

ARE PRENATAL CHILDREN LIKE CHILD SOLDIERS WHO MAY BE KILLED IN SELF-DEFENSE? SHOULD ABORTION TO SAVE THE MOTHER’S LIFE BE LEGAL AFTER *DOBBS V. JACKSON*?

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“It is easy to be a madman: it is easy to be a heretic. It is always easy to let the age have its head; the difficult thing is to keep one’s own.”
— G.K. Chesterton, *Orthodoxy*¹

INTRODUCTION

The conference “Response to the Pontifical Academy for Life’s Publication: *Theological Ethics of Life*,” held in Rome, December 8-10, 2022, brought together scholars from around the world to defend life issues, especially the prohibition of contraception promulgated in *Humanae Vitae*, seemingly undermined by the Vatican’s Academy for Life.² Professor of Law, Jane Adolphe, who organized the conference, described the *external* pressure the United Nations, in conjunction with the World Economic Forum, exerts on nation states to disregard and contradict the Church’s teachings on human life issues.³ In my presentation at the aforementioned

1. G.K. CHESTERTON, *ORTHODOXY* 101 (Image Books 1959) (1908).

2. See PONTIFICAL ACADEMY FOR LIFE, *ETICA TEOLOGICA DELLA VITA: SCRITTURA, TRADIZIONE, SFIDE, PRATICHE* [THEOLOGICAL ETHICS OF LIFE: SCRIPTURE, TRADITION, AND PRACTICAL CHALLENGES] (Vincenzo Paglia, ed. Libreria Editrice Vaticana 2022). For instance, Oxford Professor of Law and Philosophy emeritus, John Finnis, argued that *Humanae Vitae*, an encyclical issued by Pope Paul VI in 1968, is an infallible teaching that reaffirmed the perennial teaching of the ordinary magisterium of the Church condemning contraception. The former President of the Pontifical Academy for Life, Monsignor Livio Melina, critiqued the new paradigm in moral theology suggested in *Theological Ethics of Life* and asked rhetorically whether every turn in moral theology is a moving forward or backwards. Professor of Law and former spokesperson for the United States Conference of Catholic Bishops, Helen Alvaré, provided a historical overview of the cultural and legal battle over abortion in the United States; ICJurists Forum, *A Response to the Pontifical Academy for Life*, YOUTUBE, <https://www.youtube.com/playlist?list=PLWwG8qPyXx7fbPjF30fJ0AiCb0W8I5do6> (Jan. 3, 2023) (recording presentations of the conference “A Response to the Pontifical Academy for Life’s Publication: Theological Ethics of Life”).

3. See La Nuova Bussola Quotidiana, *A Response to Pontifical Academy for Life - Live Streaming* / Panel 6, YOUTUBE (Dec. 10, 2022), <https://www.youtube.com/live/-xoWmt3a1hk?si=JY4J88sBEge6OcvZ>.

conference, I referenced an exchange I had with a moral theologian where I refuted his false analogy: he compared the prenatal child of a mother faced with a life threatening pregnancy to a deadly child soldier whom, he said, she may kill in self-defense. I said that the reasoning behind this false analogy is an example of the *internal* pressure exerted by Catholic theologians on the Church to “let the age have its head” prescient of the paradigm shift suggested by the Pontifical Academy for Life’s publication, *Theological Ethics of Life*.⁴

This article will first show that a child soldier intent on murder is not comparable to a prenatal child in his mother’s womb even if his continued existence threatens his mother’s life and, so, the prenatal child may not be killed in self-defense. Secondly, it will show how such false reasoning undermines the political impact of United States Supreme Court decision, *Dobbs v. Jackson Women’s Health Organization*, that overturned *Roe v. Wade* and allowed states to outlaw abortion and mislabeled contraceptives that have an abortifacient effect.⁵

PART I. THE SANCTITY OF PRENATAL HUMAN LIFE IN ALL CIRCUMSTANCES

In 2012 I reviewed a book by a professor of theology and bioethics with the understanding that my review and the author’s reply would be published in an academic journal.⁶ The author and I agreed on many issues including the following: that prenatal children killed in their mother’s womb are a more vulnerable population than women who die from illegal abortions and that abortions targeting vulnerable minorities, such as disabled or female prenatal children, should be classified as hate crimes. We also agreed, given the fact that neonates born prematurely are accorded fundamental rights, pre-nates in utero who are the same gestational age must be granted the same legal consideration.⁷ Most importantly, we agreed that our theological reflections are ultimately subject to the discernment and definitive judgment of the teaching office/magisterium of the Catholic Church.⁸

4. *Id.*

5. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2279 (2022).

6. CHARLES C. CAMOSY, *BEYOND THE ABORTION WARS: A WAY FORWARD FOR A NEW GENERATION* (2015).

7. *Id.* at 138.

8. *Id.* at 170 n.24, 181 n.42.

However, the author's position that the Church's teaching on abortion to save the life of the mother or when pregnancy is the result of rape or incest could be reformed to allow the administration of "morning after" pills such as "Plan B" and "Ella" (without consideration of their abortifacient effect) as well as chemical abortion drugs, such as RU-486, contradicts settled moral principles.⁹ Moreover, his suggestion that a surgical abortion directly

9. The beginning of human life is a matter up for discussion amongst Catholic inspired scientists and bioethicists. Two possibilities present themselves:

1) When, after the penetration of the ovum by the sperm, a second polar body develops and the two pro-nuclei emerge, the "two pro-nuclei-stage," or 2) eighteen to twenty-four hours later when the maternal and paternal genetic material, the female pro-nucleus and the male pro-nucleus, fuse together in what is from then on referred to as a "zygote."

D. BRIAN SCARNECCHIA, BIOETHICS, LAW, AND HUMAN LIFE ISSUES: A CATHOLIC PERSPECTIVE ON MARRIAGE, FAMILY, CONTRACEPTION, ABORTION, REPRODUCTIVE TECHNOLOGY AND DEATH AND DYING 203 (2010) (citing Maddelena Zerica-Goetz, *Patterning the Embryo: The First Spatial Decisions in the Life of a Mouse*, 129 DEVELOPMENT 815-29 (2002); MAUREEN L. CONDIC, WHEN DOES HUMAN LIFE BEGIN? A SCIENTIFIC PERSPECTIVE 1 WESTCHESTER INST. FOR ETHICS AND THE HUM. PERS. 1 (2008); MAREIKE KLEKAMP, WOMEN AND ACTUAL CHALLENGES OF BIOETHICS: THE PERSPECTIVE OF CHRISTIAN SOCIAL DOCTRINE SHOWN AT THE EXAMPLE OF PRE-IMPLANTATION DIAGNOSIS (PID) (2009) 2 (presenting at the Pontifical Council for Justice and Peace First International Conference on "Life, Family, Development: The Role of Women in the Promotion of Human Rights," Rome, 20-21 March 2009) (citing Günter Rager, *Der Beginn des individuellen Menschseins aus embryologischer Sicht*, 13 ZEITSCHRIFT FÜR LEBENSRECHT 66-74 (2004))).

Therefore, contra-conception/contraception properly understood refers to any practice, drug, or devices that prevent conception of a new human being from occurring understood either as 1) the moment when the male sperm penetrates the egg membrane of the egg cell or, later, 2) when the male and female genetic material fuse to form a zygote. Examples of contra-conception include but are not limited to the following: coitus interruptus (withdrawal before ejaculation), barrier methods (condoms and female diaphragms), spermicides (short and long term drugs and vaccines that incapacitate sperm mobility and/or have an anti-ovulatory effect), and permanent contraception (if you will, male and female surgical sterilization for contraceptive purposes).

A synonym for conception is fertilization. Hence, any method, device, or drug that inhibits conception-fertilization from occurring in the procreation (God's infusion of a rational soul when the parents' gametes meet) of a new human being is a contraceptive. Any practice, device, or drug that destroys a newly conceived human being, (zygote, embryo, or fetus) directly by killing it *in situ* or removing it from its mother's womb or that destroys the life source of a newly conceived human being so that it withers, and dies is either an abortifacient or a direct surgical abortion.

However, various medical associations and ideologically driven abortion advocates have transvalued the term "conception" to indicate the successful implantation of a human embryo in the uterine lining of his or her mother's uterus. This has allowed pharmaceutical companies and population control organizations, like Planned Parenthood, to market abortifacients (such as RU-486 and the IUD – intrauterine device) as contraceptives. Abortion ideologues insist that their weaponized redefinition of "conception" is real science and anyone who disagrees with them is unscientific. For instance, they say, "[t]he campaign to conflate contraception with abortion is based on the assertion that certain methods of contraception actually end—rather than prevent—pregnancy. That assertion, however, contradicts what science says about how pregnancies are established and how contraceptives work. . . . A contraceptive method, by definition, prevents pregnancy by interfering with ovulation, fertilization or implantation. Abortion ends an established pregnancy, after implantation." Joerg Dreweke, *Conception is Not Abortion*:

targeting the prenatal child is morally justified for a woman faced with a life-threatening pregnancy because the prenatal child is analogous to a murderous child soldier (who can therefore be killed in self-defense) is tragically flawed.

A. *Prenatal Children are not Comparable to Child Soldiers*

The author argued that a child soldier was “formally innocent” because of brainwashing and trauma and was thus not morally culpable for his many murderous acts.¹⁰ While this may be true, he went on to suggest that the notion of “materially harmful” acts could be expanded to include the mere existence of a prenatal child whose life in utero is “noxious” to his mother’s health:

Notice that we can say this *without* giving up the absolutely essential moral principle that it is always wrong to aim at the death of the innocent. The key is to more precisely define what is meant by “innocence” within that principle. If the principle refers to those who are innocent (that is, “not noxious” or “not harmful”) in both formal and material senses, it may be permissible for a pregnant woman to use deadly force to save her life¹¹

On the contrary, even though a child soldier may kill an innocent person without a “guilty mind,” i.e., a bad *mens rea*, all the same, he still performs a “bad action,” that is, his *actus reus* is objectively evil.¹² Put differently, the child soldier performs a “human act,” one done with diminished capacity but nonetheless, with intelligence and free will; he consciously shoots to kill a non-combatant. In contrast, a prenatal child in utero is only capable of unconscious “acts of man” like sneezing or rolling over in one’s sleep.¹³ A traumatized child soldier who murders an innocent non-combatant may raise

The Strategic Campaign of Antiabortion Groups to Persuade the Public Otherwise, 17 GUTTMACHER POL’Y REV. 15 (2014), https://www.guttmacher.org/sites/default/files/article_files/gpr170414.pdf. See *infra*, note 16 (explaining how “morning after” emergency contraceptives work).

10. CAMOSY, *supra* note 6, at 67.

11. *Id.* at 68.

12. See *Actus Reus & Mens Rea*, STUDY.COM, <https://study.com/academy/lesson/mens-rea-vs-actus-reus-difference-comparison.html> (Mar. 2, 2022) (explaining the distinction between *mens rea* and *actus reus*).

13. See ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Pt. I-II, Q.6, Art. 1, Q. 13, Art.6 (Fathers of the Eng. Dominican Province trans., Christian Classics 1981) [hereinafter SUMMA THEOLOGICA].

the “insanity defense” in a criminal trial and be declared “innocent,” but that does not mean he acts without any conscious intention:

But in fact the child soldier and the insane shooter are not formally innocent. They possess *mens rea* in the narrow sense of purposely intending an attack, just as a rabid dog or a tiger intends to bite. This distinction is familiar to us in criminal law. The insanity defense does not question whether the defendant has *mens rea* in the narrow sense of purpose (or recklessness, or negligence, as the case may be). Rather, the insanity defense asks whether the defendant could know right from wrong. If he could not know right from wrong, then we do not punish him, but we certainly allow self-defense against his actions. . . . So the fact that we may perhaps use deadly force against a child shooter or an insane shooter, both of whom intend to kill us, does not even begin to prove that we can use such force against an unborn child who is not yet capable of intending at all.¹⁴

Another example of an innocent person who intentionally acts harmfully is that of a football player who becomes confused and runs towards his own team’s goal line and mistakenly intends to score a goal for the other team. The befuddled ball player’s own teammates have a duty to defend themselves and therefore may tackle him. The disoriented ball player is innocent, but his intentional *actus reus* is bad which entitles his teammates to defend themselves and use force to stop him.

Finally, consider the case of a mother who, held captive by terrorists, escapes in the middle of the night with her infant in one arm and a rifle in the other. Miles away, exhausted, she falls asleep in an open field. In the morning she wakes up, grabs her rifle, and walks off a short distance to refresh herself only to discover that she is in the middle of a minefield. Looking back, she sees that her sleeping infant is about to roll over onto a landmine and kill them both. Question: May she shoot her infant to prevent him from detonating the mine to save her life? Unlike a murderous child soldier, neither the sleeping infant in a mine field nor the child in utero are intentionally acting. Both are innocent non-aggressors. Therefore, the only moral choice for the mother in this hypothetical situation is to accept death rather than murder her child.

14. D. Brian Scarnecchia, *Beyond the Abortion Wars: A Way Forward for a New Generation: Four Perspectives - II*, 44 HORIZONS 154, 156 (2017) (omission in original) (quoting E-mail from Richard Stith, Senior Rsch. Professor, Valparaiso Sch. of L. (Nov. 20, 2016)) (responding to Charles C. Camosy’s book, *Beyond the Abortion Wars: A Way Forward for a New Generation* in a four-part symposium).

In nearly all cases an unwilling accessory to a crime may raise as an affirmative defense that she was forced to commit a crime lest her captors inflict on her serious harm. However, even being threatened with death is not an affirmative defense to the crime of murder. The extenuating circumstances occasioned by extreme duress that led one to kill an innocent person to save one's life may be taken into consideration at sentencing to lessen the punishment, but it does not excuse the crime of murder.¹⁵ Therefore, because a prenatal child is not comparable to a deadly child soldier, lethal force may not be directed at him even when his mother experiences extreme duress if faced with a life threatening pregnancy.

As tragic as it may be, maternal death resulting from complications of pregnancy and childbirth are *rare*.¹⁶ More importantly, the National Catholic Bioethical Center and Catholic Medical Association issued a joint statement noting that direct abortions are never appropriate medical care:

The Catholic Medical Association and the National Catholic Bioethics Center recognize the obligation to treat both patients, the mother and the unborn child, when a life-threatening pathological situation arises during pregnancy. Certain pathological situations, like infected membranes (chorioamnionitis), can allow for a treatment of the mother to directly remedy the infection, for example, by inducing labor to expel the infected membranes, and tolerating the unintended loss of the life of the pre-viable child. Such interventions are not direct abortions, and are justifiable under the principle of double effect, because the death of the unborn child is not intended nor is it the means by which the mother's life or health is protected. Certain other kinds of pathological situations during pregnancy, such as pulmonary hypertension or cardiac disease, can present a heavy burden on the mother and family as well as challenges to health care providers. They require tailored interventions in the form of expectant management, at least until viability of the unborn, to try to save both mother and child.

15. See *The Duress Defense in Criminal Law Cases*, JUSTICIA, <https://www.justia.com/criminal/defenses/duress/> (Oct. 2023).

16. Less than one in one hundred women giving birth in the U.K. will experience a potential life-threatening condition during pregnancy or childbirth such as hemorrhage, preeclampsia, HELLP syndrome (a blood clotting and liver disorder), blood clots (pulmonary embolism or deep vein thrombosis), sepsis, and amniotic fluid embolism. See *Conditions That Threaten Women's Lives in Childbirth & Pregnancy: What Is a Life Threatening Complication in Pregnancy and Childbirth?*, HEALTHTALK.ORG, <https://healthtalk.org/conditions-threaten-womens-lives-childbirth-pregnancy/what-is-a-life-threatening-complication-in-pregnancy-and-childbirth> (Apr. 2018).

... Direct abortion is never medical care, nor is it morally equivalent to inducing labor to remove a pathology, and under no circumstances can a patient under the care of a health care provider be abandoned in this way and targeted for extermination, even if another person might derive benefit. Both patients deserve better. Both deserve the devoted care and full extent of healing treatments made available by modern therapeutic medicine.¹⁷

Saints have said, “death but not sin.”¹⁸ Sometimes life requires acts of self-sacrifice and heroism. Law enforcement officers, firefighters, soldiers, and other emergency personnel foresee and understand that the duties of their state in life often entail risks to their well-being. Even soldiers drafted involuntarily into the army understand that they may have to “die in the line of duty” or be court-martialed and sanctioned. Even in cases of an involuntary pregnancy, the life of a child in utero is equal to that of his mother, and he may not be directly targeted for destruction even if the continuation of this pregnancy poses a threat to his mother’s life. The Fifth Commandment, thou shall not murder an innocent non-aggressor, allows of no exceptions.¹⁹

B. *Abortifacients Aim to Kill*

Alternatively, the author argued that the “principle of double effect” allows the administration of “morning after” pills and the chemical abortion drug, RU-486. One effect of “morning after” pills is to prevent the conceived human embryo from implanting in the mother’s uterus.²⁰ On the other hand,

17. *CMA and NCBC Respond to Misleading Statement from the American College of Obstetricians and Gynecologists and Physicians for Reproductive Health: Abortion Can Be Medically Necessary*, CATH. MED. ASS’N (Oct. 9, 2019), <https://www.cathmed.org/resources/ma-and-ncbc-respond-to-misleading-statement-from-the-american-college-of-obstetricians-and-gynecologists-and-physicians-for-reproductive-health-abortion-can-be-medically-necessary/>.

18. *See Death But Not Sin! That Was Dominic’s Lifelong Motto. It Can Become the Battle Cry of Our Youth Today!*, DOMINIC SAVIO JOHN BOSCO, <https://dominicsaviojohnbosco.wordpress.com/death-but-not-sin-that-was-dominics-lifelong-motto-it-can-become-the-battle-cry-of-our-youth-today/> (last visited Mar. 15, 2024).

19. *Exodus* 20:13.

20. The morning after pill (for instance, “Ella”) or other so-called emergency contraceptives act to prevent conception in three ways – by causing sperm incapacitation, inhibiting ovulation if it hasn’t occurred, and by preventing the implantation of the embryo should conception/fertilization have already occurred. *See The Morning After Pill*, THE KEIM CTRS., <https://keimcenters.com/morning-after-pill/> (last visited Mar. 15, 2024). *See also Facts About Plan B*, STUDENTS FOR LIFE OF AM., <https://studentsforlife.org/learn/plan-b/> (last visited Mar. 15, 2024) (“Many authors focus on these two facts to make the sweeping claim that Plan B has no effect on a human embryo. What they are forgetting

RU-486 (mifepristone and misoprostol) detaches the implanted embryo from the mother's uterine lining.²¹ The author argued that neither of these fetal toxins effect morally sinful "direct abortions;" rather, they produce morally licit "indirect abortion" *provided the woman intends merely "to cease to aid"* and does not directly "intend to kill" her prenatal child.²²

This manner of argument, however, conflates the end of the act (the *finis operis*) with the end of the agent (the *finis operantis*).²³ The author mistakenly turns the "why" a woman acts into the "what" she does.

Consider a clock. A clock maker builds a clock to tell time. It is a timepiece. To tell time is its built-in intentionality, its *finis operis*, its

is Plan B's effect at step 3, the two-day window in which embryos can form but positive pregnancy tests don't occur. That's the window during which the studies mentioned above suggest that Plan B has a likely embryocidal effect in stopping pregnancy. Second, Plan B is capable of creating an inhospitable uterine environment with the thinning of the endometrium. This uterine lining is, without artificial interference, thick and ready for a conceived child to implant and continue the gestational process. If the embryo survives all of Plan B's previous defenses and arrives at the uterus only to find nowhere to implant, he or she will die. Planned Parenthood, Scientific American, Medical News Today, the manufacturers of Plan B, and more admit that the composition of Plan B is capable of preventing a fertilized embryo (i.e. a living human) from implanting in the uterine wall.").

21. See *Mifepristone*, ENCYC. BRITANNICA (Sept. 27, 2023), <https://www.britannica.com/science/mifepristone> ("mifepristone, synthetic steroid drug used under various trade names (e.g., RU-486, Mifegyne, Mifeprex) to induce abortion in the early weeks of pregnancy. Mifepristone is an antiprogesterin; that is, it blocks the action of progesterone, a naturally produced hormone that prepares the inner lining of the uterus for implantation of a fertilized ovum and support of a growing embryo and placenta. The drug is taken orally in a prescribed dose during the first seven to nine weeks of pregnancy, and within two days the uterine lining begins to deteriorate, usually causing bleeding similar to that experienced during normal menstruation. The mifepristone is then followed up by a dose (taken orally or as a vaginal suppository) of the synthetic prostaglandin misoprostol, which stimulates the uterus to undergo contractions. The embryo and other uterine contents are expelled in a process very similar to spontaneous abortion, or miscarriage."). Note, in jurisdictions that do not allow RU-486, recourse to misoprostol alone may be used to procure a chemical abortion. See Mary Kekatos, *If an Abortion Drug Is Banned, Could Misoprostol Be Used As a Safe Alternative?*, ABC NEWS (Mar. 1, 2023, 6:41 PM), <https://abcnews.go.com/Health/abortion-drug-banned-2nd-medication-safe-alternative/story?id=97496356>.

22. SCARNECCHIA, *supra* note 9, at 288-89. ("There is some controversy among faithful Catholic[s] as to whether it is licit to administer 'emergency contraceptives' to rape victims after the victim has been tested to determine progesterone levels in the blood, and whether or not she has recently or is about to ovulate. Those in favor of the 'Peoria Protocol' (named after the diocese in which it was implemented under Bishop Myers) argue oral contraceptives suppress ovulation and hinder sperm capacitation. However, another effect of oral contraceptives is to thin the uterine lining and prevent the implantation of the newly conceived embryo; that is, causing an abortion. Chris Kahlenborn, MD, among others, believes the effects of oral contraceptives persist for days and if ovulation isn't suppressed a child conceived as a result of the rape will be aborted as an effect of the oral contraceptive. Dr. William May argues that such an abortion would not be a licit indirect abortion but an illicit direct abortion: 'here you are conditionally intending abortion,' he writes.").

23. See SUMMA THEOLOGICA, *supra* note 13, Pt. I-II, Q. 18.

definition, its nature, its inherent design as a man-made artifact. However, someone may use a table clock as a weapon to smash a man's skull and murder him. The intention of the murderer to kill does not transform the nature of a clock/timepiece into a deadly ordinance, even though the agent used it as such. The "why" a murderer uses a table clock to kill (i.e., his motive) does not unmake the inherent design of a clock. A clock still tells time even when used incidentally to murder someone. The essential built-in intentionality of a clock, its *finis operis*, inscribed in its design remains regardless of a murderer's end, his *finis operantis*, to use it as a deadly ordinance.

The same may be said of human acts. To hold a pillow firmly over the face of an enfeebled bed-ridden old woman until she stops breathing is murder, i.e., the killing of an innocent non-aggressor. It doesn't change the nature of the act just mentioned if the old woman, in terrible pain, asked to be smothered to death and the perpetrator of the act was motivated by compassion rather than malice. The act of suffocating an innocent non-aggressor is still homicide regardless of the motive of the murderer or the circumstance of the victim. There are intrinsically evil acts that are always objectively evil, that allow of no exceptions:

It is therefore an error to judge the morality of human acts by considering only the intention that inspires them or the circumstances (environment, social pressure, duress or emergency, etc.) which supply their context. There are acts which, in and of themselves, independently of circumstances and intentions, are always gravely illicit by reason of their object; such as blasphemy and perjury, murder and adultery. One may not do evil so that good may result from it.²⁴

The author misapplies the principle in the case of "morning after" pills and RU-846. The principle of double effect comes into play whenever one action has two effects: when the built-in intentionality of the actor's act is good and his motive is also good, that is, he intends to realize only the good built-in intentionality of his action, but he foresees that an unintended but inescapable bad effect may also occur. To ensure that the actor only acts for the good effect and does not do evil that good come of it, the principle has four requirements: 1) Do no intrinsic evil; *and* 2) intend only the good outcome and, so, try to minimize the unintended evil outcome; *and* 3) be sure the good outcome occurs chronologically before the evil outcome or at least

24. CATECHISM OF THE CATHOLIC CHURCH, ¶ 1756 (2d ed. 1997) [hereinafter CCC].

is initiated simultaneously in the order of causality; and 4) take care that the good outcome is greater or at least proportionate to the evil outcome.²⁵

The author also misapplies the principle to the hysterectomy of a cancerous uterus with a non-viable child *in situ*. He claims that this surgery is permissible because neither the woman nor the physician “aim at the death of the child.”²⁶ Again, he turns the “why” a person acts into the “what” he does. On the contrary, the hysterectomy of a cancerous uterus with a non-viable child *in situ* is primarily an indirect abortion because the built-in intentionality of the surgeon’s human act, (the end of his act/its *finis operis*), the target if you will, is the removal of a damaged and deadly “thing” (a traumatized maternal organ). In this case, the surgeon performs an intrinsically good act. The surgeon, in removing a cancerous uterus, is not directly targeting an innocent “who” (a person) for destruction. If he did directly remove the embryo from its site of implantation in its mother’s cancerous uterus or destroyed it *in situ*, he would perform an intrinsically evil act. Of course, the surgeon in removing a cancerous uterus with a nonviable prenatal child *in situ* foresees his action will inescapably end the life of the child. However, as the third tenant of the principle requires, he does not first kill the child to relieve the mother of the deadly side-effects of her pregnancy.

On the other hand, with the administration of RU-486 the end of the act/its *finis operis*, i.e., the built-in intentionality of this drug as designed by its manufacturer, is to poison the human embryo recently implanted in his mother’s uterus. Just as a clock is designed as a timepiece, so RU-486 was designed as a fetal toxin. Once administered it works inexorably according to its design to destroy prenatal human life by detaching the human embryo from his mother’s uterine lining. In so doing, the first and primary tenant of the principle of double effect is violated – one may not do evil, that good come of it.

Moreover, the principle of double effect also requires that the end of the agent, the *finis operantis*, be directed only to the good effect. Therefore, the acting person is required to do everything possible to minimize the evil effect.²⁷ The author would have us believe that the end of the agent, the

25. See SCARNECCHIA, *supra* note 9, at 75; see also *id.* at 53, 73-74 79-80, 88-91, 161, 293-305 (detailing more completely the particular subrules of double effect).

26. CAMOSY, *supra* note 6, at 64.

27. To make clear that everything should be done to minimize the harm to a human embryo, in cases of ectopic pregnancy, when possible, with a reasonable degree of medical certainty that harm will not accrue to the mother, attempts should be made to save the life of the embryo by transferring it to the

acting person, when administering RU-486 is merely “ceas[ing] to aid” and not “to destroy” a human embryo.²⁸ However, this proposition is refuted by the fact that the agent does nothing to minimize the evil effect of this drug, i.e., the destruction of the embryo. Instead, the destruction of the embryo is precisely the end sought by the agent. Therefore, the principle of double effect does not apply to the administration of RU-486 (or “morning after” pills without consideration of their abortifacient effect) in cases of rape. The United States Conference of Catholic Bishops insists on this point:

Compassionate and understanding care should be given to a person who is the victim of sexual assault. . . . A female who has been raped should be able to defend herself against a potential conception from the sexual assault. If, after appropriate testing, there is no evidence that conception has occurred already, she may be treated with medications that would prevent ovulation, sperm capacitation, or fertilization. It is not permissible, however, to initiate or to recommend treatments that have as their purpose or direct effect the removal, destruction, or interference with the implantation of a fertilized ovum.²⁹

The author also argues that a procured abortion in cases of rape would not be a direct abortion but a morally neutral indirect abortion that he characterizes as another case of merely “ceasing to aid.” Again, that conflates the motive, the “why,” into the moral deed, the “what.” He says, the morality of the act would depend on the rape victim’s motive and circumstances: “Some women will have a duty to aid such a child, but perhaps others will have a proportionately serious reason for ceasing to aid via indirect abortion. It does not appear to be something we can decide in the abstract.”³⁰

However, to live as an integral person, one must be willing to ultimately sacrifice one’s life, rather than act against the basic goods of human flourishing by treating other persons as objects one may dispose of when

mother’s uterus. There have been at least three such successful transfers: one in 1915, one in 1917 and another in 1990. Albert Marczewski, *Managing Tubal Pregnancies: Part 1*, ETHICS AND MEDICS 3, 3 (1996) (surgeries in 1917 and 1990); THOMAS O’DONNELL, MEDICINE AND CHRISTIAN MORALITY 202 (3rd ed. 1997) (citing C.J. Wallace, *Transplantations of Ectopic Pregnancy from Fallopian Tube to Cavity of Uterus*, 24 SURGERY, GYNECOLOGY AND OBSTETRICS 578-79 (1917) reprinted in 61 LINACRE Q. 67 (1994)) (surgery in 1915).

28. CAMOSY, *supra* note 6, at 81-83.

29. U.S. CON. OF CATH. BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVE FOR CATHOLIC HEALTH CARE SERVICES 15 (6th ed. 2018), https://www.usccb.org/resources/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06_0.pdf.

30. CAMOSY, *supra* note 6, at 81 (citations omitted).

inconvenient. As Saint John Paul II explained in *Veritatis Splendor*, seemingly pastoral but lax directions in moral theology rob the hero of his laurels and the martyr of her crown. If there are no objective moral norms, then nothing is worth dying for.³¹ Life shorn of personal virtue is bland and insipid. And a society composed of such directionless persons invites and requires external totalitarian control.

Finally, the author denounced as “extremist ‘pro-lifers’” those he claimed grant unborn children more rights than other persons.³² He argued that all other persons may use lethal force in self-defense, only mothers who face a life-threatening pregnancy may not. However, because his analogy comparing a child soldier to a prenatal child in a life-threatening pregnancy is flawed, prenatal children must be recognized as completely innocent human beings. If the law were to recognize this fact and acknowledge their legal personality, then no one could legally do prenatal children any gratuitous harm. This fact was recognized by Justice Blackman, who wrote the majority opinion in *Roe v. Wade* (1973), who admitted as much: “If this suggestion of personhood is established, the appellant’s [Roe’s] case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”³³

If the legal personality, i.e., the personhood, of prenatal children was recognized under the Fourteenth Amendment, then they could not be directly killed even to save the life of the mother. If the law were to still allow direct abortions, then the door would open wide to the killing of other innocent persons. No doubt, these implications contribute to the invidious discrimination we see leveled against prenatal children – when corporations, animals, lakes, rivers, and nature itself are clothed in legal personality while prenatal children remain nude of personhood.³⁴

31. See Pope John Paul II, *Veritatis Splendor* [Encyclical Letter Regarding Certain Fundamental Questions of the Church’s Moral Teaching] ¶¶ 75, 92, 120 (1993).

32. CAMOSY, *supra* note 6, at 143.

33. *Roe v. Wade*, 410 U.S. 113, 156–57 (1973).

34. I find it deeply ironic that at a time when corporations and, it is argued, animals, lakes, rivers, and nature itself should or already do possess legal personality, that only prenatal children are not recognized as rights bearers under the law. See Giovanni Ortolani, *Citizen Ape: The Fight for Personhood for Human’s Closest Relatives*, MONGABAY: NEWS & INSPIRATION FROM NATURE’S FOREFRONT (Oct. 24, 2018) (explaining apes are given legal personhood), <https://news.mongabay.com/2018/10/citizen-ape-the-fight-for-personhood-for-humans-closest-relatives/>; *Turning the Tide: Judge finds Lake Erie Bill of Rights Unconstitutional*, NAT’L AGRIC. L. CTR. (Mar. 4, 2020), <https://nationalaglawcenter.org/turning-the-tides-judge-finds-lake-erie-bill-of-rights-unconstitutional/> (explaining Lake Erie is given legal personhood); Erin West, *Could the Ohio River Have Rights? A Movement to Grant Rights to the Environment Tests the Power of Local Control*, GOOD RIVER: STORIES OF THE OHIO (Feb. 4, 2020), <https://www.ohiowatershed.org/>.

C. Model Legislation

The author also incorporated his new directions in moral theology into model legislation, “The Mother and Prenatal Child Protection Act” (MPCPA) as a template for politicians in hopes of finding common ground with abortion advocates to end the abortion wars. His model legislation recommends surgical abortion when continued pregnancy threatens the life of the mother as well as the provision of abortifacients in cases of rape, incest, or when pregnancy threatens the life of the mother.³⁵

However, Saint John Paul II made it clear in *Evangelium Vitae* that, for example, in a state where unrestricted access to legal abortion was the law, a legislator could introduce “incremental” pro-life legislation, that is, a bill that fails to protect all prenatal human life, but would incrementally limit access to legal abortion.³⁶ For instance, such a bill could outlaw abortion except when pregnancy is the result of rape, incest, or when pregnancy threatens the life of the mother. Then, later in time, another bill could be introduced that would protect prenatal lives even in those hard cases. However, to avoid scandal the author of the bill would need to make known his or her opposition to all direct abortion and explain that the only reason his bill contains exceptions is because, without them, the legislature would not pass the bill, or the courts would strike it down.³⁷

In sum, the author’s model legislation permits abortion in these hard cases, not as a political expediency, but because he believes that abortion in those hard cases may be “justifiable homicide” or a morally permissible “indirect abortion.” Therefore, his principled defense of direct abortion serves to legitimize Catholic support for this flawed model legislation and, as such, is an occasion of scandal.³⁸

org/ohio-river-rights-movement-grant-rights-environment-tests-power-local-control.html (explaining the Ohio River is given legal personhood); Katie Surma, *Ecuador’s High Court Affirms Constitutional Protections for the Rights of Nature in a Landmark Decision*, INSIDE CLIMATE NEWS (Dec. 3, 2021), <https://insideclimatenews.org/news/03122021/ecuador-rights-of-nature/> (explaining nature and ecosystems are given legal personhood).

35. CAMOSY, *supra* note 6, at 144, 149.

36. Pope John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] ¶ 73 (1995).

37. *Id.* ¶¶ 58, 73 (1995).

38. Scarnecchia, *supra* note 14, at 160.

PART II. THEOLOGICAL ETHICS OF LIFE UNDERMINES DOBBS' IMPACT NATIONALLY AND INTERNATIONALLY

Since the recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, that returned the issue of abortion to the States, the issue of contraception and abortifacients will be a matter of legislative action and litigation throughout the country. Prior to *Dobbs*, thirteen states had "trigger laws" in effect that should *Roe* be overturned then abortion would automatically be banned after so many weeks or months of gestation.³⁹ At least one state, Oklahoma, would ban abortion from the moment of conception.⁴⁰

Unfortunately, even *rumors of change* in Church teaching on contraception will undermine political support for these positive pro-life legal reforms. Many Catholic politicians and, perhaps, some clerics and bishops may withhold support from legislation that would ban Plan B, or Ella, or the IUD (intrauterine device), or RU-486 given what they may perceive as new directions in moral theology signaled by *Theological Ethics of Life* and defended by Catholic theologians and bioethicists as discussed above. In this sense, the Pontifical Academy of Life's controversial publication, *Theological Ethics of Life*, could not have come at a worse time for pro-life advocates nor at a better time for pro-abortion proponents.⁴¹

A. *Dobbs* Sets International Precedent

Moreover, while *Dobbs* is binding precedent in the United States, it provides persuasive authority to member states in the European Union and the United Nations. That is why these regional and international bodies immediately issued statements and resolutions condemning *Dobbs* and reaffirming sexual and reproductive rights.⁴² *Dobbs* provides precedent for

39. See Emma Batha, *Roe v Wade: Which US States Are Banning Abortion?*, CONTEXT, (Sept. 26, 2023), <https://www.context.news/money-power-people/roe-v-wade-which-us-states-are-banning-abortion>.

40. *Id.*

41. Although *Dobbs* overturned *Roe v. Wade*, it simply returned the issue of abortion to the States. It left the fate of innocent human beings to the democratic process. Whether prenatal children live, or die is up for a vote. The Supreme Court will one day have to face the truth and recognize that the Constitution does in fact protect the lives of prenatal children who are equal in dignity to all other persons. See Brief for John M. Finnis and Robert P. George as Amici Curiae Supporting Petitioners, *Dobbs v. Jackson Women's Health Org.*, 142 U.S. 2228 *passim* (2022) (No. 19-1392).

42. The U.N. High Commissioner for Human Rights denounced *Dobbs*. See U.N. High Commissioner for Human Rights, Bachelet on US ruling on *Dobbs v Jackson Women's Health*

countries around the world to disregard a top-down forced consensus requiring all member states to incorporate in their domestic laws so-called sexual and reproductive rights (contraception and abortion) and so-called sexual orientation and gender identity (same-sex marriage and transgender ideology) as human rights.

Countries that oppose this kind of “ideological colonization” may now point to *Dobbs* and argue: If the United States allows each of its states to decide for themselves whether to allow or disallow abortion, then why shouldn’t the European Union, the African Union, the Organization of American States, the Association of Southeast Asian Nations, and the United Nations allow its member states to decide for themselves whether to allow or disallow contraception and abortion and, also, euthanasia, reproductive technologies, same sex marriage, gender and transgender expression, and the like? However, if the Catholic Church is about to change its teaching on contraceptives and abortifacients, then the resolve of these member states to resist incorporating these ersatz rights in their domestic laws will weaken.

B. *Dobbs Presents the Church with a Sword that Cuts Two Ways*

Dobbs presents a window of opportunity to the Catholic Church to proclaim the truth about human sexuality and the sanctity of human life from the moment of conception to natural death. On the other hand, if the Church were to suggest new directions in moral theology that lessen the significance of objective moral norms and the inseparability of the unitive and procreative charism of human sexuality, this paradigm shift will aid and abet ideological colonization.

The process of ideological colonization began with the cultivation of a collective “contraceptive mentality.” Contraceptive ideological conditioning taught us to substitute the built-in unitive and procreative intentionality of the sexual act (its *finis operis*) for the incidental goal of the contracepting sexual partners (their *finis operantis*) to enjoy sexual pleasure and emotional comfort without concern for true intimacy between themselves and with God and the possibility of God’s gift of new life. The contraceptive mentality conditioned us to view human conception as devoid of any God-given value,

Organization (June 24, 2022), <https://www.ohchr.org/en/statements/2022/06/bachelet-us-ruling-dobbs-v-jackson-womens-health-organization>. The European Parliament reaffirmed sexual and reproductive rights following *Dobbs*. See Motion for Resolution on the US Supreme Court Decision to Overturn Abortion Rights in the United States and the Need to Safeguard Abortion Rights and Women’s Health in the EU, EUR. PARL. DOC. B9-0365 (2022), https://www.europarl.europa.eu/doceo/document/B-9-2022-0365_EN.pdf.

thereby reducing human procreation, a divine-human participatory act, to mere human reproduction, a human artifact.

Thus, human nature seen as bereft of transcendent origin or capacity, like the sun new-risen shorn of its beams, lands us in a hell of our own making.⁴³ Human nature then is but putty in our hands that we may mold as we please. However, if we are both putty and the potter, then what is to prevent the state from shaping us to fit its own design. In 1968, Saint Paul VI warned that if as a society we collectively adopt contraceptive practices and their reductive anthropology, this will put into the hands of unscrupulous rulers precedent to impose coercive population control measures to solve problems of their own making:

Finally, careful consideration should be given to the danger of this power passing into the hands of those public authorities who care little for the precepts of the moral law. Who will blame a government which in its attempt to resolve the problems affecting an entire country resorts to the same measures as are regarded as lawful by married people in the solution of a particular family difficulty? Who will prevent public authorities from favoring those contraceptive methods which they consider more effective? Should they regard this as necessary, they may even impose their use on everyone. It could well happen, therefore, that when people, either individually or in family or social life, experience the inherent difficulties of the divine law and are determined to avoid them, they may give into the hands of public authorities the power to intervene in the most personal and intimate responsibility of husband and wife.⁴⁴

A contraceptive mentality removes the only real basis for treating every human being as an equal. It is only our relationship with God that makes us radically equal: We are all from God, created in his image and likeness, and called in Christ to an eternal beatitude. It is this relationship, i.e., our divine origin, divine image, and divine calling that makes every human being

43. See JOHN MILTON, *PARADISE LOST* book I, l. 589-590 (London, 1674):
*Their dread Commander. He above the rest
In shape and gesture proudly eminent
Stood like a Tower; his form had yet not lost
All her Original brightness, nor appear'd
Less than Arch Angel ruind, and th' excess
Of Glory obscur'd: As when the Sun new ris'n
Looks through the Horizontal misty Air
Shorn of his Beams*

44. Pope Paul VI, *Humanae Vitae* ¶ 17 (1968).

innately equal.⁴⁵ In every other respect, in terms of talents and abilities, we are all inescapably unequal.⁴⁶

Thus, the widespread societal acceptance of contraceptives/abortifacients has conditioned us to view those with less talents as radically unequal and expendable when they threaten our well-being. A prenatal child, especially when pregnancy threatens the mother's life, may be considered noxious or toxic by those conditioned by a contraceptive mentality to view them as rudely nude, without a transcendent origin, capacity, or calling. Even the United States Supreme Court recognized the link between the social acceptance of contraception and the necessity of legal abortion: "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."⁴⁷

In the 2012 vice-presidential debate between Joe Biden and Paul Ryan (who both self-identify as Catholics), Biden sneered at Ryan for upholding the Church's teaching that a direct abortion, even to save the life of the mother, was immoral.⁴⁸ Now, post-*Dobbs*, that same debate will be played out again and again, in every state in the United States, in all member states of the European Union and United Nations, and in every other country around the world. Any new direction in moral theology suggested in *Theological Ethics for Life*, if it resembles that of which the author discussed above, will betray and subject to scorn political leaders with the courage of their convictions to defend the sanctity and inviolability of innocent human life in cases of rape, incest, and when pregnancy threatens the life of a mother.

CONCLUSION

It was most fitting that the conference, "A Response to the Pontifical Academy for Life's Publication, *Etica teologica della Vita. Scriptura, tradizione, sfide pratiche*," began on the feast of the Immaculate Conception, December 8, 2022. The grace of Mary's Immaculate Conception builds upon the Image of God imprinted indelibly in human nature, wounded but not destroyed by original sin. The reductive anthropology implicit in a

45. CCC, *supra* note 24, ¶ 1934.

46. *Id.* ¶ 1937.

47. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

48. See *NPR Transcript and Audio: Vice Presidential Debate*, NPR (Oct. 11, 2012, 11:15 PM), <https://www.npr.org/2012/10/11/162754053/transcript-biden-ryan-vice-presidential-debate>.

contraceptive mentality, however, would make of Our Lady's Immaculate Conception an inscrutable enigma, without any foundation in human nature, rather than "our tainted nature's solitary boast."⁴⁹

The dogma of the Immaculate Conception defends not only Mary's grace of original justice in anticipation of and for the sake of her son's redeeming mission, but it also proclaims human nature's capacity to be transformed, "divinized," by God's grace.⁵⁰ Though wounded and shorn of the grace of original justice, our human nature is not malleable putty in our hands nor a blank slate upon which the State can write as it may please. Rather touched by grace, we are radically free to be faithful to the natural law inscribed within us that bears the imprint of God's eternal law. May the Immaculata inspire us to cooperate as did she with God's grace and so help us to find new and winsome ways to speak the truth about human sexuality and the moral laws of human nature, in season and out of season, and not lose our head letting "the age have its head."⁵¹

49. WILLIAM WORDSWORTH, *THE VIRGIN* (n.p., 1822), <https://www.poetryfoundation.org/poems/45563/the-virgin> (last visited Dec. 22, 2022).

50. Mary's Immaculate Conception (a singular grace that preserved her from original sin in anticipation of the merits of her son, Jesus Christ) shows that every human being (albeit subject to the sin of origin at conception) through the death and resurrection of Jesus Christ is still called (if one cooperates with God's grace) "to be fully 'divinized' by God in Glory." See CCC, *supra* note 23, ¶ 398.

51. See CHESTERTON, *supra* note 1.