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Letters

University of Michigan Law School

L E T T E R S

Abortion controversy

To the Editor:

The statement of Professor Donald Regan on the advisability of amending the Constitution to restrict or prohibit abortion contained in the spring issue of *Law Quadrangle Notes* requires a response. That the subject has invoked, and will continue to invoke, serious consideration on legal, moral, and philosophical levels is evident. I submit that the legal aspect demands deeper consideration than the Senate Committee received in this instance.

Professor Regan's statement avoids the fundamental issue—the reason for considering the amendment at all.

Regan says, "The first issue that arises, on my approach as on a standard approach, is whether the fetus is to be regarded as a person. In my view, a general consideration of our laws does not compel an answer to this question either way. I shall therefore concede for purposes of the following argument that it is permissible to regard the fetus as a person." (Page 30)

The law cannot ignore the existence of the viable fetus nor can it be neutral toward it. The fetus must be afforded full, partial, or no protection whatsoever under the law. The controversy exists precisely because this is so. At issue is the future of our law as it will be applied to the fetus, to the woman and the man involved, and to society in general. Whichever position is finally adopted, it would seem essential that the nature of the fetus be determined and that such determination govern the law to be applied. If the nature of the fetus is determined to be such that the law regard it as a person, by Constitutional Amendment or otherwise, then the fetus is entitled to the protection afforded a person under our law, including the Fourteenth Amendment right to life. For the purpose of his argument, Professor Regan regards the fetus as a person. His conclusions following from what he regards as "basic tenets of our legal culture" are, however, legally unsupportable.

Regan, maintaining that "the issue is whether the woman should be free to reject the fetus's claim," would dispose of Fourteenth Amendment rights with the simple and puzzling assertion that we have other values besides the preservation of life and the other values sometimes prevail over the value of life (Page 31). So much for the life of the person. One shall not be deprived of life without due process—unless, per Professor Regan, other values prevail. Hopefully for all of us, the courts will not discover and apply the Regan doctrine generally.

We are offered the proposition that the act of abortion by physical or chemical means constitutes no invasion of the fetus's life from outside but, rather, a rejection of the fetus's claim on the woman, a mere "refusal to aid." Surely, it can hardly be seriously contended that the fetus has not been invaded from outside when physical or chemical means are inserted into the woman to destroy the fetus. Except in the case of certain medical emergencies, the outside force acts by or through the consent of the woman. If one wishes to engage in the sophistry of referring to the destruction of the fetus as a rejection of its claim on the woman, one may do so, but one does not thereby resolve the legal and Constitutional issues.

Regan argues that to legally protect and preserve the existence of the fetus is to invoke class discrimination against, to impose an improper burden upon, and to unduly require the giving of aid by the woman whose condition she neither invited nor desired. The Committee was offered purported analogies—the continuation of the relationship between prospective mother and child is compared to compelled organ donation, to death risking rescue efforts and to a duty to call a doctor for an injured person. To attempt to establish the direction the law should take upon the subject of abortion by the use of these grossly dissimilar illustrations is a misleading approach. It might well be asked, given Professor Regan's approach that the basic tenets of our legal culture should not prohibit or restrict abortion of the person regarded fetus, why such basic tenets should prohibit damage to or destruction of an infant. The infant's very presence may have been unwanted. It may place a serious and unique kind of burden on the mother, a member of a class of individuals who have suffered discrimination, who desires to reject the infant's claim and who has made no contract to give it aid. The infant is afforded the law's full protection because it has been determined to possess the nature and properties of a human person and is, accordingly, legally so regarded. As a person, it is protected by the right to life, to due process of law, even against the burdened mother.

If the fetus does not possess the nature and properties of a human person, our Constitution and law need not afford it rights which we so proudly and magnificently assert and diligently maintain for the human person. If, however, the fetus does possess such nature and properties, it would be a tragic error for our

legal system to fail to protect its very existence.

Hon. John H. Norton, J.D. '48

Professor Regan responds:

Many of Judge Norton's criticisms would be answered by an attentive rereading of my testimony. (A fuller statement of my view is available in the article on which the testimony was based, "Rewriting *Roe v. Wade*", *77 Michigan Law Review* 1569-1646 (1979). Two points deserve comment here.

(1) I suggest in the testimony that abortion does not involve "an invasion of the [fetus's] life from outside". Judge Norton asks how I can deny that abortion invades the fetus from outside. He has altered my claim, substituting "the fetus" for "the fetus's life." The clear point of the paragraph from which Judge Norton selects one phrase is this: The woman is not related to the fetus in the way the ordinary active wrongdoer (a murderer, say) is related to his victim. We can solve the murder-victim's problem by removing the murderer from the scene. We cannot solve the fetus's problem by removing the woman. That is why it is appropriate to think of the fetus, unlike the murder-victim, as making *positive* demands.

(2) Judge Norton suggests that my argument would justify infanticide. There are many differences between the situation of a live-born infant and that of a fetus *in utero*. One important difference is that a woman can extricate herself from the claims of an infant without bringing about its death. She can give it up for adoption. The conflict between the woman's interests and the *fetus's* permits no analogous resolution. Further, the woman who has a child and does *not* give it up for adoption has voluntarily assumed duties to the child (or has done something on which it is reasonable to predicate a voluntary assumption of duties) much more clearly than the woman who has unintentionally become pregnant.

A defense of Leidy

To the Editor:

A grave injustice has been done Prof. Leidy. I don't know that he needs anyone to pick up the cudgels for him, or that he would appreciate me, of all people, picking them up.

I refer to his supposed remark about working and attending our law school in the Letters section of the spring edition.

Much of my life I lived in Ann Arbor and worked from the 9th grade on. I knew many of the professors and they knew me, so there was no place to hide. By the time I hit Law School, I was in highly visible jobs, such as waiting table for a caterer. I saw all the faculty members regularly.

Of my six closest friends in Law School, five were working their way through. We all made it, although not without travail in my case. So I regularly saw Prof. Leidy. Only once did he mention my jobs, and that was to remind me that it was a tough haul doing it that way, but we all knew that.

If I were asked his attitude towards we working stiffs, I would say he was compassionate. That would tend to be confirmed by his remark after I received my diploma—to the effect that there were times when the faculty thought I wouldn't make it. That feeling I had shared with them.

I sort of suspected that his performance was a shell covering a considerate heart—in a tough job of trying to make attorneys out of a bunch of boys. The record would seem to indicate how successful he and the other members of the faculty were.

D. H. Hoard, J.D. '32

Law School burlesque

To The Editor:

I cannot overlook the caustic remarks about Professor Bates, Leidy, Aigler, and Grismore in W.J. Harleton's letter...I think I knew these fine men well enough to argue that Harleton's claim that they did not have a sense of humor is crazy. They had to have it to put up with the students of those days. Before my time, the Phi Delta Phi's imported the entire chorus of a burlesque show, together with a name band, for a wild three day party, and I understand that Bates single-handedly saved the entire fraternity from expulsion from the University.

Another proof of Dean Bates's sense of humor was his story-telling. He had been Secretary of the Western Golf Association, and his story about the English golfer who was caught in a folding bed in Chicago was a classic. He frequently came to the Phi Delta Phi house for dinner and nobody wanted to miss his visits. Dean Bates was important in bringing to the Law School the national prominence it enjoys today.

If some of the students thought these men were too formal, I submit they should now have the hindsight to appreciate what these devoted men did for many of us in those trying times when we were in law school.

George E. Diethelm, J.D. '32