be unjustified."[92] Abortion could only be done if the woman's life was in danger. Abortion continued to be forbidden if it was done to "hide sin or further lust."[93]

Although Sanchez was not so bold as to argue that the woman has undeniable rights of choice, he was more lenient than most Catholic casuists in saying that when the woman's life was in danger due to external circumstances of pregnancy beyond her control, the woman had the choice to maintain her honor and proceed with the abortion. The reasons behind acceptance was still threat to the woman's life. Sanchez was more liberal than most Catholics of his day, his discussion still reveals some basic Catholic values regarding abortion, i.e. due to the nature of the fetus being ensouled at

conception, only something as dramatic as the endangering of the woman's life justifies abortment (thanks to the DDE.) With this in mind, we can proceed to analyze the way in which the contemporary casuistical discussion of abortion is framed.

Contemporary Casuistry of Abortion

Thomson Dialogue

There is a vast amount of literature that discusses contemporary casuistry of abortion; too vast to do justice to here. Given the seminal nature of Thomson's article, and the ensuing dialogue that exists even today, I have decided to focus on the analogies presented by Thomson in her "A Defense of Abortion" and the response of others to these analogies. In Thomson's article, we find contemporary analogies of ensoulment and self-defense. The issue of maintaining honor is no longer as relevant to the discussion as it was historically (although it certainly remains to weigh heavy in the minds of those contemplating an abortion) and the focus has shifted towards issues of ownership and choice. The historical relevance of these contemporary discussions recurs throughout.

Ensoulment/Personhood

In a contemporary secular discussion of abortion, Thomson uses the analogy of an acorn becoming an oak tree to understand the status of a fetus. Here she suggests that the fetus does not equal a person, just as an acorn does not equal

an oak tree.[94] For as an acorn does not possess the essence of an oak tree -- it merely possesses the potential for being an oak tree -- the fetus does not possess the essence of being a person[95] -- although it certainly possesses the potential.

Although this simple argument put forth by Thomson seems attractive and compelling, the roots of it (no pun intended) seem reflective of the historical "Jewish idea of status." As seen in the historical section on Jewish casuistry, the fetus did not have significant status until the emergence of the greater part. Similarly, here the fetus does not have the rights of a person until it is recognized as a person, like an acorn does not have rights of an oak tree until we can recognize it as tree.[96] Thomson recognizes the fetus as having recognizable human characteristics (e.g. toes, fingers, etc.), "by the tenth week."[97] This recognition coincides with an affinity for Jewish casuistry.

John Finnis, on the other hand, sees a granting of rights by the tenth week as incomplete.[98] He presents an analysis of Thomson's acorn analogy that has reverberations of a distinctively Roman Catholic idea of ensoulment. Again, as we see in the historical section of casuistry, Catholics have tended to view ensoulment as occurring at the point of conception. Finnis begins by acknowledging that an acorn can remain dormant for years. But,

> plant it and from it will sprout an oak sapling, a new, dynamic biological system that has nothing much in common

> with an acorn save that it came from an acorn and is capable of generating new acorns. Suppose an acorn is formed in September 1971, picked up on 1 February 1972, and stored under good conditions for three years, then planted in January 1975; it sprouts on 1 March 1975 and fifty years later is a fully mature oak tree. Now suppose I ask: When did that oak begin to grow? Will anyone say September 1971 or February 1972? Will anyone look for the date on which it was first noticed in the garden? Surely not. If we know it sprouted from the acorn on 1 March 1975, that is enough (though a biologist could be a trifle more exact about 'sprouting'); that is when the oak began. A fortiori with the conception of a child, which is no mere germination of a seed. Two cells, each with only twenty-three chromosomes, unite and more or less immediately fuse to become a new cell with forty-six chromosomes providing a unique genetic constitution... [which] will substantially determine the new individual's makeup.[99]

Within this selection from Finnis, we find that the uncertainty of when an acorn becomes an oak tree parallels the uncertainty of when a fetus becomes a person. As decided by earlier casuists, Finnis found it best to follow the safest path, granting the child rights at conception stating that the combination of the two cells determines the make-up of an individual. One can almost sense Finnis' agreement with the "most common opinion" of earlier Catholic casuists, being rooted in natural law.[100]

Part of the disagreement between Thomson and Finnis is derived from their selection of paradigm cases of beings with full moral status. A Jewish argument is one that links one's status with its entering into the human community. Although the acorn analogy hints at suggesting this, Thomson does not develop it fully enough for the reader to discern. The reference to the tenth week and the fetus having human traits,

is however, the foundation of a Jewish argument. A Catholic argument is one that links an ontological status of the fetus, with a natural act of God. Finnis' argument seems to be at least implicitly reflective of this.

Given that the acorn analogy is not the focus of Thomson' article, and in fact occupies very little space, I turn to a discussion by William Cooney[101] and Chenyang Li[102] that picks up where Thomson left off. To categorize somewhat, Cooney is closer to Finnis' camp whereas Li more closely resembles Thomson.

The argument Cooney puts forth suggests that all person-denying arguments for abortion do not work. Using Thomson's acorn analogy as a flash point, he reinforces the distinction that an acorn and an oak tree are not identical.

> It is nearly impossible to hang a rubber-tyre swing from an acorn; and a love-sick couple which desires to carve its mark 'John loves Mary' will find it difficult going on an acorn, unless Johnny has a very small knife and a very steady hand.[103]

The problem with this argument rests in our attempt to extrapolate from the acorn-oak tree analogy to the fetus-person debate. This is problematic because we do not value oak trees as much as we value persons. "The more we value oak trees, the less the difference between acorns and oak trees would impress us."[104]

To explicate this, Cooney creates the analogy of a Druid oak-tree worshipper. If the non-Druid neighbor cut up oak trees to make firewood, the Druid might view this destruction

as "tantamount to murder." Furthermore, if this non-Druid started a kitty-litter business and argued that acorns "make the best kitty-litter in the world because of their distinctive odour and texture," one would assume the Druid to be aghast. "For the Druid, the life-force which exists in the oak tree and which makes it divine, also exists in the acorn." Similarly, "the more we value personhood, the less the distinction between fetus and person becomes relevant."[105] This fun and imaginative argument can be understood to be implicitly connected with a Catholic argument; the essential "life-force" of the oak tree exists within the acorn, whereas the essential "life-force" or soul exists, for Catholics, within the fetus.

Li, on the other hand, believes that the acorn analogy, which argues against the slippery slope of personhood, is valid.[106] Because we cannot point to a line that distinguishes fetus from person, it does not follow that there is no difference between the two.[107] For just as we cannot tell when a continuously developing fresh egg becomes a chicken, we can recognize there being a difference and are quite comfortable calling eggs "eggs" and chickens "chickens."[108]

Returning to the acorn analogy, Li puts the argument against personhood at conception in the following form:

> (1) it is a truth of common sense that an acorn is not an oak tree;
> (2) it is also true that there is no clear cut-off point between an acorn and an oak tree; and

> (3) therefore it is false to say that if there is not a clear cut-off point to be made in the development of A into B, A is B.[109]

With regard to Cooney's Druid analogy, Li argues that valuing oak trees more does not mean that we value acorns equally.[110] Thus, the acorn-oak tree analogy proves that the fetus is not a person simply because we do not know when to draw a line to separate the acorn form the oak tree or the fetus from the person.

Although Li's argument against personhood at conception does not show any direct affiliation with a Jewish argument of status, it is not opposed to it. Thomson's suggestion that the tenth week post-conception is important in that we find the development of distinctly human characteristics, indicates that the values of a historical Jewish casuistry are still evident in the contemporary casuistical discussion of abortion. Finnis and Cooney's belief that because of the great value we hold for persons, we should value fetuses as persons at conception, recognizes the difficulty in separating the two. This reinforces the existence of a casuistry holding certain Catholic values within a secular debate. The extent to which this debate is secular and free of historical values, will become more clear as we examine the paradigm of self-defense.

Self-defense

The most well known analogy created by Thomson is that of the famous violinist. Although much of her discussion about

this analogy is concerned with individual rights (which will be discussed in the section on property ownership), I will focus here on that aspect of the violinist which deals with self-defense. I will also draw upon Thomson's house analogy to further explicate her use of the paradigm of self-defense.

To move beyond the discussion of ensoulment, Thomson begins with the premise that every person has a right to life and that the fetus shares this right. There are times, however, when the fetus' right to life becomes secondary to the woman's. Despite the logical premise that "a person's right to life is stronger and more stringent than the mother's right to decide what happens in and to her body, and so outweighs it,"[111] a case of self-defense could be one such instance when the woman's right outweighs that of the fetus.[112]

Consider the case of a famous violinist (V) with a fatal kidney ailment. Person A is captured by the Society of Music Lovers. A wakes up to find that V has been attached to her kidneys because A has the appropriate blood match for V. Because the renal system of V is extracting toxins from the blood of V, if V is unplugged from A, V will die.[113]

Unfortunately, V is putting excess strain on the kidneys of A which will result in the death of A within a month. Because of this danger posed to A, Thomson feels that A morally can unplug the connection to V, without committing murder. "If anything in the world is true, it is that you do

not commit murder, you do not do what is impermissible, if you reach around to your back and unplug yourself from that violinist to save your life."[114]

One's right to life does not necessarily guarantee one's right to use another person's body[115] if that usage endangers the life of the person whose body is being used. For "the right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly."[116] Thus, when a fetus is threatening the life of a woman, Thomson suggests that by analogy of V being attached to A, the woman can defend herself from the threat of the fetus. Such defense is not viewed by Thomson to be an unjust killing, insofar as the fetus resembles the violinist.

In an attempt to strengthen Thomson's case for the violinist, Wennberg proposes the image of the violinist as the music lover's son. He concludes that "even though turning the stranger into a son may alter our <u>moral</u> evaluation of the case, [it does not]... alter our conviction that we should not legally force the mother to remain hooked-up to the violinist."[117] Thomson and Wennberg, however, have set up a case which implicitly supports a Jewish position where the life of the individual woman being attacked is more important than that of the attacker, regardless of the relationship between woman and attacker. This is also consistent with a Catholic position, although Catholics are more likely to push for the woman to sacrifice her life for that of the fetus, in

order to secure infant baptism.

Although Thomson admits that the woman cannot safely abort the fetus herself, unlike when she reaches around to her back to pull the plug disconnecting V, she feels that using a third party to assist in aborting the fetus is nonproblematic. Thomson believes the woman owns her body and is entitled to the unencumbered use of her kidneys.[118] Finnis challenges this assumption of ownership and the claim that unplugging the violinist is ethically identical to the killing of a child in an abortion. This challenge comes from the manipulation of the scenario in the following way:

> Suppose, not simply that 'unplugging' required a bystander's intervention, but also that (for medical reasons, poison in the bloodstream, shock, etc.) unplugging could not safely be performed unless and until the violinist had been dead for six hours and had moreover been killed outright, say by drowning or decapitation (though not necessarily while conscious). Could one then be so confident, as a bystander, that it was right to kill the violinist in order to save the philosopher?[119]

The point Finnis is making is that "the violinist-unplugging in Thomson's version is not the 'direct killing' which she claims it is, and which she must claim it is if she is to make out her case for rejecting the traditional principle about direct killing."[120] Thomson cannot simply extrapolate from the violinist to the fetus because the relationship that the violinist and the fetus have with the woman are dissimilar although the relationship that the two have with the mother is significant. Schwartz picks up on this: "the very thing that makes it plausible to say that the person in bed with the

violinist has no duty to sustain him: namely, that he is a stranger unnaturally hooked up to him, is precisely what is absent in the case of the mother and her child."[121] Tying this in with a traditional rule about abortion which utilizes the DDE,[122] abortion can be conducted only if killing the fetus is not directly intended. As for the violinist being the woman's child, that suggests further dissimilarity between the violinist and the fetus.

Finnis moves on to show three ways in which the case of the violinist, as presented by Thomson, differs from a "therapeutic abortion performed to save the life of the mother.... (i) no bystander, (ii) no intervention against or assault upon the body of the violinist, and (iii) an indisputable injustice to the agent in question. Each of these factors is absent from the abortion cases in dispute."[123]

Although Thomson sees the unplugging of the violinist as a justifiable act of self-defense and an assertion of property rights (protecting one's property from a violinist that is taking something that is not his to take), Finnis emphasizes the disanalogy between the case of the violinist and the case of the aborting mother. It then becomes a casuistical problem to decide whether this disanalogy is significant. To do this, one may have to appeal to the background of larger moral beliefs, e.g. the moral status of the fetus or a mothers obligation to care for a child. Upon being forced to do this,

we find that the fetus has definite person status as far as Finnis is concerned. Furthermore, it would seem that Finnis views the woman as having more of an obligation to the fetus and the violinist, than does Thomson.

Appealing to the idea of self-defense, English provides an analogy which is used to help understand Thomson's argument of self-defense:

> Suppose a mad scientist, for instance, hypnotized innocent people to jump out of the bushes and attack innocent passers-by with knives. If you are so attacked, we agree you have a right to kill the attacker in self-defense, if killing him is the only way to protect your life or to save yourself from serious injury. It does not seem to matter here that the attacker is not malicious but himself an innocent pawn, for your killing of him is not done in a spirit of retribution but only in self defense.[124]

A self-defense model similar to the above, "supports Thomson's point that the woman has a right only to be freed from the fetus, not a right to demand its death."[125] Such cases are easy to justify if one is clearly an unjust attacker and the other a helpless victim. English's point, however, is that self-defense applies even when the attacker is not unjust.

Another scenario created by Thomson to support the right of a woman in self-defense, is that of the house analogy. The first part of the house analogy, resembles the growing Alice in Lewis Carroll's Alice in Wonderland:

> Suppose you find yourself trapped in a tiny house with a growing child. I mean a very tiny house and a rapidly growing child -- you are already up against the wall of the house and in a few minutes you'll be crushed to death. The child on the other hand won't be crushed to death; if nothing is done to stop him from growing he'll hurt, but in the end he'll simply burst open the house

and walk out a free man.[126]

She believes that causing the death of the growing child is acceptable under these circumstances, on the grounds of self-defense. And by likening the fetus to the growing child and the mother to the "person who houses the child," one can see her acceptance for abortions in self-defense. One is reminded that "the mother and the unborn child are not like two tenants in a small house which has, by an unfortunate mistake, been rented to both: the mother owns the house."[127] Furthermore, she has every right to defend herself as one can defend one's property.

In light of the background assumptions employed in Catholic casuistry, this seems to mark a fundamental departure. Whereas Catholics would deny that the woman has ownership of her body, stating perhaps that she has her body on Divine loan, Jews are more willing to give the woman ownership of her body because they do not equate the growing fetus with full personhood. As the argument stands now, we find that Thomson's liberal view of self-defense aligns more closely with that of a historical Jewish view of self-defense, one which even allows for psychological threats as indices of justifiable self-defense. Finnis, in his disagreement regarding the self-defense aspect of the violinist analogy, reverberates the values of the earlier Catholic casuists of the requirement of indirect killing along with the sacredness of the ensouled fetus. As it is suggested above, the paradigm

of self-defense has certain commonalities with the paradigm of property ownership, to which we will now turn.

Property Ownership/Choice

In our historical discussion on maintenance of honor, Sanchez hinted at the idea of choice but did not pursue it, arguing that a threat to the woman's life was still necessary to carry out an abortion. The Jewish casuists such as Bachrach and Emden suggest that the woman might defend her honor and choose to abort the fetus if the pregnancy posed a physical or psychological threat to the woman. This choice historically associated with defense of one's honor has, in the contemporary debate, become a choice to assert property ownership. Carrying over the house and violinist analogies from the discussion on self-defense, we see an incomplete departure from the discussion on maintenance of honor. I say incomplete because although maintenance of honor is no longer the focal point of the contemporary discussion, the values apparent in the historical discussion remain.

Returning to the violinist analogy, Thomson suggests that the woman has a right to make decisions regarding her body. To argue this, she creates three different cases of the violinist (V) with kidney failure, being attached to another person's (A's) kidneys. In this rights discussion, the attachment of V to A does not harm A.

Case 1: Attachment of V to A lasts nine months.[128]

Case 2: Attachment of V to A lasts for an extremely long

period of time such as nine years or even the rest of her life.[129]

Case 3: Attachment of V to A lasts a short period of time, e.g. one hour.[130]

All things considered, "nobody has any right to use your kidneys unless you give him such a right."[131] Although the varying length of time serves to make her point about the burden to one's rights, she argues that although one "ought to allow him to use your kidneys for that hour -- it would be indecent to refuse"[132] -- the woman is under no moral obligation to do so. Although it would certainly be nice if the woman share her kidneys with the violinist, Thomson views the kidneys as being the woman's to share only if she wants. No one possesses any claim to her kidneys other than what she is willing to grant.

In the house analogy, Thomson again suggests ownership. She asks: "if the room is stuffy, and I therefore open a window to air it, and a burglar climbs in" does it follow that the burglar has any right to be inside the house? Thomson says no.[133] As applied to abortion, the fetus is compared to the burglar and the room in which the burglar intrudes is compared to the womb which is invaded by the fetus. In this analogy of ownership, the fetus is uninvited and the house owner has every right to ask, or force, the fetus to leave.

Beckwith and Finnis both disagree. Beckwith feels that "since there is no natural dependency between a burglar and a

homeowner, as there is between child and parent, Thomson's analogy is way off the mark. Burglars don't belong in other people's homes, whereas preborn children belong in no other place except their mother's womb."[134] Here I point out this emphasis on the natural dependency of the fetus on the mother and the constituent ethical obligation which it entails. This echos natural law; it is natural for the fetus to be in the womb and therefore it is just.

Finnis warns that the burglar

> too, has 'no right to be there', even when she opens the window! But beware of the equivocation! The burglar not merely has no claim-right to be allowed to enter or stay; he also has a strict duty not to enter or stay, i.e. he has no Hohfeldian liberty[135] -- and it is this that is uppermost in our minds when we think that he 'has no right to be there': it is actually unjust for him to be there.[136]

But the fetus is not identical to the burglar because whereas the burglar does not have a right to be there, it does not follow that the fetus does not have a right to be there.

Recognizing potential difficulties, Thomson modifies the situation somewhat.

> Suppose it were like this: people-seeds drift about in the air like pollen, and if you open your windows, one may drift in and take root in your carpet or upholstery. You don't want children, so you fix up your windows with fine mesh screens, the very best you can buy. As can happen, however, and on very rare occasions does happen, one of the screens is defective; and a seed drifts in and takes root. Does the person-plant who now develops have a right to the use of your house?[137]

Thomson again implies that the property owner has a right to defend herself from an unwanted intruder. But here she seems to be asking whether or not a woman can get rid of the person-

plant if she does not want it. That is, if the undesired seed drifts in to the house and begins to grow, is the woman obligated to allow the seed to grow? Does it matter if this growth is an inconvenience or a potentially embarrassing situation which might result in familial estrangement? Thomson seems to suggest that the woman can make such choices to abort because she is the owner of her body.

Finnis, in his disagreement, suggests that "our whole view of the violinist's situation is coloured by this burglarious and persisting wrongfulness of his presence plugged into his victim."[138] Does this relate to the unborn child?

> True, the child has no claim-right to be allowed to come into being within the mother. But it was not in breach of any duty in coming into being nor in remaining present within the mother;... I fail to see why the unborn child should not with justice say of the body around it: 'That is my house. No one granted me property rights in it, but equally no one granted my mother any property rights in it.' The fact is that both persons share in use of this body, both by the same sort of title, viz., that this is the way they happened to come into being.[139]

Thus, Finnis seems to suggest that the woman has no special right which allows her to make choices that would affect the fetus, for both have equal rights to the house. Both the woman and the fetus are using the space since "this is the way they happened to come into being." The woman does not own her body.

What was rejected in Sanchez's argument was the idea of the woman as the property owner. It is on that score that Finnis echos his Catholic forbearers, not on the grounds of

honor. The issue of honor is also not pivotal in Thomson's discussion, although her restatement of values likened to the earlier Jewish casuists, such as Bachrach and Emden, who would allow abortion in cases where there was a physical or psychological threat to the woman, such as in the needs to maintain honor. Thomson takes one step the Jewish casuists do not. She allows for this defense of maintenance of honor on the grounds that the woman is owner of her body and thus primary determiner of what poses a threat.

CHAPTER 3

Contributions of Historical Casuistry to Contemporary Casuistry

Abortion

Having dealt with both historical and contemporary casuistries of abortion, a brief summary of how these casuistries reflect the values of a group or individual is appropriate. The early Jewish argument around abortion focuses on the status of the fetus. From this, it begins to define when an abortion can be performed. The fetus gains higher status with the "emergence of the greater part;" Jews assign the fetus less moral value than the woman carrying the fetus. The status of the woman being higher than that of the fetus allows the woman to abort a threatening fetus when her life is in danger. This threat to the woman can be either physical or psychological, but must occur prior to the "emergence of the greater part."

In contrast to this, the Roman Catholic position views the fetus as being ensouled at the time of conception. Along with this is the importance of natural law which suggests that the natural course of events should not be altered. Given that the development of a fetus is a natural event, only when the fetus is a direct physical harm can it be aborted. Even then, however, the abortion should not be the direct result of

an action, but rather an indirect outcome.

Having recapped the Jewish and Catholic positions, we find that the debate of Thomson and Finnis mirrors some of these earlier discussions. For example, where Thomson and Li deny the fetus personhood, they do so with an argument similar to that of the Jews which said that there is a noticeable difference between the fetus and the woman carrying the fetus. Finnis and Cooney counter saying that one cannot create a line that demarcates between fetus and a person, thus it is better to follow the safest path which says that the fetus has a soul at birth. This, of course, is reminiscent of natural law rationale and historical Catholic discussions. With regard to the violinist, Finnis contends that for the taking of the life to be justified, it must indirect. Thomson, on the other hand, says that the woman has the right to defend herself from the violinist and the fetus because neither has a right to the use of her body.

This marks a point of departure for the historical and contemporary casuists. For the historical casuists, there was the requirement that abortion was justified only when the life of the woman was in danger. The contemporary casuists utilized the idea of ownership which would give the woman the power to decide for herself whether or not to have an abortion. This ability of the woman to determine the destiny of her own body was something the historical casuists did not grant. The evolution of this idea that one's body is one's

property and thus one's to do with what one chooses, potentially has something to do with the idea that as one views the self as property owner, non-vital interests become increasingly important. Before the view of ownership, the historical casuists had the idea that the woman had her body "on loan." Where the historical casuists required the motive to be self-defense, contemporary casuists opened the doors to choice.

Expanding upon this, we find yet another difference between the historical and contemporary casuists: the historical casuists never seemed to employ a paradigm that acknowledged that anyone other than the infant might be innocent. Thus, a significant disanalogy between the historical and contemporary casuists has to do with the innocence of the fetus. For the historical casuists, innocence was gained through self-defense and the DDE. For contemporary casuists such as English, the innocence of the aggressor seems irrelevant to the argument of whether a woman can have an abortion.

Yet another disanalogy between historical and contemporary casuists seems to be, for whatever it is worth, the ease with which contemporary casuists use bizarre and imaginative analogies and counter-analogies; I have yet to find any historical analogies that talk about person-plants, violinist, or acorn-worshipping Druids. The significance of this may be reflective of a greater ability to deviate from

concrete examples and address issues that are more obscure and hypothetical. This is not to suggest that the examples of the contemporary casuists are less directly valuable than the examples of the historical casuists, but that the applicability of the contemporary casuists is derived more indirectly than the examples of the historical casuists. For example, when a historical casuist discusses ensoulment, it is done with direct language; contemporary casuists might use the analogy of the acorn-worshipping Druid to make their point about ensoulment.

General

Although the similarities between the historical casuistry and contemporary casuistry of abortion are evident, the point is not to say that Thomson is secretly a Jew or that Finnis is a closet Catholic, both arguing for their points while wearing secular clothing. Rather, the point is that contemporary casuistry does not seem to be as independent of its historical past as many may like to believe. Thus, the generalization that we can draw from our casuistical discussion of abortion is: whether or not the contemporaries are conscious of the similarities they have with past casuists (religious casuists in particular), such similarities exist. In understanding the origin of values and points of divergence, we must look at these lines of values (e.g. Jewish-Thomson, Catholic-Finnis) and realize that the profound

impact history has had on contemporary thought may be more prevalent than frequently acknowledged.

Despite the similarities, the differences between the historical and contemporary casuistry are at least as compelling (and maybe even more so.) From the differences, we find that the limits of the paradigms are drawn by the larger culture in which the paradigms are entertained and include nonmoral beliefs about human nature. Casuistry may well be limited by the nature of the culture in which it is practiced.

This returns us then to the earlier stated question inquiring about how value-laden casuistry is in ways that contemporaries want to disavow? To what extent is casuistry constructed independent of principles with different starting premises? Contemporary casuists want to suggest that casuistry can be "light" or free of principles. From the material presented above, it appears that certain rulings of casuistry, over time, are treated as principles that justify the moral resolution. For example, what was initially a Catholic casuistical discussion about the status of the fetus (ensouled at conception) became a principle that justified why one should not have an abortion. In the contemporary dialogue, we see the discussion of having a "right" to abortion based on what has become a principle of individual ownership and accountability.

Although contemporary casuists may want to refute this,[140] it seems that they cannot ignore the way in which

principles infiltrate and become entrenched in the framework of moral reasoning. It is true that the starting premises influence what becomes heralded as the dominant casuistical opinion, but these premises do not create a principle-free casuistry. Rather, they create a casuistry with principles of differing moral emphasis depending on the group doing the casuistry.

NOTES

1.The roots of casuistry are found in the "ideas of Greek philosophy, the judicial practices of Roman Law, and the traditions of rabbinical debate that developed within Judaism." Jonsen, Albert R., and Stephen Toulmin. The Abuse of Casuistry: A History of Moral Reasoning. Berkeley: Univ. of California Press, 1988. p. 47.

Casuistry, as understood today, is believed to have originated around the tenth century in confessionals in Ireland. Casuistry was actively maintained in Islam (see Jonsen, Albert R., and Stephen Toulmin, The Abuse of Casuistry: A History of Moral Reasoning, 366-367) and Judaism and developed in Protestantism, but it flourished within the Roman Catholic Church. It was the application of casuistry by the Catholics which was brought into question and eventually led to its decline.

Although Jonsen and Toulmin do mention Protestant and Jewish casuists, they do not attempt to distinguish between religious traditions which might be a direct result of foundational value differences between these religions; differences which potentially account for different yet predictable outcomes for a particular case. Through an analysis of historical paradigms on the abortion debate, I will argue that the value-laden nature of casuistry characterizes the value choices of the casuist in a way that is a contemporary reflection of the past.

2.Such as Jonsen, Albert R., and Stephen Toulmin, The Abuse of Casuistry: A History of Moral Reasoning; Jonsen, Albert R. "Casuistry as Methodology in Clinical Ethics." Theoretical Medicine 12(1991): 295-307; or Arras, John D. "Getting Down to the Cases: The Revival of Casuistry in Bioethics." Journal of Medicine and Philosophy 16(1991): 29-51.

3.Jonsen, Albert R., and Stephen Toulmin, The Abuse of Casuistry: A History of Moral Reasoning, 11.

4.Jonsen, Albert R., and Stephen Toulmin, The Abuse of Casuistry: A History of Moral Reasoning.

5.Tomlinson, Tom. "Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?" Theoretical Medicine 15(1994): 5-20.

6.Tomlinson, Tom, "Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?", Theoretical Medicine 6-7.

7.See Beauchamp, Tom L. and James F. Childress. Principles of Biomedical Ethics. 3d ed. New York: Oxford University Press, 1989.

8.In the section on "The Principle of Nonmaleficence," in Principles of Biomedical Ethics, 143-145, Beauchamp and Childress discuss the example of mercy killing in the case of "It's Over, Debbie." Journal of the American Medical Association. 259(1988): 272. Contrast this with Jonsen's discussion of the case in Jonsen, Albert R. "Casuistry as Methodology in Clinical Ethics." Theoretical Medicine 12(1991): 295-307.

9.Tomlinson, Tom, "Casuistry in Medical Ethics: Rehabilitated, or Repeat Offender?", Theoretical Medicine 7.

10.Casuistry never completely disappeared; rather, it went into hibernation. With its growing unpopularity, casuistry disappeared from public discussion but continued to be used as a pedagogical tool in Catholic seminaries. In 1975, Jonsen and Toulmin began collaborating on the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, a project which resulted in the 1988 publication, The Abuse of Casuistry: A History of Moral Reasoning.

11.Although Protestantism will not be a focal point of this essay, Protestants did eventually develop their own casuistry, adopting many of the same nuances of Catholic casuistry. This was done in response to a perceived moral void that was created after the initial discarding of casuistry from the moral deck.

12.Pascal, Blaise. The Provincial Letters. Translated by A.J. Krailsheimer. London: Penguin Group, 1967. Published originally in 1657, The Provincial Letters was used as a weapon to bring into question the structural validity of the Roman Catholic Church and its foundation of moral resolutions. In these letters, Pascal assumes the pen of a fictional naive Jesuit named Escobar. An analysis of the claims made by Pascal and the soundness of these claims can be found in Belloc, Hilaire. "An Analysis of the 'Lettres Provinciales'" Studies: An Irish Quarterly Review of Letters Philosophy & Science IX (Sept. 1920), 355-373. In this analysis, Belloc suggests that of the 132 casuistical citations used by Pascal (all of which were draw from Jesuit sources), all but fourteen were exaggerative or fictive.

13.Laxism, in theory, allowed for the acceptance of almost any action. Such broad moral acceptance was frowned upon by many, such as Pascal, who petitioned for stricter guidelines for right and wrong. The Jansenists, of which Pascal was

one, were almost Puritanical in nature and therefore were not accepting of such moral laxism employed by Jesuits.

14.Molière. "Tartuffe or The Impostor" (1664) in The Misanthrope and Other Plays. Translated by John Wood. London: Penguin Group, 1959.

15.Molière, "Tartuffe or The Impostor," 151.

16.Molière, "Tartuffe or The Impostor," 163.

17.Montesquieu. Persian Letters. (1721) Translated by C.J. Betts, 121-122. London: Penguin Group, 1973.

18.Montesquieu, Persian Letters, 239. It is presumed that this attack is mainly in response to Sanchez's De matrimonio (1673), which Montesquieu mentions later in Letter 143.

19.Myers, M.L. "Adam Smith as Critic of Ideas." Journal of the History of Ideas 36(AP-JE 1975): 281-296. This quote, from Myers 292, comes from Smith's Theory of Moral Sentiments pt.VII, sec.IV, 500.

20.Although we do not see condemnation of contemporary casuistry to the extent that historical excerpts suggest, this largely has something to do with the effectiveness of these earlier anti-casuists. With casuistry being less well known, we find those opposed to it within academic literature, e.g. Degrazia, David. "Moving Forward in Bioethical Theory: Theories, Cases and Specified Principalism." Journal of Medicine and Philosophy 17(1992): 511-539.; Lustig, B. Andrew. "The Method of 'Principalism': A Critique of the Critique." Journal of Medicine and Philosophy 17(1992): 487-510.; Beauchamp, Tom L. and James F. Childress, Principles of Biomedical Ethics, 1989. The opposition, for the most part, is less pointed than that of historical critics.

21.Part of the reason that we see less of a reaction to Jewish casuistry can be speculated to be due to: 1) the larger acceptance and greater influence Christianity had on Western Europe; and 2) the continued utilization of casuistry in the Talmud and other sources of rabbinical teaching.

22.Cantor, Norman. The Civilization of the Middle Ages. New York: Harper Collins, 1993. p487.

23.Gay, Peter and R.K. Webb. Modern Europe to 1815. v.1 New York: Harper & Row Publishers, 1973. p.123.
For a good overview of the reformation, see Gay and Webb 123-161.

24.See Wood, Thomas. English Casuistical Divinity During the Seventeenth Century: With Special Reference to Jeremy Taylor. London: SPCK, 1952.

25.The six steps referred to by Jonsen and Toulmin are:

Step 1 -- Paradigm and analogy: Paradigm cases are the extreme cases in which one would be absurd not to consider such an act an offense. These paradigms allow us to analogously understand and work with broader classifications (e.g. the Ten Commandments.)

Step 2 -- Maxims: Those unquestioned moral principles within a case that are seldom further proved or explicitly demonstrated. For example, "one good turn deserves another" is a maxim most accept without further investigation. Most of these are derived from natural law.

Step 3 -- Circumstances: Cases are constructed from the paradigms by adding complicating circumstances in order to understand what qualifies as a greater or lesser harm.

Step 4 -- Probability: The probability was the degree to which the given action was either probably right or probably wrong. This is to allow an individual to decide how great of a moral risk he or she is willing to take for a particular action.

Step 5 -- Cumulative Arguments: The strength of the resolution comes from the number of arguments that it has to support it.

Step 6 -- Resolution: The permissibility or moral licitness of the act is decided upon.

Jonsen, Albert R., and Stephen Toulmin, The Abuse of Casuistry: A History of Moral Reasoning, 251-257.

26.Jonsen, Albert R. "Casuistry as Methodology in Clinical Ethics." Theoretical Medicine 12(1991): 295-307. Citations from 295.

27.Wildes, Kevin Wm. "The Priesthood of Bioethics and the Return of Casuistry." Journal of Medicine and Philosophy 18(1993): 33-49. Wildes argues that the secular casuistry put forth by Jonsen and Toulmin is really a casuistry that assumes the values of a Roman Catholic; without this assumption, the casuistry of Jonsen and Toulmin is inappropriate. Although Wildes makes a good point, I believe that he overlooks the influence that these "non-secular" values, e.g. Roman Catholic, have had on putting forth secular arguments -- casuistry or not.

Most recently, James M. Tallmon, in his "How Jonsen Really Views Casuistry: A Note on the Abuse of Father Wildes." Journal of Medicine and Philosophy 19(1994): 103-113, challenged Wildes critique of Jonsen and Toulmin's casuistry. Wildes responds to Tallmon in "Respondeo: Method and Content in Casuistry." Journal of Medicine and Philosophy 19(1994): 115-119.

28.The method of casuistical analysis presented by John D. Arras is even more vague than that presented by Jonsen and Toulmin. Arras views casuistry as useful insofar as it is a "theory modest" rather than a "theory free" form of moral reasoning. He allows ethical theory to maintain a larger role in casuistical analysis than the Jonsen and Toulmin model seems to provide. Yet, like Jonsen and Toulmin, he believes in the importance of casuistry as a pedagogical tool. [Arras, John D. "Getting Down to the Cases: The Revival of Casuistry in Bioethics." Journal of Medicine and Philosophy 16(1991): 29-51.]

Baruch Brody, on the other hand, offers a model of casuistry that relies heavily on the intuitions we form about particular cases rather than the epistemological commitments Jonsen and Toulmin hold for paradigms and analogies. The resolutions reached by Brody's model attempts to take into account the pluralistic nature of our moral world. Its weakness is found in the initial plurality because the more varied the moral view points, the more difficult for Brody's model to function. [Wildes, Kevin Wm., "The Priesthood of Bioethics and the Return of Casuistry." Wildes discussion of Brody is found most succinctly on 46.] Thus, his model also seems to fall short of a flawless casuistry.

29.Jonsen, Albert R., and Stephen Toulmin, The Abuse of Casuistry: A History of Moral Reasoning, 257.

30.With the 1962 publication of The Structure of Scientific Revolutions, "paradigm" entered mainstream scholarly discourse.* Although the Kuhnian discussion of scientific paradigms is helpful in understanding the basic concept of paradigms, my concern is not with scientific paradigms but rather with moral paradigms. A moral paradigm differs from a scientific paradigm in that the former is concerned with issues of morality whereas the latter applies primarily to scientific frameworks that are universally recognized as "model problems and solutions."†

One reference which to sheds light on the intricacies of moral paradigms has been presented by Edmund Pincoffs.‡ Although Pincoffs does not mention moral "paradigms" as such, he does discuss moral "truisms", which appear to serve the same purpose for him that paradigms serve for Kuhn. A moral "truism" is something that is viewed as impossible or morally absurd to deny.§

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*The seminal work by Kuhn which initiated the discussion of paradigms, and to which I refer, is: Kuhn, Thomas S. The Structure of Scientific Revolutions. 2d ed. Chicago: Univ. of Chicago Press, 1970. To counter the heated discussion regarding the meaning of the term paradigm that followed publication, Kuhn responded with: Kuhn, Thomas

S. 1977. "Second Thoughts on Paradigms." The Essential Tension: Selected Studies in Scientific Tradition and Change, 293-319. Chicago: Univ. of Chicago Press. (First published in The Structure of Scientific Theories, ed. Frederick Suppe, 459-482. Urbana: Univ. of Illinois Press, 1974.)

†Kuhn, The Structure of Scientific Revolutions, viii.

‡Pincoffs, Edmund L. "Justificatory Powers of the Standard Theories." Quandaries and Virtues, 53-70. Lawrence, KS: Univ. of Kansas Press, 1986.

§Pincoffs, Quandaries and Virtues, 54. Regarding moral language, "it is so framed as to leave room for clarification or transcendence by the presentation of one truism as the prism through which we can see others. We can, by altering prisms, get new perspectives on the common life" (69). This opens the door to individual value-laden moral analysis by allowing the way in which the paradigm is framed to determine the way in which it is viewed. Some examples mentioned by Pincoffs include ideas of what is "cruel, unjust, dishonest, selfish, or vindictive... [i.e.] no one whose opinion we respect seriously denies that cruelty is wrong" (54).

31.I owe the basic premise of this analogy to Tom Tomlinson.

32.It was decided that in theory, this may be so, but in practice this should not be allowed. In particular, note the case of the insulted gentleman, Jonsen, Albert R., and Stephen Toulmin, The Abuse of Casuistry: A History of Moral Reasoning, 216-227, where it is hypothetically suggested that it would be acceptable to kill someone for insulting one's honor. Insults punishable by death went so far as to include the slapping of a gentleman. Although this example holds little moral weight as a contemporary example of justifiable homicide, it does help to explain the way paradigms have been used historically.

33.I thank Bill Lovis for drawing my attention to this point.

34.As many may be interested in how my personal views on abortion might influence an even-handed presentation of the abortion debate, I reveal that my views lie somewhere around the middle of the continuum. If we wish for either the extensive debate to diminish or for the "problem" of abortion to decrease in attention, we need to focus not on whether abortion is "right" or "wrong," but on how we can educate and influence social change to bring about decreased desire or need for the availability of the option of abortion. I do not believe that either extreme -- "pro-choice" or "pro-life" -- holds a monopoly on the morality of abortion.

35.Using abortion as a heuristic tool to demonstrate casuistical differences, it should be noted that the practice of abortion was a familiar art in the lands surrounding the Mediterranean Sea, the site of origin for Judaism and Christianity.* In looking for guidance regarding the morality of abortion, Jews have looked to the Torah, the Talmud, and other responsa writing; Catholic thought has looked at the Bible and a series of highly developed manuals and commentaries of moral theology;† Protestant casuistry has focused primarily on Biblical text deliberately ignoring many of the commentaries developed by their Catholic counterparts.‡

The discussions of abortion in this early Greco-Roman environment ranged from Plato and Aristotle's view of abortion as a means of "preventing excess population" to Soranos of Ephesus' (a gynecologist c. A.D. 98-138) discussion of methods and reasons for abortions.§ Philo, in his commentary The Special Laws, condemns both accidental and intentional abortions, likening them to "infanticide and the abandonment of children."¥

In the same vein as Philo's prohibition of abortion, three texts of the early Christian community reinforce this prohibition. The Didache, or Teaching of the Twelve Apostles, states:

> Do not murder; do not commit adultery;... do not fornicate;... do not kill a fetus by abortion, or commit infanticide.**

A later commentary, The Epistle of Barnabas, structured the commandment on abortion as such:

> Do not waiver in your decision.... Love your neighbor more than yourself. Do not kill a fetus by abortion, or commit infanticide. Do not withdraw your hand from your son or your daughter; but from their youth teach them the fear of God.††

And yet another piece of literature, The Apocalypse of Peter, saw a "pit of torment for sinners, among them women 'who have caused their children to be born untimely and have corrupted the work of God who created them.'"‡‡

The list of Catholic Church teachings against abortion continued from Clement of Alexandria§§ to Minucius Felix¥¥ to Tertullian*† to Jerome and Augustine*‡ and Aquinas.*§

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*Noonan, John T. Jr. "An Almost Absolute Value in History" from John T. Noonan, Jr. The Morality of Abortion: Legal and Historical Perspectives Cambridge, MA: Harvard University Press, 1970. (Noonan 3).

†The Catholic Church has known two lines of thought: 1. the papacy which has prohibited abortion, and 2. the theological casuists (17/18th C. in particular) that allowed some abortions. Both groups argued from the Bible as a starting point and developed extensive commentaries and manuals of moral theology.

‡Initially, Protestants wanted to discard everything to do with Catholicism, including casuistry. After a perceived moral void, the English Protestants (i.e. Anglicans and Puritans) adapted casuistry to serve their needs. This adapted Protestant casuistry referred back to the Bible and ignored, in most instances, Catholic commentaries (with the exception of an occasional reference that suggested how the Catholics were wrong).

§Noonan, John T. Jr., "An Almost Absolute Value in History," 4.

¥Noonan, John T. Jr., "An Almost Absolute Value in History," 6.

**The Didache, or Teaching of the Twelve Apostles. 2.2 Ancient Christian Writers, vol.6. Mahwah, NJ: Paulist Press, 1948.

††The Epistle of Barnabas 19.5. In The Didache. Ancient Christian Writers, vol.6. Mahwah, NJ: Paulist Press, 1948.

‡‡Noonan, John T. Jr., "An Almost Absolute Value in History," 10.

§§Clement (c.150-215) forbade Christians from hiding their fornication by commanding them not to "take away human nature, which is generated from the province of God, by hastening abortions and applying abortifacient drugs [phthoriois pharmakois] to destroy utterly the embryo and, with it, the love of man." Noonan, John T. Jr., "An Almost Absolute Value in History," 11.

¥¥Minucius Felix (c.190-200) extends the legal term "parricide" to include abortions; seen as a crime of pagan conduct. Noonan, John T. Jr., "An Almost Absolute Value in History," 12.

*†Tertullian (c.155-220) focuses his discussion on the question of ensoulment. He argues that something must first be alive before one can kill it. Drawing from the general commandment -- "You shall not kill" -- destroying what is in the womb is a "crime" (scelus.) Noonan, John T. Jr., "An Almost Absolute Value in History," 12-13.

*‡"Both Jerome and Augustine affirmed that, in fact, man did not know when the rational soul was given by God." Noonan, John T. Jr., "An Almost Absolute Value in History," 15. The references provided by Noonan for such positions are: Augustine, De Origine Animae 4.4; Jerome, On Ecclesiastes 2.5. Jerome and Augustine were contemporaries, c.347-420 and c.354-430 respectively.

*§Aquinas in speaking of the sinful nature of using drugs to bring abortion, saw such usage as being "against nature because even the beasts look for offspring." Noonan, John T. Jr., "An Almost Absolute Value in History," 23.

36.Ensoulment is the time at which the embryo or fetus is infused with a soul.

37.To avoid confusion or ahistorical usage of terminology, I will reserve the term "personhood" for the contemporary discussion. Although I believe that Jews used an idea of "personhood" which meant "having person-like features," e.g. hands, toes, head, the contemporary useage of personhood carries a more detailed meaning and greater moral weight.

38.Throughout the majority of this thesis, I will be using the term fetus in a general sense to mean anything pre-parturition. I recognize that the term is actually a technical one that describes the period from the ninth week of pregnancy to end of term. I will make this distinction when necessary to delineate the difference between Jewish and Catholic views of development.

39.According to Jakobovits, the crux of the difference between Judaism and Christianity stems historically from the misinterpretation/translation of the above passage. See Jakobovits, Immanuel. "Jewish Views on Abortion." In Jewish Bioethics, edited by Fred Rosner and J. David Bleich, 118-133. New York: Hebrew Publishing Co., 1979, 1983. Reprinted from Abortion and the Law, ed. by D.T. Smith. Western Reserve University Press, 1967. (Jakobovits 1967, 120)

40.Tractate Arachin 7a.

41.Rosner, Fred, "The Jewish Attitude Towards Abortion," 259.

42.Sanhedrin 87. Rosner, Fred, "The Jewish Attitude Towards Abortion," 261.

43.By weak surface logic, I mean the passages used to explain a problem appear non-sequitur until a better understanding of the background is provided. I do not want to suggest that the logic is weak, only that it may appear to be weak on the surface.

44.Rosner, Fred. "The Jewish Attitude Towards Abortion" In Contemporary Jewish Ethics, ed. by Menachem Marc Kellner, (1968): 257-269. Reprinted from Tradition 10(2). (Rosner, 261.)

45.Sanhedrin 72b. Klein, Isaac. 1970. "Abortion and Jewish Tradition" (Klein 271) In Contemporary Jewish Ethics, ed. by Menachem Marc Kellner, 270-278. New York: Sanhedrin Press. Reprinted from Conservative Judaism, 24(3). The Mishnah is that body of literature that serves as a supplement to the Torah, arising after the Exile. The Talmud is a scholarly commentary on the Mishnah.

"While the Mishnah requires extension of the greater part of the child, the Tosefta speaks about the extension of

the head." The Tosefta is a contemporary Rabbinical work. For a slight variation of Oholot 7:6, see Tosefta Yebamot 9:9. Klein, 271.

46.Credit for this imaginative description should be given to Tom Tomlinson, who has obviously spent too much time watching movies.

47.Moore, Keith L. The Developing Human: Clinically Oriented Embryology 3rd ed. Philadelphia: W.B. Saunders Co., 1993.

48.Klein, Isaac, "Abortion and Jewish Tradition," 271.
"Many Talmudic sources [Mishnah Niddah 3:5; Tractates Sanhedrin 72b; Niddah 29a; Tosefta Yevamot 9:9] and commentators on the Talmud ["Commentaries of Bartinoro (Rabbi Obadiah ben Abraham of Bertinoro, Italy, 15th Century); Rosh (Asher ben Yechiel, 1250-1327) and Rishon Letzion (Rabbi Isaiah Berlin of Breslau) on the Mishnah in Oholoth 7:2; and the commentaries of Rashi on Tractate Sanhedrin 72b and Tosefot on Tractate Sanhedrin 59a." (Rosner, "The Jewish Attitude Towards Abortion", 268.)] substitute the word "head" for "greater part" in the above Mishnah." Despite this, both Maimonides and Karo agree that the extrusion and retraction of a limb is enough to consist of birth. (Rosner, 260.)

49.Klein, Isaac, "Abortion and Jewish Tradition," 274.

50.Klein, Isaac, "Abortion and Jewish Tradition," 274.

51."After the baby's head has emerged, however, the fetus attains the status of a nefesh..., and the 'weak' argument of pursuit no longer justifies killing the child even if the mother's life is threatened since it is a case of Heavenly pursuit." Rosner, "The Jewish Attitude Towards Abortion", 262.

52.Noonan, John T. Jr., "An Almost Absolute Value in History," 35.

53.Noonan, John T. Jr., "An Almost Absolute Value in History," 35.

54.Noonan, John T. Jr., "An Almost Absolute Value in History," 36.

55.Noonan, John T. Jr., "An Almost Absolute Value in History," 36.

56.Noonan, John T. Jr., "An Almost Absolute Value in History," 38.

57.The Doctrine of Natural Law is quite complex and the literature describing it is very extensive. Of the numerous overview articles that I read, I found D'Arcy, Eric. "Natural Law." Encyclopedia of Bioethics v.3. Warren T. Reich, ed. New York: Free Press, 1978. p.1131-1137, to be most helpful.

58.Rosner, "The Jewish Attitude Towards Abortion", 262.

59.Although this makes it more difficult to understand, I should note that some Jewish authorities do not even grant the fetus the rights of a viable child until after the first month of life. "The newborn child is not considered fully viable until it has survived thirty days following birth as it is stated in the Talmud [Tractate Shabbat 135b]: 'Rabban Simeon ben Gamliel said: Any human being who lives thirty days is not a nephel (abortus) because it is stated (Num 18:16): 'And those that are to be redeemed of them from a month old shalt thou redeem,' since prior to 30 days it is not certain that he will survive." Rosner, "The Jewish Attitude Towards Abortion", 260.

60.Klein, Isaac, "Abortion and Jewish Tradition," 276.

61."Denunciations of the practice of abortion are recorded in the medical oaths and prayers of Asaf Judaeus in the seventh century, Amatus Lusitanus in the sixteenth century and Jacob Zahalon in the seventeenth century." Rosner, "The Jewish Attitude Towards Abortion", 260.

This does not open the door for the acceptance of all abortions, for "all the authorities of Jewish law are agreed that physical or mental abnormalities do not in themselves compromise the title to life, whether before or after birth." Jakobovits, Immanuel, "Jewish Views on Abortion," 123.

62.Maimonides, Laws of the Murderer 1:9; In Klein, Isaac, "Abortion and Jewish Tradition," 272.

63.Jakobovits, Immanuel, "Jewish Views on Abortion," 121.

64.Klein, Isaac, "Abortion and Jewish Tradition," 276.

65."This view is almost completely reverse of the attitude of the Catholic Church which never tolerates the operation if directed at the child as the cause of the danger ('direct abortion'), though the treatment of a pregnant mother leading to her fruit's abortion may be sanctioned if the condition to be treated resulted from an illness ('indirect abortion'.)" Jakobovits, Immanuel, Jewish Medical Ethics, 170-191. New York: Philosophical Library, 1959. Above citation, 186-187 (endnote 171.)

66.Commentary of Rabbi Israel Lipschutz (1782-1860) on the Mishnah Oholot 7:6.

67.Rosner, "The Jewish Attitude Towards Abortion", 262.

68.Klein, Isaac, "Abortion and Jewish Tradition," 274.

69.Klein, Isaac, "Abortion and Jewish Tradition," 275.

70.For a more complete discussion of DDE, see Boyle, Joseph. "Who is Entitled to Double Effect?" Journal of Medicine and Philosophy 16(1991): 475-494; and Marquis, Donald B. "Four Versions of Double Effect." Journal of Medicine and Philosophy 16(1991): 515-544.

71.Noonan, John T. Jr., "An Almost Absolute Value in History," 28.

72.Noonan, John T. Jr., "An Almost Absolute Value in History," 28.

73.For Lessius, since most moralists believed contraception to be wrong because it was "against the nature of generation", it seemed to follow that abortion would be even more wrong. Noonan, John T. Jr., "An Almost Absolute Value in History," 30.

74.Noonan, John T. Jr., "An Almost Absolute Value in History," 30.

75.Noonan, John T. Jr., "An Almost Absolute Value in History," 30. What matters is dominant purpose; this continues the self-defense analogy by focusing on the character rather than the actions.

76.Noonan, John T. Jr., "An Almost Absolute Value in History," 28. Noonan gives the reference as Sanchez, De Sancto Matrimonii Sacramento at 9.20.8, 9, 11-12.

77.Noonan, John T. Jr., "An Almost Absolute Value in History," 29.

78.Sanchez did not wish to allow a blanket of acceptance for abortion, for he felt that it was "intrinsically evil to procure the death of the innocent or to expose oneself to the risk of doing so." Noonan, John T. Jr., "An Almost Absolute Value in History," 29.

79.Noonan, John T. Jr., "An Almost Absolute Value in History," 30.

80.Noonan, John T. Jr., "An Almost Absolute Value in History," 31.

81.Noonan, John T. Jr., "An Almost Absolute Value in History," 31.

82.Noonan, John T. Jr., "An Almost Absolute Value in History," 31.

83.The papacy did not necessarily agree with the casuists who questioned the absolute prohibition of abortion. The Decretals of Gregory IX were quite strong on their stand against abortion. Despite Si aliquis having "been canon law for over three hundred years, the Sacred Penitentiary by the time of Gregory XIII did not treat as homicide the killing of an embryo under 40 days." [Noonan, John T. Jr., "An Almost Absolute Value in History," 32.]

Sixtus V saw that "abortion as an adjunct to fornication intensified the evil. In the course of a campaign largely aimed at prostitution in Rome, on October 29, 1588, he issued the bull Effraenatam" which penalized those involved with an abortion which was viewed similar to homicide. [Noonan, John T. Jr., 33.] On March 2, 1679, Innocent XI issued a commandment which condemned 65 propositions. Two of these condemned propositions related to abortion:

> 34. It is lawful to procure abortion before ensoulment of the fetus lest a girl, detected as pregnant, be killed or defamed.
>
> 35. It seems probable that the fetus (as long as it is in the uterus) lacks a rational soul and begins first to have one when it is born; and consequently it must be said that no abortion is homicide.

"The 65 propositions were globally designated by the Holy Office as 'at least scandalous and in practice dangerous.'... What were rejected was Sanchez' opinion that the danger of death from relatives was ground for abortion and the opinion of 'the prince of laxists,' Juan Caramuel y Lobkowicz, on the time of ensoulment." [Noonan, John T. Jr., 34.] With the absence of the exceptions to patristic prohibition argued by the casuists, "the next two centuries [1750-1965, saw] the teaching of the Church develop to an almost absolute prohibition of abortion." [Noonan, John T. Jr., 36.]

84.Noonan, John T. Jr., "An Almost Absolute Value in History," 31.

85.Klein, Isaac, "Abortion and Jewish Tradition," 273-74.

86.Klein, Isaac, "Abortion and Jewish Tradition," 273-74.

87.Jakobovits, Immanuel, "Jewish Views on Abortion," 122.

88.Jakobovits, Immanuel, "Jewish Views on Abortion," 122.

89.Klein, Isaac, "Abortion and Jewish Tradition," 277.

90.Noonan, John T. Jr., "An Almost Absolute Value in History", 28.

91.Noonan, John T. Jr., "An Almost Absolute Value in History", 28.

92.Noonan, John T. Jr., "An Almost Absolute Value in History", 28-29.

93.Noonan, John T. Jr., "An Almost Absolute Value in History," 28.

94.Thomson grants that drawing lines such as this are difficult, but decides to go ahead and work from the assumption that the fetus is a "human person well before birth" rather than try to deal with the sticky issue of ensoulment. Thomson, Judith Jarvis, "A Defense of Abortion," 29.

95.Thomson does not discuss what for her constitutes the essence of personhood. Jane English, in her "Abortion and the Concept of a Person." Canadian Journal of Philosophy 5 (October 1975): 233-243, provides a good discussion on the issue of the essence of personhood.

96.That is, whatever rights we may grant to an oak tree, we do not grant the acorn until the acorn is considered an oak tree.

97.Thomson, Judith Jarvis, "A Defense of Abortion," 29.

98.Finnis, John, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson," 151-152.

99.Finnis, John. "The Rights and Wrongs of Abortion: A Reply to Judith Thomson." Philosophy and Public Affairs 2 (Winter 1973): 117-145. Reprinted in Dworkin, R.M., ed. The Philosophy of Law, 129-152. Oxford Readings in Philosophy. Oxford: Oxford University Press, 1977. Above citation comes from reprinted edition, 151. It should be noted that the fusion of two cells to form a new cell is also true of seeds from sexual plant reproduction.

100.For Finnis' view of natural law, see Finnis, John M. "Natural Law and Unnatural Acts." Heythrop Journal 11(4) October 1970: 365-387.

101.Cooney, William. "The Fallacy of All Person-denying Arguments for Abortion." Journal of Applied Philosophy 8(2) October 1991: 161-165.

102.Li, Chenyang. "The Fallacy of the Slippery Slope Argument on Abortion." Journal of Applied Philosophy 9(2) October 1992: 233-237.

103.Cooney, William, "The Fallacy of All Person-denying Arguments for Abortion," 162.

104.Cooney, William, "The Fallacy of All Person-denying Arguments for Abortion," 162.

105.Cooney, William, "The Fallacy of All Person-denying Arguments for Abortion," 162.

106.The slippery slope which Li refers to is conceptually the same as that mentioned earlier by Thomson. "Since the person-denying people cannot draw a clear cut-off line between an early person on the one hand and the non-person fetus on the other, they have to accept that personhood begins at the moment of conception and that the fetus is a person all along. This is the slippery slope argument on personhood of the fetus."
Li, Chenyang, "The Fallacy of the Slippery Slope Argument on Abortion," 234.

107.Li, Chenyang, "The Fallacy of the Slippery Slope Argument on Abortion," 235.

108.Li, Chenyang, "The Fallacy of the Slippery Slope Argument on Abortion," 234.

109.Li, Chenyang, "The Fallacy of the Slippery Slope Argument on Abortion," 235.

110.Li, Chenyang, "The Fallacy of the Slippery Slope Argument on Abortion," 236.

111.Thomson, Judith Jarvis, "A Defense of Abortion," 30.

112.Thomson, Judith Jarvis, "A Defense of Abortion," 30.

113.Thomson, Judith Jarvis, "A Defense of Abortion," 30.

114.Thomson, Judith Jarvis, "A Defense of Abortion," 32. Note a distinction between murder and killing. Murder is an unjustified killing often associated with an element of intent. Killing is merely the causing of death.

115.Thomson, Judith Jarvis, "A Defense of Abortion," 36.

116.Thomson, Judith Jarvis, "A Defense of Abortion," 36.

117.Beckwith, Francis J. "Personal Bodily Rights, Abortion, and Unplugging the Violinist." International Philosophical Quarterly 32 (March 1992): 105-118. Above citation, 113-114, note 18.

118.Finnis, John, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson," 147.

119.Finnis, John, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson," 147-148.

120.Finnis, John, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson," 148.

121.Beckwith, Francis J, "Personal Bodily Rights, Abortion, and Unplugging the Violinist," 114.

122.See Finnis, John, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson," 141 ff for what he refers to as the "traditional condemnation of abortion." Finnis does a better job saying what this traditional casuistry of abortion is not, rather than what it is. Furthermore, he discusses this traditional position on abortion without giving substantive examples and references to support his claim.

123.Finnis completes the above thought by saying that: "Each [of the factors] has been treated as relevant by the traditional casuists whose condemnations Thomson was seeking to contest when she plugged us into the violinist."
Finnis, John, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson," 150.
As noted in the previous endnote, Finnis does not provide sufficient citations to support this claim. Although I agree that historical casuistry dealt with many of the similar issues, it is not clear to what casuists Finnis is referring.

124.English, Jane, "Abortion and the Concept of a Person," 86.

125.English, Jane, "Abortion and the Concept of a Person," 87.

126.Thomson, Judith Jarvis, "A Defense of Abortion," 33.

127.Thomson, Judith Jarvis, "A Defense of Abortion," 33.

128.Thomson, Judith Jarvis, "A Defense of Abortion," 30.

129.Thomson, Judith Jarvis, "A Defense of Abortion," 30.

130.Thomson, Judith Jarvis, "A Defense of Abortion," 38.

131.Thomson, Judith Jarvis, "A Defense of Abortion," 35.

132.Thomson, Judith Jarvis, "A Defense of Abortion," 39.

133.Thomson, Judith Jarvis, "A Defense of Abortion," 38.

134.Beckwith, Francis J, "Personal Bodily Rights, Abortion, and Unplugging the Violinist," 112, note 14.

135.Finnis refers to the assertion of a Hohfeldian right as a "three-term relation between two persons and the action of one of those persons in so far as that action concerns the other person." [Finnis, John, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson," 131.] Hohfeldian liberty is the just claim one has to one's own body; Hohfeldian claim-rights are rights that "other people shall not (at least without one's permission) do things to or with one's own body." [Finnis, John, 131.] A combination of these two can result in Hohfeldian power (right to "change another person's right (liberty) to use one's body by making a grant of or permitting such use") and Hohfeldian immunity (right "not to have one's right (claim-right) to be free from others' use of one's body diminished or affected by purported grants or permissions by third parties"). A non-Hohfeldian right is a "title" that one has to something, e.g. chocolates or bodies. [Finnis, John, 132.]

136.Finnis, John, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson," 149.

137.Thomson, Judith Jarvis, "A Defense of Abortion," 38.

138.Finnis, John, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson," 149.

139.Finnis, John, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson," 149.

140.Although the contemporary casuists try to downplay the influence of values, they are undeniably present, as they were historically.

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