

The Ethics of Abortion in the United States: A Socio-Political Approach

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Introduction

In this paper, I examine the issue of *abortion policy* – and family-oriented *policies* as a whole – from biblical, legal, and practical perspectives in the United States. Note the stress that I put here on *abortion policy*, and in the particular context of the U.S. My comments below are not absolutely identical with how I might *personally* advise people in any circumstance, whether they be fellow Christians or not, but these positions about *policies* are nevertheless deeply informed by my Christian convictions. I will state up front the positions to which my current research and reflections have led me, and then provide the reasons for those positions in the rest of the paper.

I believe that legal human personhood should be defined as consistently as possible with both beginning of life care and end of life care in mind. Coordinating them on practical grounds, and making them consistent, I find that legal human personhood can be based on the presence of a functioning nervous system. Therefore, I believe that legal human personhood can be established at 23 days of fetal life, when the nervous system is present, healthy, and ostensibly functioning in the fetus. I explain below why this is a biblical perspective which overlaps with a scientific and practical perspective, which can stand on its own on those pragmatic grounds. I believe that the RU-486 ‘morning after’ pill should be commercially available for common use. Additionally, my research leads me to believe that abortions performed after the 23rd day of fetal life should be safe and legal for the mother to procure and the doctor to administer. This is because in actual fact, anti-abortion laws have been shown to reduce abortions like Prohibition reduced alcohol: It didn’t reduce the instances, but only drove it underground into a vast gray market, where (mostly white) women of means and connections were always able to procure medically safe abortions, but women of color and poor women were not. This raises a Fourteenth Amendment ‘equal treatment’ issue many anti-abortion advocates simply do not address. If a society is unable to administer laws in a way that is fair to its citizens, then the laws are unconstitutional and must be changed.

In the framework I propose, after the 23 day mark, if the mother’s life is in danger due to her health or older age, or in the cases of severe abnormalities detected in the fetus, no additional steps need be taken in tandem with providing the mother with the abortion she seeks. Meanwhile, for all other cases of abortion, a DNA test should be performed on every aborted fetal life to determine the baby’s paternity; current health care privacy (HIPAA) laws need to be changed to allow for this. The biological father should then be legally fined for an amount proportional to his income and wealth, perhaps up to what he would normally be fined for child support over 18 years. If a married couple seeks to abort a fetus, the penalty fine should account for household, not individual, wealth and incomes, and be increased by some moderate amount that does not lead to couples fictionalizing a legal divorce. Additional criminal charges can be brought against men who are accused and convicted of rape and/or incest. In this policy framework, much more legal responsibility is placed upon the father of any fetus for the abortion. In fact, the father bears more moral responsibility for any abortion because of both pragmatic considerations and also Christian moral conviction which considers the wider relational nature of any morally costly situation.

Moreover, I believe that the First Amendment – in particular, freedom of religious conscience – is a faithful expression of Christian principle, which must be considered with, and balanced by, other moral and legal considerations. This is important to acknowledge because Jewish tradition, broadly speaking, includes a very significant percentage (though not all) of the Jewish community believes that legal human personhood begins at childbirth, when the baby breathes its first breath of air. Jewish scholars who support this position base their view on the Hebrew Bible (the Christian Old Testament), as I will highlight below. Jewish tradition also has a broader definition of immoral conception as a basis for abortion, including in the State of Israel. From a Christian perspective, this is a good faith argument, and not a bad faith one. In other words, the very definition of full human personhood is defined differently based on religious, and even biblical, grounds. Since the First Amendment guarantees to American citizens the legal freedom of religious conscience, some allowance needs to be given to Judaism. Therefore, I propose that there should be no fine involved for a woman who is Jewish, or a married couple who is Jewish, *and* who have demonstrated involvement in a Jewish synagogue community prior to pregnancy (for example for at least one year). I will briefly examine the teachings of the other major faith traditions, and with small variations, most could find general agreement with the policy I describe above. Atheists, however, have no grounded position from which to differ, nor do they have an epistemological basis on which to offer an alternative to coordinating legal human personhood with the presence of an ostensibly healthy nervous system, which, as I mentioned above, brings a basic consistency to beginning of life and end of life care.

I also propose broader social policies designed to reduce the incidences of abortion by making child-raising more affordable. I explore broad social and economic policies designed to support child-raising as not only the most

pragmatically effective way to reduce abortion rates, but as a necessary approach from legal, constitutional, moral, and biblical perspectives. I make this explicit because the conservative, pro-life tendency to treat abortion as an individual issue alone runs into profound difficulties, not only pragmatically, but also legally, ethically, and even biblically. Indeed, the tendency for conservative Protestant evangelicals to deploy a meritocratic-retributive justice principle – in this case, against a woman for getting pregnant, or an abortion provider for performing an abortion – is itself born out of very particular Protestant heresies, and additional insecurities about the apparent decline of cultural and political power wielded by conservative Christians. Although that last statement might surprise many readers, I firmly believe they must be addressed.

PART ONE: ABORTION IN THE CONTEXT OF THE UNITED STATES

Abortion Policy and Practice in the U.S.

From mid-2017 to early 2018, debates about aborting Down Syndrome babies were reinvigorated at the State level. As the state legislature of Utah considered a bill banning abortion for Down Syndrome babies, a flurry of articles and opinion pieces talked about the pros and cons. Ruth Marcus, at the *Washington Post*, titled her article, ‘I Would’ve Aborted a Fetus with Down Syndrome. Women Need That Right.’¹ Chris Kaposy, in the *New York Times*, replied with ‘The Ethical Case for Having a Baby With Down Syndrome.’² If individual States had different laws for Down Syndrome babies, what would happen?

The technological ability we now have to detect Down Syndrome in the fetus has led to very high levels of abortion of those fetuses. Between 67 – 90% of all babies who are detected with Down Syndrome are aborted.³ With percentages so high, it would be hard to imagine that this would be strictly a partisan issue, and although there may currently be more Republicans than Democrats who would be against abortion for Down Syndrome, I am not sure there is a ‘pure ideological’ reason why this should remain the same. In the U.K., the figure is 90%,⁴ while the absolute figures have ‘significantly increased’ as the percentage stays the same.⁵ In Iceland, 98%.⁶ This, despite Down Syndrome people ranking high in levels of personal fulfillment, and 88% of siblings of people with Down Syndrome feeling that they were better brothers and sisters, and with parents of children with Down Syndrome having a lower rate of divorce than the general rate.⁷ Liberals sometimes portray the issue as if expecting parents have the right to do this. Sometimes they assert that a mother’s right to determine the life or death of the fetus in her womb extends all the way up until the point when her body goes into labor and she gives birth. Claims like these deserve to be very thoroughly examined.

Then, in February of 2018, the Republican House and Republican Senate proposed a federal spending bill fully funding the organization to the tune of half a billion dollars.⁸ This prompted Republican Senator Rand Paul, from Kentucky, to tweet:

¹ Ruth Marcus, ‘I Would’ve Aborted a Fetus with Down Syndrome. Women Need That Right.’ *Washington Post*, March 9, 2018; https://www.washingtonpost.com/opinions/i-wouldve-aborted-a-fetus-with-down-syndrome-women-need-that-right/2018/03/09/3aaac364-23d6-11e8-94da-ebf9d112159c_story.html

² Chris Kaposy, ‘The Ethical Case for Having a Baby With Down Syndrome,’ *New York Times*, April 16, 2018; <https://www.nytimes.com/2018/04/16/opinion/down-syndrome-abortion.html>

³ Jaime L. Natoli Deborah L. Ackerman Suzanne McDermott Janice G. Edwards, ‘Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995–2011),’ *Prenatal Diagnosis*, March 14, 2012; <https://obgyn.onlinelibrary.wiley.com/doi/abs/10.1002/pd.2910>

⁴ Alison Gee, ‘A World Without Down Syndrome,’ *BBC*, September 29, 2016; <https://www.bbc.com/news/magazine-37500189>

⁵ Dr. Angelo Bottone, ‘Down Syndrome and Abortion; the Facts,’ *Iona Institute for Religion and Society*, January 24, 2018; <https://ionainstitute.ie/down-syndrome-and-abortion-the-facts/>

⁶ JLF USA Team, ‘All Danish babies with Down syndrome aborted but 4 in 2016,’ *Jerome Lejeune Foundation*, December 22, 2017; <https://lejeunefoundation.org/denmark-down-syndrome-abortion/>

⁷ Jeanne Mancini, ‘People with Down Syndrome Are Happy. Why Are We Trying to Eliminate Them?’ *Washington Post*, August 24, 2017; <https://www.washingtonpost.com/news/posteverything/wp/2017/08/24/people-with-down-syndrome-are-happy-why-are-we-trying-to-eliminate-them/>

⁸ Kelli, ‘President Trump Just Signed a Spending Bill That Fully Funds Planned Parenthood,’ *Save the Storks*, March 25, 2018; <https://savethestorks.com/2018/03/president-trump-just-signed-spending-bill-fully-funds-planned-parenthood/> and Alice Miranda Ollstein, ‘GOP Lawmakers’ Reality: They Won’t Cut Planned Parenthood,’ *Politico*, December 2, 2018; <https://www.politico.com/story/2018/12/02/gop-congress-planned-parenthood-1036942>

‘It’s a good thing we have Republican control of Congress or the Democrats might bust the budget caps, fund planned parenthood and Obamacare, and sneak gun control without due process into an Omni... wait, what?’⁹

During the 2016 presidential campaign, Democrat Hillary Rodham Clinton promised to fully fund Planned Parenthood, the nation’s leading abortion provider. Republican Donald J. Trump promised to defund it. Trump’s Vice Presidential candidate Mike Pence, an evangelical Christian, wrote a letter with Trump to pro-lifers, saying:

‘I am committed to ... Defunding Planned Parenthood as long as they continue to perform abortions, and reallocating their funding to community health centers that provide comprehensive health care for women.’¹⁰

President Trump signed the bill into law, despite his campaign promises. One might wonder soberly whether there are political pressures such that even a Republican majority in government somehow do not fulfill their own political rhetoric on abortion funding. We might also recall that *Roe v. Wade* was decided 7 – 2 by a majority conservative, Republican-appointed Supreme Court, asking ourselves: If the politics of abortion policy is difficult, how difficult might the crafting of real abortion policy be? And what about the implementation and effectiveness of those policies?

Conservatives regularly portray the issue as if overturning *Roe v. Wade* (1973) would have a decisive impact on abortion rates. The assumption is that giving States legislative, budgetary, and judicial control over reproductive policies will lead to a better environment overall. Yet one must also consider how abortion policy in the United States was actually administered in the era before *Roe v. Wade*. What were abortion rates and practices in that time?

Pro-life policy before *Roe* stopped abortions like the era of Prohibition stopped alcohol. Namely, it didn’t. For example, between 1923 and 1967, Dr. Robert Douglas Spencer performed an estimated one hundred thousand or more abortions in his spotless clinic in the midst of coal country in Ashland, Pennsylvania. He charged virtually nothing. Reports exist of him charging rates as low as \$10, \$25, and \$50.¹¹ Explaining why he offered these women who came to him seeking abortions, he said, ‘I could see their point of view.’

Moreover, doctors in hospitals were never prosecuted for the abortions they performed. The law allowed for abortion performed for ‘therapeutic purposes.’ In practice, hospitals were given wide leeway to define what conditions threatened the health of the mother. One physician admitted:

‘After starting a little bleeding I’d tell her to go home and call me back within twenty-four hours to let me know if the bleeding continued. If it did, which I expected that it would, I would then admit her as a threatened abortion and complete the process in a legitimate way.’¹²

Physicians regularly admitted that the practice of performing abortions in hospitals ‘is inequitable, inconsistent, and largely illegal.’¹³ One survey of New York hospital practices in the 1950’s concluded that in a five year period, 90 percent of all so-called ‘therapeutic’ abortions were actually illegal.¹⁴ Reports abound of sympathetic doctors performing a ‘dilation and curettage’: causing a small amount of uterine bleeding, telling the woman seeking an abortion to come back the next day, and providing an abortion on therapeutic grounds. In one small hospital, reports

⁹ Ibid

¹⁰ Melanie Arter, ‘In Budget Deal, GOP and Trump Fully Fund Planned Parenthood,’ *CNS News*, February 9, 2018; <https://www.cnsnews.com/news/article/melanie-arter/budget-deal-gop-and-trump-fully-fund-planned-parenthood>

¹¹ Susan Brownmiller, ‘Dr. Spencer, 1889 – 1969: Last Trip to Ashland,’ *The Village Voice*, January 30, 1969; <https://www.villagevoice.com/2010/06/21/when-an-abortionist-dies/>

¹² Ellen Messer and Kathryn E. May, *Back Rooms: Voices from the Illegal Abortion Era* (New York, NY: St. Martin’s Press: 1988), p.179 – 180

¹³ Robert E. Hall, ‘Abortion in American Hospitals,’ *American Journal of Public Health* 57 (1967), p.1933

¹⁴ Mark A. Graber, *Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics* (Princeton, NJ: Princeton University Press, 1996), p.49; see the long list of citations he provides

show that 107 ‘diagnostic uterine curettages’ were performed in one year; of those, 104 patients had been pregnant.¹⁵

Surprisingly, the fact that, just prior to *Roe v. Wade* in 1973, thirty states made abortion illegal in all cases without exception, sixteen states legalized abortion under ostensibly rare circumstances (rape, incest, health threat to mother), three states legalized abortions but only for state residents, and New York allowed abortions generally, meant virtually nothing about the actual practice of abortion. ‘In fact, wealthy citizens usually had access to safe abortions even in jurisdictions with draconian restrictions on abortion on the books.’¹⁶ Prior to *Roe*, California, for example, was known to be so flexible with medical terminology, and so sympathetic to women seeking abortion that:

‘No scholar includes California as among the states that legalized abortion immediately before *Roe*, because the state penal code after 1967 declared that abortion was legal only when bringing a child to term would ‘gravely impair’ maternal health. The officials responsible for administering that provision, however, permitted abortion on demand. As a result, legal abortion rates in California by 1973 were higher than in some states that had repealed all restrictions on abortion in their statutory books.’¹⁷

By the 1930’s, says the *Oxford Companion to United States History*, licensed physicians performed about 800,000 abortions per year, despite pro-life laws in every state.¹⁸ During the 1950’s and 1960’s, estimates range from 200,000 to 1.2 million per year.¹⁹ I will comment on why there is reason to doubt the lower estimate, below. One report extrapolated from data from North Carolina alone in 1967 and concluded that 829,000 illegal or self-induced abortions occurred in that year.²⁰ A 2016 report from the Center for Disease Control estimates roughly 900,000 abortions occurred that year.²¹ Moreover, abortion rates prove to be stubborn despite the position of the law, even in other countries. ‘A comprehensive global study of abortion has concluded that abortion rates are similar in countries where it is legal and those where it is not, suggesting that outlawing the procedure does little to deter women seeking it.’²²

A similar phenomenon occurs in the State of Israel. Since 1977, abortion has been fully legal in Israel for a broad range of categories, subject to the pregnant woman coming before a termination committee, which by any

¹⁵ Graber, p.55 cites Jerome E. Bates and Edward S. Zawadski, *Criminal Abortion: A Study in Medical Sociology* (Springfield, IL: Charles C. Thomas, 1964), p. 79–80; and James Tunstead Burtchaell, *Rachel Weeping: The Case Against Abortion* (San Francisco, CA: Harper and Row, 1982), p. 49. Graber adds in the footnote, ‘Several persons who wish to remain anonymous have informed me that large hospitals in New York City, Boston, and St. Louis also practiced this subterfuge.’

¹⁶ Graber, p.19

¹⁷ Graber, p.19

¹⁸ Paul S. Boyer, editor, *The Oxford Companion to United States History* (Oxford: Oxford University Press, 2006), p.3

¹⁹ Mary Steichen Calderone, editor, *Abortion in the United States: A Conference Sponsored by the Planned Parenthood Federation of America, Inc., at Arden House and the New York Academy of Medicine* (New York, NY: Hoeder-Harper, 1958), p.180. Cited by Graber, p.42; cf. Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867 – 1973* (Berkeley, CA: University Press, 1998)

²⁰ Rachel Benson Gold, ‘Lessons from Before Roe: Will Past be Prologue?’ *Guttmacher Institute*, March 1, 2003;

<https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue>

²¹ Associated Press, ‘The Abortion Rate Hasn’t Been This Low Since Before ‘Roe v. Wade’,’ *USA Today*, November 23, 2016; <https://www.usatoday.com/story/news/2016/11/23/cdc-us-abortion-rate-falls-to-lowest-level-in-decades/94350572/> notes, ‘The latest annual report by the Centers for Disease Control and Prevention, incorporating data from 47 states, said the abortion rate for 2013 was 12.5 abortions per 1,000 women aged 15–44 years. That is down 5 percent from 2012, and is half the rate of 25 recorded in 1980. The last time the CDC recorded a lower abortion rate was in 1971, two years before the U.S. Supreme Court’s *Roe v. Wade* decision that established a nationwide right for women to have abortions. Abortion was legal in some states at that time. The CDC tallied 664,435 abortions in 2013 from the 47 states, down 5 percent from 2012 and down 20 percent from 2004. The CDC does not receive abortion data from California, Maryland and New Hampshire — and thus its total is less than the widely accepted current estimate of more than 900,000 abortions per year in all 50 states.’

²² Elisabeth Rosenthal, ‘Legal or Not, Abortion Rates Compare,’ *New York Times*, October 12, 2007;

<https://www.nytimes.com/2007/10/12/world/12abortion.html> notes, ‘The wealth of information that comes out of the study provides some striking lessons, the researchers said. In Uganda, where abortion is illegal and sex education programs focus only on abstinence, the estimated abortion rate was 54 per 1,000 women in 2003, more than twice the rate in the United States, 21 per 1,000 in that year. The lowest rate, 12 per 1,000, was in Western Europe, with legal abortion and widely available contraception.’ See also Jacqui Wise, ‘Abortion Rates Are Similar in Countries Where Procedure is Legal or Restricted,’ *The British Medical Journal*, March 21, 2018; <https://www.bmj.com/content/360/bmj.k1308>

interpretation is quite lenient.²³ Women who procure abortions outside of the termination committee process do not face criminal penalties. In theory, the doctors who provide them are legally subject to a fine or up to five years of imprisonment. No doctors have been prosecuted.²⁴ One government study estimates that about half of Israel's 40,000 abortions per year occur outside of the committee process.²⁵

The reason for this startling gap between abortion law and abortion practice is the sheer willingness of many actors to circumvent the law to protect abortionists they felt served them. Prior to *Roe*, while single women sought abortions too, the overwhelming majority of abortion requests were made by married women.²⁶ Especially when the women were white and middle- to upper-class, abortions were readily available. Pre-*Roe* policy created a vast gray market in abortion:

'Virtually every member of the law enforcement community helped shield abortionists from serious legal sanctions. The primary 'impediment to the enforcement of abortion statutes' was the blunt refusal of aborted women to consider themselves 'victim[s] of crime.' Lacking cooperative witnesses and complainants, law enforcement agents could not easily shut down known practitioners of criminal abortion. Moreover, many police officers and prosecutors 'share[d] the widespread belief that the abortionist is in fact performing a useful service' and preferred spending their scarce resources preventing what they and their communities regarded as real crimes. The few prosecutions that were instituted faced jurors unwilling to convict abortionists and judges unwilling to impose severe sentences. Anti-abortion advocates complained that 'even the most outrageous abortionist' could not be convicted in a jury trial. One juror refused to convict a well-known abortionist because there was 'nobody in Schuykill County that the doctor hasn't helped.' Half the abortionists convicted in New York between 1925 and 1950 were sentenced only to probation. Dr. Milan Vuitch, a prominent physician-abortionist, was arrested sixteen times for openly running an abortion clinic in Washington, D.C., but never went to jail.'²⁷

Recall the example of Dr. Robert Spencer in Ashland, Pennsylvania. As to why he was never prosecuted under criminal charges, Dr. Spencer's widow explains:

'no one was out to get him because he was such a good doctor. Besides, he was benefiting the local economy. People were coming here from all over the United States. They spent money in the hotels and restaurants. The local merchants, no matter what their attitudes about abortion, knew a good thing when they saw it, and they weren't about to kill the goose that laid the golden egg.'²⁸

In fact, one man ran as a candidate for district attorney, promising to prosecute Dr. Spencer and shut down his business. He was crushed in the next election.²⁹

In that light, consider a recent incident in American politics. Republican Tim Murphy served Pennsylvania in the U.S. House of Representatives for fifteen years, consistently advocating anti-abortion legislation. In October 21, 2017, Murphy abruptly resigned. Shannon Edwards, his 32 year old mistress (Murphy was then 65), had just revealed Murphy asked her to abort a child he thought they had conceived together. Edwards gave their text exchange to the *Pittsburgh Post-Gazette*, which read:

Edwards: *'And you have zero issue posting your pro-life stance all over the place when you had no issue asking me to abort our unborn child just last week when we thought that was one of the options'*

²³ Law Library of Congress, Israel, *Reproduction and Abortion: Law and Policy*, Section IV.A, https://www.loc.gov/law/help/israel_2012-007460_IL_FINAL.pdf points out, 'Although Israeli law imposes strict limitations on abortions, in practice 98.5% of all requests for abortions to the committees were approved in 2009, and 98.7% in 2010.'

²⁴ Ibid, Section III; https://www.loc.gov/law/help/israel_2012-007460_IL_FINAL.pdf.

²⁵ Central Bureau of Statistics, 'Patterns of Fertility in Israel in 2004,' August 30, 2005; http://www.cbs.gov.il/hodaot2005n/01_05_191b.doc

²⁶ Graber, p.42

²⁷ Graber, p.45

²⁸ Patricia G. Miller, *The Worst of Times* (New York, NY: Harper Collins, 1993), p.123 – 125, 135; quoted in Graber, p.49

²⁹ Miller, p.127; Graber, p.49

Murphy: 'I get what you say about my March for life messages. I've never written them. Staff does them. I read them and winced. I told staff don't write any more. I will.'³⁰

Edwards' revelation and Murphy's resignation suggest much about the politics of abortion in the U.S.³¹ They also indicate how a powerful and well-connected white man believed a white woman could obtain a safe abortion very easily, and apparently, very privately. A devastating article by Devorah Blachor called 'Abortion is Immoral, Except When it Comes to My Mistresses' deserves to be read by all.³²

Commenting on the lower estimate of 200,000 abortions per year, Graber highlights a methodological problem used to arrive at that number. Namely, there are differences in health care available to white women vs. women of color, which affect the estimate. I cite Graber here to illustrate that what emerged was, in fact, a two-tier system of abortion providers.

'The most influential pro-life study reaches the conclusion that no more than 210,000 illegal abortions were performed annually from 1940 to 1972 by relying on Center for Disease Control (CDC) data on abortion fatalities that CDC officials admit represent 'a minimum estimate.' The authors then calculate the relative risk of the average criminal abortion by using a survey of 'the nonwhite population of New York City.' That study was done at a time when 94 percent of the women who died from criminal abortions in that community were women of color. Nowhere do the authors explain why one would assume that black women in Harlem had access to anything remotely resembling the same quality abortion services as had white women who lived in such affluent suburbs as Scarsdale and Great Neck. More generally, no article published after 1960 in a respectable medical, public health, or scientific journal supports the claim of prolife advocates that less than 200,000 abortions were being performed annually in the United States during the period when abortion was illegal. The most reliable studies, which admittedly are not very reliable, suggest that approximately one million illegal abortions were performed annually in the years before Roe.'³³

Indeed, the available statistics for the experiences of black and Latino women, compared with those of middle to upper class white women, are quite disturbing.³⁴ Women of color received nowhere near the same sympathy and access to safe abortion as white women, from the overwhelmingly white medical profession. One study of medical practices in Georgia concluded that, in 1970, single white women were twenty-five times more likely to be granted a 'therapeutic abortion' than single black women.³⁵ Of course this pushed poor and minority women to procure

³⁰ Paula Reed Ward, 'Rep. Tim Murphy, Popular with Pro-Life Movement, Urged Abortion in Affair, Texts Suggest,' *Pittsburgh Post-Gazette*, October 3, 2017; <http://www.post-gazette.com/news/politics-nation/2017/10/03/rep-tim-murphy-pro-life-sought-abortion-affair-shannon-edwards-susan-mosychuk-pennsylvania-chief-of-staff-congress-emails-texts/stories/201710030018>

³¹ Ibid, '[Their] text exchange over abortion was prompted by a Jan. 24 Facebook post by Mr. Murphy: 'The United States is one of just seven countries worldwide that permits elective abortion more than halfway through pregnancy (beyond 20 weeks). It is a tragic shame that America is leading the world in discarding and disregarding the most vulnerable,' he wrote. Mr. Murphy noted in that post that he sponsored and voted for a bill prohibiting the use of federal funds to pay for abortions and said he had hope that 'we will once again be a nation committed to honoring life from the moment of conception and ensuring American taxpayer dollars are never spent to end a life before it even begins.' He is currently a co-sponsor with 181 other legislators of the Pain-Capable Unborn Child Protection Act, which would bar abortion after 20 weeks except in cases of rape, incest or where the pregnancy poses a threat to the life or physical health of the mother. Mr. Murphy voted for the bill Tuesday evening, according to Roll Call. It passed 237 to 189.'

³² Devorah Blachor 'Abortion is Immoral, Except When it Comes to My Mistresses,' *McSweeney's Internet Tendency*, July 11, 2018; <https://www.mcsweeney.net/articles/abortion-is-immoral-except-when-it-comes-to-my-mistresses>

³³ Graber, p.23

³⁴ Alan Charles and Susan Alexander, 'Abortions for Poor and Nonwhite Women: A Denial of Equal Protection?' *Hastings Law Journal* 147 (1971), p.150 – 51.

³⁵ Roger W. RoCHAT, Carl W. Tyler, and Albert K. Schoenbacher, 'An Epidemiological Analysis of Abortion in Georgia,' *American Journal of Public Health* 543 (1971), p.548. See also Hyman Rodman, Betty Sarvis, and Joy Walker Bonar, 1987, *The Abortion Question* (New York, NY: Columbia University Press, 1987), p.149 – 150. See Harold Rosen, 'The Emotionally Sick Pregnant Patient: Psychiatric Indications and Contraindications to the Interruption of Pregnancy,' also edited by Harold Rosen, *Abortion in America: Medical, Psychiatric, Legal, Anthropological, and Religious Considerations* (Boston, MA: Beacon Press: 1967a), p.73 for racially discriminatory distribution of abortions in Baltimore, Maryland

unsafe abortions. A study of abortions in New York City from 1954 to 1962 concluded that 93 percent of the women who died as a result of complications from illegal abortions were black or Puerto Rican.³⁶

One impact of *Roe v. Wade* was that deaths of women from unsafe abortions disappeared.³⁷ Similarly, South Africa legalized abortion in 1996, and studies showed that there was a '90 percent decrease in mortality among women who had abortions.'³⁸ Pro-life groups assert that the number of abortions increased substantially after 1973, but their data for the pre-*Roe* era is methodologically questionable, as discussed above; the more likely result is that there was a slight increase in actual abortion rates before and after *Roe*. However, in economically developed countries, gestational limits, a mix of waiting and counseling periods required of women seeking abortions, and social policies designed to make childrearing affordable *do* seem to bring down abortion rates,³⁹ and I will comment on those policies below. Both before and after *Roe*, women were and are vulnerable to being coerced or pressured by others into seeking abortion,⁴⁰ which should be accounted for in any policy.

Given the state of actual abortion law as practiced on the ground, Graber and other constitutional scholars raise the question of *equal choice*. The Fourteenth Amendment guarantees to citizens the right to be treated equally under the law. One very early Supreme Court case demonstrates how equal treatment under the law is significant. In *Yick Wo v. Hopkins* (1886), Yick Wo was convicted of running a laundry business without a license. San Francisco denied licenses to all Chinese laundry operators. It granted licenses to all other laundry operators but one. Law enforcement had arrested more than a hundred Chinese people for operating laundries without licenses. The Court overturned Wo's conviction, saying, 'Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations, between persons in similar circumstances... the denial of equal justice is still within the prohibition of the Constitution.'⁴¹

One major problem raised by this gray market in abortion is the vastly unequal treatment women face based on race, class, and connectedness. Graber observes:

³⁶ Edwin M. Gold, Carl L. Erhardt, Harold Jacobziner, and Frieda G. Nelson, 'Therapeutic Abortions in New York City: A 20-Year Review,' *American Journal of Public Health* (1965), p.964 – 66; Graber, p.8 notes, 'The persons responsible for administering abortion policy did, however, take steps that prevented competent abortionists from offering the same services to the general public. The resulting exclusive gray market... violates the philosophical and constitutional principle that persons must be governed only by general laws, rules of universal application made by their elected representatives.'

³⁷ Tara Culp-Ressler, 'What Americans Have Forgotten About the Era Before *Roe v. Wade*,' *ThinkProgress*, November 19, 2014; <https://thinkprogress.org/what-americans-have-forgotten-about-the-era-before-roe-v-wade-19687b9e9b16/>.

³⁸ Elisabeth Rosenthal, 'Legal or Not, Abortion Rates Compare,' *New York Times*, October 12, 2007; <https://www.nytimes.com/2007/10/12/world/12abortion.html>;

³⁹ Ross Douthat, 'What Reduces Abortion Rates?,' *New York Times*, February 21, 2012; <https://douthat.blogs.nytimes.com/2012/02/21/what-reduces-abortion-rates/>; Douthat provides a website link to Vicky Claeys, 'Abortion Legislation in Europe,' *International Planned Parenthood Federation European Network*, 7th Congress of the ESC, April 2002, p.14, who gives helpful commentary on how to understand abortion rates in various European countries, as well as challenges with data collection

⁴⁰ Elizabeth Dvoskin, 'Coerced Abortions: A New Study Shows They're Common,' *The Daily Beast*, October 8, 2010; <https://www.thedailybeast.com/coerced-abortions-a-new-study-shows-theyre-common> finds from three studies that, 'For women in violent relationships, somewhere between a third and half report having experienced some form of reproductive coercion. But even for women in relationships that are not violent, 15 percent report experiencing such controlling behaviors, according to a study of 1,300 women published in the journal *Contraception* in April.' An oft-quoted statistic that up to 64% of women who procure abortions were coerced in some manner seems to be unreliable, as it originates from the Elliot Institute, whose founder David Reardon claims to have earned a Ph.D. in biomedical ethics, but from an unaccredited institution with no classroom instruction, and which publishes very questionable studies. Among human trafficking victims, see Laura Lederer and Christopher A. Wetzel, 'The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities,' *Annals Health* (2014) 23: 61; <https://www.icmec.org/wp-content/uploads/2015/10/Health-Consequences-of-Sex-Trafficking-and-Implications-for-Identifying-Victims-Lederer.pdf>. See also Laura Lederer, 'Examining H.R. 5411, the Trafficking Awareness Training for Health Care Act of 2014,' *U.S. House of Representatives, Energy and Commerce Committee, Witness Hearings*, September 11, 2014; <https://docs.house.gov/meetings/IF/IF14/20140911/102647/HHRG-113-IF14-Wstate-LedererL-20140911.pdf>

⁴¹ Although the *McClesky v. Kemp* (1987) decision went contrary to this basic principle, the direction of the Court is uncertain, and equal choice claims might still be upheld with *McClesky* remaining a judicial outlier, or even overturned. Discussed by Graber, p.77ff. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, NY: The New Press, 2011), ch.3 also discusses *McClesky*.

'Recriminalizing abortion will not protect the unborn because pro-life laws on the books are nearly impossible to implement. Criminal measures succeed in practice only when the bulk of the community shares the sentiments embodied by the law. Because more Americans support abortion rights than in the past, localities that recriminalize abortion will experience even greater public pressure not to prosecute competent abortionists than we have seen historically. Fewer police officials will investigate or arrest competent abortionists, fewer jurors will convict them, and fewer judges will impose substantial sentences on them. Citizens and officials hostile to abortion rights will confront increasing numbers of pregnant women who can travel to jurisdictions where abortion is legal or can obtain such drugs as RU-486, a substance that promises relatively safe, self-induced abortions. Significantly, no major pro-life official has announced a plan for preventing the rebirth of the abortion underground.'⁴²

From this vantage point of seeing how anti-abortion law led to violations of the Fourteenth Amendment, I reiterate the necessity of approaching abortion from the perspective of broader social and economic policies designed to support childraising.

Abortion and the U.S. Constitution

Another major problem for abortion policy is the nature of the U.S. Constitution itself, and the structure of American law and governance. From a Constitutional perspective, some abortion was legal and even religiously acceptable in the minds of the Puritans, the American 'Founding Fathers,' and the authors of the U.S. Constitution.⁴³

The Catholic and Protestant West believed that human personhood began at 'quickening,' the first time the mother felt the baby kick in the womb, typically between 14 to 28 weeks of the pregnancy. 'Quickening' was a belief carried over from Aristotle. Aristotle asserted that the fetus had to acquire the proper 'form' and shape before it was ensouled. In *History of Animals* 7.3, Aristotle relays his observations of miscarried fetuses and relates the question of ensoulment to the physical development of the fetus. For various reasons related to his observations, he says that this 'form' is acquired by male fetuses at around forty days, and by female fetuses at around ninety.⁴⁴ The proper 'form' was a precondition for ensoulment. This was one of the prevailing views of Greek science – the other view being that of the Stoics, who held that ensoulment and human personhood occurred when the fetus was born and drew its first breath of air. Prior to birth, believed the Stoics, the fetus was part of the mother's body, like fruit was part of a tree.

Augustine of Hippo, in the early fifth century, accepted Aristotle's view. While still holding that abortion was immoral, Augustine did not equate it with murder:

⁴² Graber, p.73 – 74 and see citations

⁴³ Ranana Dine, 'Scarlett Letters: Getting the History of Abortion and Contraception Right,' *Center for American Progress*, August 8, 2013; <https://www.americanprogress.org/issues/religion/news/2013/08/08/71893/scarlet-letters-getting-the-history-of-abortion-and-contraception-right/>; Katha Pollitt, 'Abortion in American History,' *The Atlantic*, May 1997; <https://www.theatlantic.com/magazine/archive/1997/05/abortion-in-american-history/376851/>;

⁴⁴ Aristotle, *History of Animals* 7.3 writes, 'In the case of male children, the first movement usually occurs on the right-hand side of the womb and about the fortieth day, but if the child is a female then on the left-hand side and about the ninetieth day. However, we must by no means assume this to be an accurate statement of fact, for there are many exceptions, in which the movement is manifested on the right-hand side though a female child is coming, and on the left-hand side though the infant is a male. And in short, these and all suchlike phenomena are usually subject to differences that may be summed up as differences of degree. About this period the embryo begins to resolve into distinct parts, it having previously consisted of a flesh-like substance without distinction of parts. What is called effluxion is a destruction of the embryo within the first week, while abortion occurs up to the fortieth day; and the greater number of such embryos as perish do so within the space of these forty days. In the case of a male embryo aborted at the fortieth day, if it is placed in cold water it holds together in a sort of membrane, but if it is placed in any other fluid it dissolves and disappears. If the membrane is pulled to bits the embryo is revealed, as big as one of the large kind of ants; and all the limbs are plain to see, including the penis, and the eyes also, which as in other animals are of great size. But the female embryo, if it suffer abortion during the first three months, is as a rule found to be undifferentiated. If however it reach the fourth month it comes to be subdivided and quickly attains further differentiation. In short, while within the womb, the female infant accomplishes the whole development of its parts more slowly than the male, and more frequently than the man-child takes ten months to come to perfection. But after birth, the females pass more quickly than the males through youth and maturity and age; and this is especially true of those that bear many children, as indeed I have already said.'

‘One who procures abortion before the soul is infused into the body is not a murderer. An embryo which is not yet formed cannot be murdered, nor can it properly be considered a human being in the womb. This depends on the soul, for when something is unformed and has no soul, it cannot be murdered.’⁴⁵

The medieval theologian Anselm of Canterbury affirmed this view:

‘No human intellect accepts the view that an infant has the rational soul from the moment of conception.’⁴⁶

The influential Thomas Aquinas also asserted that ‘movement’ is one of the two necessary principles of life. Thus, he accepted the Aristotelian theory of fetal development and ensoulment, while still viewing abortion as a type of sin less than homicide. Also in the 13th century, contemporaneously with Aquinas, Peter of Spain wrote a book called *Treasury of the Poor*, which contained an exhaustive list of contraceptive herbs and medicines, including those believed to be effective as abortifacients recommended for terminating a pregnancy prior to ensoulment;⁴⁷ Peter of Spain became Pope John XXI in 1276. Until 1869, Roman Catholic canon law distinguished between a *foetus animatus* and a *foetus inanimatus*.⁴⁸ Although the Aristotelian tradition held that a boy in the womb was formed at forty days, and a girl at eighty or ninety days, at some point opinions settled on the forty day threshold. English law also held to this distinction, which the Puritans brought to North America. Thus, until the 19th century in the U.S., the abortion procedure was legal until the moment of ‘quickening’:

‘From 1776 until the mid-1800s abortion was viewed as socially unacceptable; however, abortions were not illegal in most states. During the 1860s a number of states passed anti-abortion laws. Most of these laws were ambiguous and difficult to enforce.’⁴⁹

The Supreme Court justices behind *Roe* cite much of this historical material as significant to the meaning and intention of the Constitution.⁵⁰

Moreover, the high court also had to evaluate American common law and the States’ laws to understand if the abortion of a quickened fetus was a murder, homicide, etc.

‘In 1828, New York enacted legislation that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it ‘shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose.’ By 1840, when Texas had received the common law, only eight American States had statutes dealing with abortion. It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening, but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother’s life, that provision soon disappeared, and the typical law required that the procedure actually be necessary for that purpose. Gradually, in the middle and late 19th century, the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were

⁴⁵ Augustine of Hippo, *Quaestiones in Heptateuchum* 2.80

⁴⁶ *Encyclopedia of Catholicism*, p.4

⁴⁷ John Noonan, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (Cambridge, MA: Harvard University Press, 1965, 2nd edition 1986)

⁴⁸ Pope Gregory VI (1045 – 1046) said, ‘He is not a murderer who brings about abortion before the soul is in the body’ according to Frank K. Flinn, J. Gordon Melton, *Encyclopedia of Catholicism* (Facts on File Encyclopedia of World Religions, 2007), p.4. Pope Gregory XIII (1572 – 85) said it was not homicide to kill an embryo of less than 40 days since it was not yet human. Pope Gregory XIV (1590 – 1591) said Pope Sixtus’ censures against abortion were to be treated as if he had never uttered them; cf. Peter De Rosa, *Vicars of Christ* (Poolbeg Press, Dublin, 2000), p.374 – 375. In 1621 the Vatican issued another pastoral directive permitting abortion up to 40 days.

⁴⁹ Acevedo Z., ‘Abortion in Early America,’ *Women Health*, 1979 Summer; 4(2):159-67. *US National Library of Medicine National Institutes of Health*; <https://www.ncbi.nlm.nih.gov/pubmed/10297561>

⁵⁰ *Roe v. Wade*, 410 U.S. 113 (1973); <https://supreme.justia.com/cases/federal/us/410/113/>

increased. By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.⁵¹

In view of this history, we cannot say that the 'original intent' of the Constitution was to protect human life *from conception*. The case can be made that the American legal tradition, as it developed, sought to protect human life *as human life* from the earliest point at which human personhood could possibly be established. But unfortunately, even that is not uniform and consistent, and American law at both State and federal levels were impacted by slavery and ongoing racial animus: at times, public assistance was made contingent on women of color agreeing to be sterilized; women of color were sterilized without their consent, often by procedures paid for with federal funds;⁵² and women of color were used as human guinea pigs to determine the efficacy of 'the pill.'⁵³ Unfortunately, then, those conservatives who decry liberals as 'legislating from the bench' or 'exercising judicial activism' are vulnerable to the very same charge. The original religious, social, and political context of the Constitution assumed that women had some access to abortion.

The dissenting views of Justices William Rehnquist and Byron White in the 7 – 2 *Roe* decision are, of course, important to consider seriously.⁵⁴ The two Justices defended the right of the State of Texas to develop its own anti-abortion laws, without interference from the federal government. Justice Antonin Scalia reiterated this States-rights principle in *Planned Parenthood v. Casey* (1992).⁵⁵ They saw a procedural issue, centered around the rights of States. Of course, we must also ask how we might establish legally enduring and meaningful protections for human persons when such principles varied from State to State. Consider the parallel case when the definition of life and personhood between the State and Federal levels were at odds. Oregon was founded as a white supremacist haven. They defined human personhood as for white people only; they had a 'whites only' clause in their State Constitution. That became a violation of the U.S. Constitution's Fourteenth Amendment, which requires equal treatment under the law, and also requires that States respect the same legal rights accorded to persons by federal law. The only way for the Supreme Court to rule was to annul that part of Oregon's Constitution and laws. In our federalist framework, having changing definitions for 'life' and 'personhood' and 'liberty' can only be resolved on a federal level.

⁵¹ *Roe v. Wade*, 410 U.S. 113 (1973), IV.5

⁵² Nancy Ordover, *American Eugenics: Race, Queer Anatomy, and the Science of Nationalism* (Minneapolis, MN: University of Minnesota Press, 2003); James A. Tyner, *Genocide and the Geographical Imagination: Life and Death in Germany, China, and Cambodia* (Lanham, MD: Rowman & Littlefield, 2012), p.52; Lutz Kaelber, 'Eugenics/Sexual Sterilizations in North Carolina,' University of Vermont; last updated October 30, 2014; <http://www.uvm.edu/~lkaelber/eugenics/NC/NC.html>

⁵³ Marcie Blanco, 'The Dark History of Birth Control That You Haven't Heard,' *Mic*, March 18, 2015; <https://mic.com/articles/113022/the-dark-history-of-birth-control-that-you-haven-t-heard#pZZSfFBRC> writes, 'There were a handful of reasons why Puerto Rico became 'the ideal setting for pill trials, which were the largest series of clinical tests ever performed,' Preciado writes. As PBS reports, government 'officials supported birth control as a form of population control in the hopes that it would stem Puerto Rico's endemic poverty.' In 1937, the passage of Law 136 legally sanctioned sterilization of Puerto Rican women for such purposes. What's more, the pill trials that later began in Puerto Rico in the 1950s also expanded to other 'pseudo-colonial locations' like Haiti and Mexico, Iris Ofelia López points out in her book *Matters of Choice: Puerto Rican Women's Struggle for Reproductive Freedom*.'

⁵⁴ Justice Byron White 'criticized the majority's arbitrary choice of a rigid framework without any constitutional or other legal foundation to support it. He believed that this aggressive use of judicial power exceeded the Court's appropriate role by taking away power that rested with state legislatures and essentially writing laws for them. White argued that the political process was the appropriate mechanism for seeking reform, rather than letting the Court decide whether and when the mother should be a higher priority than the fetus.' Justice William Rehnquist 'expanded on the historical elements of White's argument. He researched 19th-century laws on abortion and the status of the issue at the time of both the Founding and the Fourteenth Amendment. His originalist approach led him to conclude that state restrictions on abortion were considered valid at the time of the Fourteenth Amendment, so its drafters could not have contemplated creating rights that conflicted with it.' *Roe v. Wade*, 410 U.S. 113 (1973); <https://supreme.justia.com/cases/federal/us/410/113/>

⁵⁵ Scalia: 'My views on this matter are unchanged from those I set forth in my separate opinions in *Webster v. Reproductive Health Services*, and *Ohio v. Akron Center for Reproductive Health*. The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, 'where reasonable people disagree the government can adopt one position or the other.' The Court is correct in adding the qualification that this 'assumes a state of affairs in which the choice does not intrude upon a protected liberty,' – but the crucial part of that qualification is the penultimate word.'

Federal law and Supreme Court rulings do not simply average or aggregate existing State laws. They are their own body of laws and precedents. They often reflect – or, are forced to reckon with – people’s ability to physically move, commit crimes, and carry guns and birth control pills and other relevant items across State lines. For the Supreme Court to not have a previous definition available about fetal personhood and liberties for pregnant women, the only real recourse for them at the federal level in *Roe* was to consider what ‘life’ and ‘liberty’ meant at the time of the Constitution (a la the preamble), especially for women and unborn infants, and consider whether any other Constitutional amendments clarified the situation. Barring the introduction of a Constitutional amendment at the federal level which updated both the theological and scientific understanding of human personhood nationwide, it is hard to see how *Roe* could have gone another way, even if the ‘right to privacy’ had not been articulated beforehand by *Griswold v. Connecticut* or had not been discussed for a century before that.⁵⁶ So in *Roe*, even though the Supreme Court majority consisted of Justices appointed by Republicans, they nevertheless annulled the Texas law.

Other countries, meanwhile, handle abortion by amending their respective Constitutions. And: ‘Of the 36 countries in Europe that allow abortion on request, the vast majority impose time limits of around 12 weeks.’⁵⁷ Their Constitutions are changed fairly regularly. But therein lies the rub: The ‘Founding Fathers’ of the U.S. made the Constitution hard – quite hard, in fact – to change.⁵⁸ They did this because they distrusted widespread democracy.

Thus far, I have simply noted the history of Christian theological ethical reflection on abortion and its impact on American Constitutional law. As many have said before, the Constitution itself reflects human flaws. Those who were committed to anti-slavery, racial equality, and women’s suffrage had to recognize that long ago. I think it is important that evangelicals who want tighter restrictions on abortion (myself included), but who would like to imagine that the Constitution is the answer (unlike me), have to acknowledge that *the Constitution is itself part of the problem*.

I continue in my argument that broad economic and social policies designed to support childraising would be the most effective and principled way to reduce abortion rates. To add more support to this argument, I will demonstrate how the biblical material addressing abortion is not as clear as Christians in the anti-abortion camp have led us to think, or have been led to think, themselves.

PART TWO: ABORTION IN THE CONTEXT OF THE BIBLE

The Bible and Abortion: Exodus 21

Without question, Exodus 21:22 – 25 has been the most important biblical text when trying to understand the ethical nature of abortion. It appears, at the very least, in Tertullian’s and Augustine’s comments on abortion, and in the Byzantine legal collection called the *Ecloga*.⁵⁹ A reading of Jewish reflection on the topic of abortion produces the

⁵⁶ There is some contemporary criticism of the ‘right to privacy’ expressed in *Roe v. Wade*, on both the right and the left. Does the ‘penumbra’ principle, for example, discerned by the early 20th century Justice Louis Brandeis as standing behind the Fourth and Fifth Amendments, extend so far as to cover abortion? Denying the ‘right to privacy’ altogether is a rather extreme criticism, and although some take up that critique, it seems to be driven more by political fashion than by legal analysis. After all, the ‘right to privacy’ is still invoked by both the right and the left when criticizing government surveillance and other issues. We do not believe the government has an unlimited right to surveil people.

⁵⁷ Sara Miller Llana, ‘In Europe, It Is Both Easier and Harder to Get an Abortion Than in US,’ *Christian Science Monitor*, May 24, 2018; <https://www.csmonitor.com/World/Europe/2018/0524/In-Europe-it-is-both-easier-and-harder-to-get-an-abortion-than-in-US>; Romain Brunet, ‘Abortion Laws Vary Significantly Across the EU,’ *France24*, May 25, 2018; <https://www.france24.com/en/20180525-abortion-laws-vary-eu-ireland-malta-poland-termination>;

⁵⁸ Eric Posner, ‘The U.S. Constitution is Impossible to Amend,’ *Slate*, May 5, 2014; http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/amending_the_constitution_is_much_too_hard_bla_me_the_founders.html writes, ‘Most liberal democracies—including the nice, stable ones in Western Europe—amend their constitutions with great frequency. Germany amends its Basic Law almost once per year, and France a bit more than once every two years. Indeed, most states in the U.S. amend their constitutions every couple of years. Many have completely replaced their original founding documents. The procedures for amendment in states and most liberal democracies are much easier than they are for the U.S. Constitution. For example, in Germany, an amendment requires a two-thirds majority in each House, and that’s it. In all these cases, no one complains about the lack of constitutional stability.’

⁵⁹ Spyros Troianos, ‘The Embryo in Byzantine Canon Law,’ (publication and date unknown) writes, ‘It is interesting to note that the so-called Appendix to the *Ecloga* – an aggregation of different unions of texts – includes the Mosaic Command, a collection

impression that Exodus 21:22 – 25 is the main biblical text explicitly considered.⁶⁰ Yet Exodus 21 is challenging to interpret. There is a curious but very significant difference between the Hebrew Masoretic Text (MT) and Greek Septuagint (LXX) manuscripts. Even besides that difference, the passage has interpretive uncertainties, which I highlight in the table below.

The text considers the case of two men fighting, where one strikes a pregnant woman unintentionally. That much is clear. What follows is unclear. First, does the law envision the pregnant woman going into early labor and delivering an otherwise healthy baby (NASB)? Or is the law addressing her miscarriage (NRSV, LXX)? Second, does the fine imposed reflect the emotional distress inflicted on the pregnant mother who gives birth prematurely to an otherwise healthy child (NASB)? Or is the fine potentially two-fold and cumulative, reflecting not only the cost of miscarrying the child (v.22) but also any injury done to the mother (v.23) (NRSV)? Or is the fine singular, where the amount is based solely on the developmental stage of the miscarried fetus (LXX)?

Hebrew Masoretic (NASB)	Hebrew Masoretic (NRSV)	Greek Septuagint (Brenton's)
²² If men struggle with each other and strike a woman with child so that she gives birth prematurely, yet there is no injury, he shall surely be fined as the woman's husband may demand of him, and he shall pay as the judges decide.	²² When people who are fighting injure a pregnant woman so that there is a miscarriage, and yet no further harm follows, the one responsible shall be fined what the woman's husband demands, paying as much as the judges determine.	²² And if two men strive and smite a woman with child, and her child be born imperfectly formed, he shall be forced to pay a penalty: as the woman's husband may lay upon him, he shall pay with a valuation.
²³ But if there is any further injury, then you shall appoint as a penalty life for life, ²⁴ eye for eye, tooth for tooth, hand for hand, foot for foot, ²⁵ burn for burn, wound for wound, bruise for bruise.	²³ If any harm follows, then you shall give life for life, ²⁴ eye for eye, tooth for tooth, hand for hand, foot for foot, ²⁵ burn for burn, wound for wound, stripe for stripe.	²³ But if it be perfectly formed, he shall give life for life, ²⁴ eye for eye, tooth for tooth, hand for hand, foot for foot, ²⁵ burning for burning, wound for wound, stripe for stripe.

The Greek Septuagint text assumes the case of miscarriage and makes a further distinction. It asks whether the child was 'imperfectly formed' (v.22) or 'perfectly formed' (v.23) in order to determine the penalty. The Greek term in question is ἐξέκονσμένον. As I will detail below, everyone commenting on the LXX regarded this to be a situation of forced miscarriage, not simply premature childbirth. This might reflect an interest the original Hebrew text or the LXX translators had in distinguishing between a woman who was more obviously pregnant than a woman who was not yet showing. A man who struck the latter would understandably have less responsibility than if he struck the former. Or, as later commentators understood this verse, the developmental stage of the fetus itself made a fundamental difference.

By contrast, the Hebrew Masoretic Text, in translations like the NRSV, distinguishes between injury to the fetus, at whatever stage of development it is miscarried, and injury to the woman. Loss of a fetus may or may not be classified as a homicide, or it might fall into its own category; we cannot be sure. Regardless, in the MT, the fetus, *at whatever stage of development*, is not regarded as a full human person, based on how the assailant is held accountable. But surely, we might ask of the MT, there is some point at which the fetus is so near to term that it

of 70 fragments from the Pentateuch, that repeats the well known passage 21.22 – 23 from Exodus in chapter 27.29 strongly indicating that the problem of the 'figuration' or not of the embryo never ceased to be of practical significance.'

⁶⁰ Interestingly, while Orthodox Jews are opposed to abortion except in case of the mother's life being threatened, Judaism is generally approving of abortion because of its more liberal approach to the biblical text. For a readable summary, see CultureBox, 'What Do Orthodox Jews Think About Abortion and Why?', *Slate*, August 25, 2000; http://www.slate.com/articles/news_and_politics/culturebox/2000/08/what_do_orthodox_jews_think_about_abortion_and_why.html. See also MJL, 'Abortion and Judaism,' *My Jewish Learning*, date unknown; <https://www.myjewishlearning.com/article/abortion-in-jewish-thought/>. For more detail, see Jewish Virtual Library, 'Issues in Jewish Ethics: Abortion,' *Jewish Virtual Library*; <https://www.jewishvirtuallibrary.org/abortion-in-judaism>

could and should count as a full human person? Perhaps the MT envisions the offender paying a fine on a sliding scale based on stage of pregnancy? How obvious was the woman's pregnancy? Is that a relevant factor?

The LXX seems to anticipate questions like this. The LXX, then, is ethically *more discerning and demanding* than the MT because the LXX introduces the developmental stage where the fetus is treated as a full human person as shown by the level of accountability for taking it. The LXX is also more textually clear. The LXX also takes away the phrase 'as the judges decide' (Ex.21:22), which could have been an adjustment to the varying conditions of diaspora Judaism, where synagogue officials might not have called themselves 'judges' (a 'judge' is the Hebrew *hassopet*; Greek *kritou* in Dt.17:12; whereas the 'synagogue official' is called *archon* in Mt.9:18; Lk.8:41).

Those who want to make more ethical 'space' for abortion point out that Exodus 21 does not speak of abortion, but miscarriage, forced yet unintentional. What that suggestion communicates is the notion that Jewish law only desires to protect a fetus and/or pregnant woman from violence and abuse from beyond the mother's body and will. Jewish law, on this reading, does not necessarily protect a fetus from its own mother. Thus, on this reading, voluntary abortion would be permissible. But this is a strained reading of the text as a whole, as the following comments show.

In its narrative context, Exodus 21:2 – 23:33 is the first set of laws God gave Israel after He delivered them from Egypt, and provided the Ten Commandments. Exodus 24:1 – 8 is a narrative 'seal' of those particular commandments, where Israel agreed to this covenant. Of course, Israel later broke this covenant (Ex.32), which required further mediation from Moses (Ex.33 – 34) and the institutionalization of his mediator role to stabilize the covenant (Ex.35 – Lev.27). As such, there is a relationship between the commands God gave in Exodus 21 – 23 and all the narrative material that came before. In the immediate sense, God wanted to eliminate 'Pharaonic slave practices' from Israel, to help a traumatized people not traumatize each other or foreigners in their midst. Moreover, in the larger context of salvation history, God was bringing Israel into a new garden land to be a renewed version of Adam and Eve, reminding Israel of the original garden, and His vision for human bodies and relationships. Throughout the biblical narrative God retells the same basic storyline – or recapitulates – what He has done before. Even the water of the Red Sea (Ex.14) was a reminder of the waters of the primordial creation (Gen.1); on the other side of water is a garden land.

Hence, the very first subject presented after the Ten Commandments is servitude and freedom. God commanded Israel to not keep people in a certain form of servitude for more than six years (Ex.21:2 – 6). That principle fits a sabbath pattern involving the number seven. God wanted indentured servants ('slave' is now a dangerous mistranslation of the Hebrew *ebed*) to rest and be freed on the seventh year, which also seems to be a retrospective condemnation of how Laban tricked the vulnerable Jacob to serve two seven year terms (Gen.29:20; 30). God was rebuilding His vision of the creation order – with the Sabbath on the original seventh 'day' (Gen.2:1 – 3) – into back Israel's way of life. This echo of creation fits a pattern of recapitulation in the biblical narrative.

The clearest textual evidence for linking these laws to their narrative context occurs in Ex.21:16. God commands Israel to not kidnap people into slavery, on pain of death (Ex.21:16). This command serves at least two purposes. First, it is a commentary on the eighth commandment, 'do not steal' (Ex.20:15), since kidnapping a person is the most egregious form of stealing. Second, it is a retrospective condemnation on Pharaoh's theft of Israel's labor through forcible enslavement.

The other commandments in Exodus 21:2 – 36 and the remainder of this section of case law (Ex.22:1 – 23:33) can be understood in these ways. God commanded Israel to not impose harsh or unlimited beatings (Ex.21:18 – 21), as Pharaoh inflicted on them (Ex.1:8 – 14). He commanded Israel to not injure vulnerable infants (Ex.21:22 – 27) as Pharaoh once did to their infants (Ex.1:15 – 22). He even commanded Israelites to end cycles of retaliatory violence (Ex.21:12 – 14) which Moses failed to do (Ex.2:11 – 15). Perceiving the commands against these short term (Egypt) and long term (creation) frameworks has an impact on how we read Exodus 21:22 – 25.

God placed a value on every human life, even if a person was indentured, or in the womb. The chiasmic structure of Exodus 21:2 – 36 supports this position:

- A. Restoration Without Payment: Indentured Servants; Betrothed Daughters (21:2 – 11)
- B. Sacredness of Bodies and Relations; Crimes Punished by Death (21:12 – 17)

- C. Injuries from a Physical Fight; Toward Full Healing (21:18 – 19)
- D. The Full Humanity of the Slave: Cases of Murder vs. Homicide (21:20 – 21)⁶¹
- C'. Injuries of Bystanders to a Fight; Full Compensation (21:22 – 25)⁶²
- B'. Sacredness of the Body and Relations; Freedom to Servants (21:26 – 27)
- A'. Restoration With Payment: Indirect Injuries; Servants; Compensation (21:28 – 36)

While time and space do not permit me to address every question that arises about this section, I do wish to make some important points about the pregnant mother case addressed in C'.

No matter which manuscript tradition we take – Hebrew Masoretic or the Greek Septuagint – there appears to be a narrative intention behind this entire section and its placement: to prevent bodily harm and bodily enslavement. Positioning damage done to a fetus against the damage done by Pharaoh to Israelite baby boys is especially illuminating. Whoever does the damage is in the wrong, and bears some responsibility. In fact, the biblical authors dress up Israelites who break God's commandments in the literary garb of 'Pharaoh' motifs. The thought that one Israelite might enslave another through debt triggers the reminder that 'I am the LORD your God who brought you out of Egypt' (e.g. Lev.25:55). Much later, King Solomon's building projects and severe tax policy invite the narrator of the *Book of Kings* to dress him up as a type of Pharaoh: 'forced labor' (1 Ki.9:15); 'storage cities' (9:19); 'slave labor' (9:21); and even an explicit alliance with Pharaoh via marriage to 'Pharaoh's daughter' (9:24). Any Israelite who enslaves others would be acting like *Pharaoh*. King Solomon, later in life, acted like *Pharaoh*. Unless there are extenuating moral circumstances, like when the life of the mother is threatened, anyone, including the mother, who takes the life of a vulnerable fetus is, to some degree, acting like *Pharaoh*. While the questions about Exodus raised by the manuscript difference remain with us, to understand Jewish law's position on a pregnant mother taking the life of her own fetus, or a father wishing his unborn fetus to be aborted, we have to consider other biblical texts and other moral considerations.

What, then, do we make of the difference between MT and LXX on the possibility that the fetus' death be treated as the death of an ordinary human person? Protestant scholar Richard B. Hays makes short shrift of this question when he dismisses the LXX on the basis 'that Protestant theological tradition has historically affirmed the canonical priority of the Hebrew text over the Septuagint.'⁶³ Indeed, on these particular verses, the Samaritan Pentateuch, which dates to approximately 122 BC, agrees with the Hebrew Masoretic.⁶⁴ So does the Dead Sea Scroll fragment of Exodus known as 4Q22, which dates to 100 – 25 BC.⁶⁵ But larger textual and historical considerations have to be

⁶¹ In the Masoretic Hebrew and the Greek Septuagint manuscripts of v.21, a man who beats his servant and commits homicide (as opposed to murder) should not be punished: 'no vengeance shall be taken' (NASB). That poses a moral irregularity and difficulty. Should he not be punished for a homicide? However, the Samaritan Pentateuch variant contains the phrase, 'he shall not die,' instead. Meaning, for a homicide with unclear intent, a punishment short of death is called for, since 'he shall die' for the homicide with clearer brutal intent in v.20 is the comparison point. See Rev. Canon Garratt, 'On the Samaritan Text of the Pentateuch,' *Journal of the Transactions* (London: Harrison & Sons, 1904), p.6; <http://shomron0.tripod.com/articles/garrattpentateuch.pdf>.

⁶² 'An eye for an eye' is a principle in Exodus 21:23 – 25 that Jewish rabbinical commentators interpret as not strictly retributive. It is an outer limit of proportionality for cases of bodily harm, meant to represent proportional financial compensation (*Talmud Bava Kamma* 83b – 84a) or, in some cases, lashes (*Makot* 1:1). They actually reason that because of the possibility that the offender is already blind: One cannot blind an already blind man! So they believe that the 'eye for an eye' is meant as proportional compensation: If you blind someone's eye, you become his 'second eye.' This restorative justice reading is reinforced by these facts: (1) In Exodus 21:18 – 19 (C), parallel to this example of bodily harm (C'), the offender must care for the injured victim until he is 'completely healed.' It is likely that the former interprets the latter. (2) In Exodus 21:22 (C') and 30 (A'), financial compensation is named again. (3) In Leviticus 19:17 – 18, the law instructs Israelites to 'not take vengeance' upon one's neighbor, such that these commands are mutually interpreting; see e.g. Darren W. Snyder Belousek, *Atonement, Justice, and Peace: The Message of the Cross and the Mission of the Church* (Grand Rapids, MI: Eerdmans, 2012), p.408. (4) God anticipated Israel's exile from the garden land and loss of political sovereignty (Dt.27 – 28; cf. Ex.20:4 – 6), reenacting Adam and Eve's exile from Eden (Gen.3:20 – 24); and Israel would not be able to enact capital punishment while being ruled by another nation; so the principle of restoration and compensation was important to establish from the start. Therefore, Jewish law was victim-oriented and restorative, not primarily retributive in nature.

⁶³ Richard B. Hays, *The Moral Vision of the New Testament: A Contemporary Introduction to New Testament Ethics* (San Francisco, CA: HarperSanFrancisco, 1996), p.447

⁶⁴ Samaritan Pentateuch Book of Exodus, *Step Bible Tyndale House*; <https://www.stepbible.org/?q=version=SPE&reference=Exo.21>

⁶⁵ 4Q22 PaleoExodus; *Dead Sea Scrolls Bible Translations*; <http://dssenglishbible.com/scroll4Q22.htm>

mentioned. Linguists accept the traditional date of the LXX Torah being translated in the 3rd century BC from Alexandria, Egypt based on the early form of Koine Greek utilized. The LXX, therefore, comes from the earliest possible Hebrew text. If the *Letter to Aristaeus* is to be believed on this point, the LXX was commissioned and approved by the Sanhedrin and High Priest in Jerusalem, prior to any Jewish-Christian textual disputes, whereas the MT had no such governing body. A great many Christians tend to believe the prophecy of LXX Isaiah 7:14 that a ‘virgin’ will conceive, quoted by Matthew 1:23, as opposed to MT Isaiah 7:14, which says only ‘maiden.’ The LXX was widely used for centuries, by both Jews and Christians, and just as important for study of the New Testament, for the New Testament quotes from the LXX more than any other translation of the Old Testament.⁶⁶

Therefore, Hays’ abrupt dismissal of the LXX is not satisfactory. It is logically self-defeating, as it raises the notorious and amusing question of whether Protestants – who cry ‘sola scriptura’ over ‘tradition’ – can invoke ‘tradition’ to resolve an issue of competing biblical manuscripts, arguably the most fundamental of all issues. It is exegetically questionable, because of the clear appreciation Jesus and the apostles had for the LXX, even if we do not assume their endorsement of the entire translation. It is historically presumptuous, because the Hebrew Masoretic text has not been categorically vindicated over the LXX on every issue, even with the discovery of the Dead Sea Scrolls; rather, the opposite is true on many finer textual points.⁶⁷ And it is ecclesiologically narrow, for Protestants cannot simply distance themselves from the Catholic and Orthodox traditions, who hold the LXX in higher regard. Certainly, both historic Jewish and Christian communities have been influenced by *both* the LXX translation with its focus on the developmental stage of the fetus *and* the Masoretic translation with its focus on the mother. Simply out of respect,⁶⁸ if not because of genuine uncertainty, we must consider both manuscript families.

Perhaps the LXX is a ‘synthesis’ of Jewish oral law and the MT, or an application of the MT? If a woman who is eight and a half months pregnant is struck, and the fetus in her womb is injured or miscarried, why would that not count as the homicide of a full human person? According to U.S. federal law, specifically the Unborn Victims of Violence Act of 2004, if a motorist strikes a pregnant woman and both the mother and the fetus in her womb die, then the motorist is guilty of two homicides, not one, even if that woman was on her way to a hospital or clinic to abort the fetus. As of this writing, thirty-eight States count the fetus as a separate legal person for purposes of crimes committed against the pregnant mother.⁶⁹ So this is a very basic question to ask of the Exodus case law.

It is also fair to wonder if the LXX translators were influenced by Aristotle, or attempting to engage the basic understanding posed by Greek science. To repeat a point made above, Aristotle made observations of miscarried fetuses and related the question of ensoulment to the physical development of the fetus.⁷⁰ The proper ‘form’ was a precondition for ensoulment, Aristotle’s view. Aristotle’s student Ptolemy had become Alexandria’s ruler after it was founded by Alexander the Great. In very little time, Alexandria surpassed Athens as the intellectual and

⁶⁶ For example, in addition to the ‘virgin’ prophecy of LXX Isaiah 7:14, Luke 4:18 quotes from LXX Isaiah 61:1, which includes the phrase ‘and recovery of sight to the blind,’ whereas the MT does not. Acts 7:14 quotes from LXX Genesis 46:20 – 22 and Exodus 1:5 when Stephen refers to 75 people, whereas MT mentions only 70 people. Hebrews 1:6 contains the phrase, ‘And let all the angels of God worship him,’ from LXX Deuteronomy 32:43 and the Dead Sea Scrolls, which is not found in the MT. Hebrews 10:5 quotes from LXX Psalm 40:6, including the phrase, ‘a body You have prepared for me,’ whereas MT Psalm 40:6 does not. Paul quotes the LXX instead of the MT throughout his corpus, including LXX Isaiah 59:20 in Rom. 11:26. We have evidence that the LXX was used very broadly by diaspora Jews, wherever Greek was spoken, because Hellenistic Jews, except for the educated rabbis, generally lost the ability to read and speak Hebrew, even in Palestine, and certainly in the diaspora. The LXX also played an enormous role in the spread of Christian faith, including the fact that the apostolic writers of the New Testament utilize it.

⁶⁷ E.g. MT 1 Samuel 14:41 reads, ‘Therefore Saul said unto the LORD God of Israel, ‘Give Thummim.’ And Saul and Jonathan were taken: but the people escaped.’ This makes very little sense, and seems to be the error of a scribe who skipped a line. LXX 1 Samuel 14:41 reads, ‘Therefore Saul said, ‘O LORD God of Israel, why have you not answered your servant this day? If this guilt is in me or in Jonathan my son, O LORD, God of Israel, give Urim. But if this guilt is in your people Israel, give Thummim.’ And Jonathan and Saul were taken, but the people escaped.’ The word ‘pierced’ in LXX Psalm 22:16 has been replaced by ‘lion’ in the MT, which makes little sense. LXX Psalm 145:13 is omitted from the MT. The Dead Sea Scroll known as 4Q44 Deuteronomy containing Dt.32:9 – 10, 37 – 43 appears to agree with the LXX and not the MT, although 4Q44 Dt.32:43 is still missing a phrase.

⁶⁸ The LXX forms the basis for the Old Latin, Slavonic, Syriac, Old Armenian, Old Georgian and Coptic versions of the Old Testament

⁶⁹ Linly Sanders, ‘When Does Life Begin? Pregnant Woman’s Unborn Child Counted Among 26 Killed in Texas Shooting,’ *Newsweek*, November 8, 2017; <https://www.newsweek.com/why-are-fetuses-included-mass-shooting-death-tolls-705928>

⁷⁰ Aristotle, *History of Animals* 7.3

cultural center of the Greek-speaking world. So there can be little doubt that educated Alexandrians – including the Hellenistic Jews there – knew the writings of the older Athenian philosophers and playwrights. Aristotle did not use the word ἐξαικονισμένον or its cognates in *On the Nature of Animals*, but the conceptual parallel is unmistakable. And the LXX reflects a fairly deep engagement with Hellenism. On the one hand, the LXX reflects a tendency to diminish the rich anthropomorphic and anthropopathic language for God given in the original Hebrew, perhaps out of a concern to avoid the impression that the God of Israel is like Zeus, and to at least engage (some might say ‘accommodate’) the sensibilities of Hellenistic philosophical speculation about divinity.⁷¹ However, the LXX also plays an important step in *changing* the meaning of certain Greek terms – like the very important term for ‘righteousness/justice’ (*dikaosyne*) – as the translators coordinated Greek with Hebrew.⁷² So the influence, as it were, is not one-directional.

The Record of Jewish Thought on Abortion and Exodus 21

Judaism as a whole understands the body as a gift from God to human beings – a gift, in fact, ‘on loan’ to us. Multiple prohibitions on bodily acts, from eating to tattoos to suicide, illustrate the Jewish vision which rejects the idea that the individual has unfettered right to do whatever he or she pleases with the body. So what is the record of Jewish thought on Exodus 21?

The first century Hellenistic Jewish commentator Philo of Alexandria (c.25 BC – c.50 AD) is the earliest witness. Philo recognizes from Exodus 21 that intentionality matters. The text of Exodus 21 speaks of a man striking a pregnant woman, unintentionally causing her to miscarry. Philo treats the case of someone intentionally striking a pregnant woman *in order* that she miscarry. He comments:

‘If a man comes to blows with a pregnant woman and strikes her on the belly and she miscarries, then, if the result of the miscarriage is unshapen and undeveloped [*aplaston kai adiatypoton*], he must be fined both for the outrage and for obstructing the artist Nature in her creative work of bring into life the fairest of living creatures, man [*anthropon*]. But, if the offspring is already shaped and all the limbs have their proper qualities and places in the system, he must die, for that which answers to this description is a human being [*anthropos*], which he has destroyed in the laboratory of Nature who judges that the hour has not yet come for bringing it out into the light.’⁷³

Philo concentrates on the developmental stage of the fetus in the case of miscarriage. The miscarriage is either ‘unshapen and undeveloped’ or ‘already shaped’ where ‘all the limbs have their proper qualities and places.’ A fine is required for the former; death for the latter. This might mean that Philo accepts the LXX and rejects the Hebrew Masoretic. However, Philo’s knowledge of Hebrew has been questioned.⁷⁴ It is also possible that Philo was only familiar with the LXX on this point. Yet the authors of the article ‘Issues in Jewish Ethics: Abortion’ at the Jewish Virtual Library cite the Samaritan Targum (which traditionally dates to 20 BC, but could date to the 3rd century AD) and ‘a substantial number of Karaite commentators’ as agreeing with Philo.⁷⁵

Flavius Josephus (37 – c.100 AD), the first century Jewish historian, does not mention the developmental stage of the fetus. Because that consideration is absent, he appears to refer to a proto-Masoretic text:

‘He that kicks a woman with child, so that the woman miscarry, let him pay a fine in money, as the judges shall determine, as having diminished the multitude by the destruction of what was in her womb; and let

⁷¹ See e.g. Paul Gavriluk, *The Suffering of the Impassible God: The Dialectics of Patristic Thought* (Oxford: Oxford University Press, 2004), chs.1 – 2

⁷² See e.g. Alister E. McGrath, *Iustitia Dei: A History of the Christian Doctrine of Justification* (Cambridge: Cambridge University Press, 1986), ch.1 discusses how the Hebrew *shalom* and *tsedeq*, referring to Hebraic restorative justice, altered the Greek *dikaosyne*, which originally referred to Greek meritocratic-retributive justice. This laid a very important groundwork for the New Testament to use *dikaosyne* with reference to the Hebrew, biblical sense.

⁷³ Philo of Alexandria, *On Special Laws* 3.108 – 109, cited by Richard B. Hays, *The Moral Vision of the New Testament: A Contemporary Introduction to New Testament Ethics* (San Francisco, CA: HarperSanFrancisco, 1996), p.460 in footnote 3

⁷⁴ יהודגן כהן-גשר and Jean-Georges Kahn, ‘Did Philo Know Hebrew?’ *Mandel Institute for Jewish Studies*, Vol.4 (Tamuz, 5725), p.337 – 345; https://www.jstor.org/stable/23591240?seq=1#page_scan_tab_contents

⁷⁵ ‘Issues in Jewish Ethics: Abortion,’ *Jewish Virtual Library*; <https://www.jewishvirtuallibrary.org/abortion-in-judaism>

money also be given the woman's husband by him that kicked her; but if she die of the stroke, let him also be put to death, the law judging it equitable that life should go for life.'⁷⁶

At the same time, elsewhere, Josephus comments on the case where a pregnant mother intentionally aborts her child:

'The Law has commanded to raise all the children and prohibited women from aborting or destroying seed; a woman who does so shall be judged a murderess of children for she has caused a soul to be lost and the family of man to be diminished.'⁷⁷

Almost certainly, the later Jewish midrashic tradition *does* show the pervasive influence of Aristotle's views on diaspora Judaism, and not just the LXX translation. According to the later rabbinic document *Midrash Nidpas* 3:7, the fetus was considered to be 'fully formed' on the *forty first day* after conception. *Yevamot* 69b describes the fetus *before forty days* as 'mere water.' A convergence to this level of detail is rather suspect. The time frame of forty days for 'formation' is probably not a coincidental agreement, but rather, reflects dependence.

The opinion of Rabbi Ishmael ben Elisha (90 – 135 AD) is unusual. He is recorded, by *Sanhedrin* 57b, to have said that Gentiles, but not Jews, incurred the death penalty for intentional abortions. Given that most Jews have held that Jews are bound by stricter laws than Gentiles, Ishmael should probably be taken as making a rhetorical point communicating his horror at Gentile practices. In any case, Orthodox Christian bioethicist H. Tristram Englehardt is mistaken for taking Rabbi Ishmael's opinion as characteristic of Judaism as a whole.⁷⁸ Other Talmudic authorities believed that abortion, while prohibited, did not constitute murder.⁷⁹ For some, abortion was not categorized as a transgression until the fetus was viable.⁸⁰

Complicating matters, however, Orthodox Jews today reject the LXX in favor of the Hebrew Masoretic Text. Of course, a Christian concern with this rejection is that it seems motivated by the widespread Christian usage of the LXX, and Christians have accused Jews of modifying the Old Testament text in certain places where messianic prophecies were involved. Regardless of motivation, that Jewish decision to favor the Masoretic Text is reflected in the following statement by an Orthodox Jewish scholar:

'If she is not harmed in any other way, the Bible says, then the man who struck her has to pay her husband damages. From this one can deduce that feticide isn't murder, because the penalty for murder is death. Rather, removing a fetus is said to be like amputating a limb – which a woman is still not allowed to do for mere economic or cosmetic reasons, since that would be self-mutilation, which is forbidden.'⁸¹

This comment seems to constitute a basic denial that the LXX, with its interest in the fetus being 'formed' versus 'unformed' at some point, is a trustworthy authority on the situation. The Hebrew Masoretic Text contains no distinction about the developmental stages of the fetus, so treats all miscarriages equally. And any assailant of a pregnant woman who causes a miscarriage is subject to a fine, according to Jewish law. Implicit in this statement is that Exodus 21 refers to harm to the *mother*, either of a lesser nature with the loss of her fetus, or of a greater nature if she suffers even more bodily harm. More progressive Jews (Conservative, Reform, etc.) entertain a variety of positions which amount to imputing full human personhood somewhere after conception but before birth.⁸² In any case, there is a robust intra-Jewish debate about when human personhood begins.

The Record of Christian Thought on Abortion and Exodus 21: First Through Third Centuries

Christianity led to the perception and treatment of children as people for the first time in the Greco-Roman world. In his book, *When Children Became People: The Birth of Childhood in Early Christianity*, O.M. Bakke narrates how

⁷⁶ Josephus, *Antiquities of the Jews* 4.33

⁷⁷ Josephus, *Against Apion* 2.202

⁷⁸ Josephus, *Against Apion* 2.202

⁷⁹ *Tosefta*, *Sanhedrin* 59a; *Chullin* 33a

⁸⁰ *Mekh. Mishpatim* 4 and see *Sanhedrin* 84b and *Niddah* 44b

⁸¹ CultureBox, 'What Do Orthodox Jews Think About Abortion and Why?' *Slate*, August 25, 2000;

http://www.slate.com/articles/news_and_politics/culturebox/2000/08/what_do_orthodox_jews_think_about_abortion_and_why.html

⁸² MJL, 'Abortion and Judaism,' *My Jewish Learning*; <https://www.myjewishlearning.com/article/abortion-in-jewish-thought/>

Christians confronted the prevailing cultural and legal views about children.⁸³ As Christian faith spread from the communities of Palestinian and Diaspora Judaism to confront the Greco-Roman world, Christian literature from the first to third centuries uniformly condemns the practice of abortion and the exposure of infants, and attests to Christians striving to honor children by rejecting abortion as an option.

Without exception, pagan Greek and Roman law, philosophy, and culture held that infants had absolutely no inherent rights. Plato, in *The Republic*, records a conversation between Socrates and Glaucon in which they approve of both infanticide and abortion: infanticide in cases of ‘inferior parents’ or children ‘born defective,’ and abortion in cases of women who become pregnant after the age of forty.⁸⁴ Similarly, Aristotle stated:

‘Let there be a law that no deformed child shall live. But as to an excess in the number of children, if the established customs of the state forbid this (for in our state population has a limit), no child is to be exposed. But when couples have children in excess, let abortion be procured before sense and life have begun; what may or may not be lawfully done in these cases depends on the question of life and sensation.’⁸⁵

In the days of the pagan Roman Republic and Roman Empire, a new mother laid her newborn baby on the ground, and the father of the household had to pick it up in order for the household to embrace that child. Parents could legally discard such a child to the elements to die (*expositio*), prior to the eighth day for boys and the ninth day for girls. These practices indicate that social birth, not biological birth, was decisive. The ancient document known as *Papyrus Oxyrrhynchus 744*, dating to 1 BC, is probably typical of a father in the Roman Empire giving instruction to his wife about their newborn baby:

‘I am still in Alexandria [Egypt]... I beg and plead with you to take care of our little child, and as soon as we receive wages, I will send them to you. In the meantime, if (good fortune to you!) you give birth, if it is a boy, let it live; if it is a girl, expose it.’

Moreover, a husband could punish his wife for procuring an abortion on the grounds that she deprived him of an heir. An unmarried woman, however, faced no such restrictions. The Christian teaching about abortion stands in very stark contrast to all this.

The Didache, perhaps an example of Palestinian Christianity dating to 50 – 100 AD, instructs Christian readers, ‘You shall not murder a child by abortion nor kill that which is begotten.’⁸⁶ It also speaks against infanticide: ‘Those that kill children are destroyers of a creation of God.’⁸⁷

The Epistle of Barnabas (70 – 130 AD) says, ‘You shall not slay the child by procuring abortion; nor, again, shall you destroy it after it is born. You shall not withdraw your hand from your son, or from your daughter, but from their infancy you shall teach them the fear of the Lord.’⁸⁸

The Apocalypse of Peter (~130 AD) warns, ‘And near this flame there is a great and very deep pit and into it there flow all kinds of things from everywhere: judgment, horrifying things and excretions. And the women (are) swallowed up (by this) up to their necks and are punished with great pain. These are they who have procured abortions and have ruined the work which he has created... Tiny beasts that devour flesh... turn and torture them forever, with their husbands.’⁸⁹

Justin Martyr, in his *First Apology* (~150 AD) says that Christians are taught not to expose their infants: ‘But as for us, we have been taught that to expose newly-born children is the part of wicked men; and this we have been taught

⁸³ O.M. Bakke, *When Children Became People: The Birth of Childhood in Early Christianity* (Minneapolis, MN: Fortress Press, 2005), ch.2

⁸⁴ Plato, *Republic* Book 5, 460b – c and 460e – 461c

⁸⁵ Aristotle, *Politics* 7.16

⁸⁶ *Didache* 2:2

⁸⁷ *Didache* 5:2

⁸⁸ *The Epistle of Barnabas* 19:5

⁸⁹ *The Apocalypse of Peter* 8

lest we should do any one an injury, and lest we should sin against God, first, because we see that almost all so exposed (not only the girls, but also the males) are brought up to prostitution. And as the ancients are said to have reared herds of oxen, or goats, or sheep, or grazing horses, so now we see you rear children only for this shameful use; and for this pollution a multitude of females and hermaphrodites and those who commit unmentionable iniquities, are found in every nation And you receive the hire of these, and duty and taxes from them, whom you ought to exterminate from your realm. And any one who uses such persons, besides the godless and infamous and impure intercourse, may possibly be having intercourse with his own child, or relative, or brother. And there are some who prostitute even their own children and wives, and some are openly mutilated for the purpose of sodomy; and they refer these mysteries to the mother of the gods, and along with each of those whom you esteem gods there is painted a serpent, a great symbol and mystery.’⁹⁰

Athenagoras of Athens, in *A Plea for the Christians* (177 AD), written to the Emperors Marcus Aurelius and Lucius Aurelius Commodus, notes, ‘Women who practice abortion are murderers and will render account to God for abortion...’⁹¹

Tertullian of Carthage, *Apology* (197 AD) says, ‘But with us, murder is forbidden once for all. We are not permitted to destroy even the fetus in the womb, as long as blood is still being drawn to form a human being. To prevent the birth of a child is a quicker way to murder. It makes no difference whether one destroys a soul already born or interferes with its coming to birth. It is a human being and one who is a man, for the whole fruit is already present in the seed.’⁹² Tertullian, *On the Soul* (210 – 213 AD), explains the Christian position as rooted in the Old Testament. ‘The law of Moses, indeed, punishes the man who causes an abortion.’⁹³

Clement of Alexandria, *Eclogae Propheticae* (~200 AD) refers to God’s care for vulnerable children, worked out in the church community: ‘Children who were exposed by parents are delivered to a protecting angel, by whom they are brought up and nourished. And they shall be, it says, as the faithful of a hundred years old here... The *Apocalypse of Peter* says that children born abortively receive the better part. These are delivered to a care-taking angel...’⁹⁴

Hippolytus of Rome, *Refutation of All Heresies* (~228 AD) writes, ‘Women who were reputed to be believers began to take drugs to render themselves sterile, and to bind themselves tightly so as to expel what was being conceived, since they would not, on account of relatives and excess wealth, want to have a child by a slave or by any insignificant person. See, then, into what great impiety that lawless one has proceeded, by teaching adultery and murder at the same time.’⁹⁵

Marcus Minucius Felix of Rome, *Octavius* (~230 AD), writes, ‘And in fact, it is a practice of yours, I observe, to expose your own children to birds and wild beasts, or at times to smother and strangle them; a pitiful way to die; and there are women who swallow drugs to stifle in their own womb the beginnings of a man to be – committing infanticide before they give birth to their infant.’⁹⁶

⁹⁰ Justin Martyr of Rome, *First Apology* 27

⁹¹ Athenagoras of Athens, *A Plea for the Christians* 35

⁹² Tertullian of Carthage, *Apology* 9.8

⁹³ Tertullian of Carthage, *On the Soul* 37; referring to Exodus 21:22 – 23; cf. *On the Soul* 23 – 37 where Tertullian describes one abortion procedure: ‘Among surgeons’ tools there is a certain instrument, which is formed with a nicely-adjusted flexible frame for opening the uterus first of all and keeping it open; it is further furnished with an annular blade, by means of which the limbs [of the child] within the womb are dissected with anxious but unfaltering care; its last appendage being a blunted or covered hook, wherewith the entire fetus is extracted by a violent delivery. There is also [another instrument in the shape of] a copper needle or spike, by which the actual death is managed in this furtive robbery of life: They give it, from its infanticide function, the name of embrosphaktes, [meaning] ‘the slayer of the infant,’ which of course was alive... [The doctors who performed abortions] all knew well enough that a living being had been conceived, and [they] pitied this most luckless infant state, which had first to be put to death, to escape being tortured alive... Now we allow that life begins with conception because we contend that the soul also begins from conception; life taking its commencement at the same moment and place that the soul does.’

⁹⁴ Clement of Alexandria, *Eclogae Propheticae* 41

⁹⁵ Hippolytus of Rome, *Refutation of All Heresies* 9.7

⁹⁶ Marcus Minucius Felix of Rome, *Octavius* 30 – 31

Spyros Troianos, a modern scholar of Byzantine law and history, points out that the status of the fetus entered into Christian discussions on other occasions, too. During the first three centuries, Christians also pondered the question of whether baptizing the adult mother in effect baptized the unborn fetus, too; they decided that it did not.⁹⁷ From that angle as well, the fetus in the womb was not reducible to a part of its mother's body.

The Record of Christian Thought on Abortion and Exodus 21: Fourth Century

We now consider the momentous fourth and fifth centuries, which are important for several reasons. First, Christian leaders, in councils, coordinate their views about abortion with specific pastoral responses, like penance. Second, a difference of opinion about the status of the fetus emerges between Basil of Caesarea, who represents the Greek East, and Augustine of Hippo, who would come to represent the Latin West, and the authors of the *Apostolic Constitutions*, in the Syrian church. Third, the Roman Empire itself, and its laws and administration, starts to embrace Christians and welcome Christian influence. This gives us some indication for how Christian concern for the unborn – and human life in general – was translated into concrete policies.

The Council of Elvira (~306 AD) was an early local council of nineteen bishops, convened in Roman Hispania (southern Spain). They made two decisions about how they would treat abortion among their parishes. Canon 63 says that if a woman becomes pregnant by adultery while her husband is absent, then takes the child's life, she 'shall not be given communion even at the end, since she has doubled her crime.' Canon 68 says that if a female catechumen becomes pregnant after committing fornication and then causes the death of her child, 'her baptism is to be postponed until the end of her life.' By comparison, any act of fornication was declared to require five years of penance (canons 47 and 48). It must be added that Christian leaders were concerned not just to punish people, but to protect them, because there was biblical evidence in 1 Corinthians 11:28 – 32, and perhaps in other places in the church's memory, that people who take the eucharist with an unworthy attitude might actually die.

The Council of Ancyra, in 314 AD, in the capital of Galatia in modern Turkey (314 AD) was a local meeting of about a dozen bishops from Asia Minor and possibly Syria also. They decide, in canon 21, 'Women who prostitute themselves and who kill the children thus begotten, or who try to destroy them while in their wombs, are by ancient law [other translations read 'by former decree,' meaning the Council of Elvira] excommunicated to the end of their lives. We, however, have softened their punishment, and condemn them to the various appointed degrees of penance for ten years.' This rule remained influential until well into the Middle Ages. It is noteworthy, however, that canon 22 was a decision about murderers, and it says, 'Concerning wilful murderers let them remain prostrators; but at the end of life let them be indulged with full communion.' This difference in prescribed pastoral response is of interest to us. From this difference we may fairly conclude that the Council of Ancyra saw abortion as a variation of murder, but also a distinct category within it.

Basil of Caesarea, in his *Epistle 188* (374 AD) to his protégé Amphilochius, bishop of Iconium, comments on the decisions of the Council of Ancyra. Basil explains, 'A woman who deliberately destroys a fetus is answerable for murder.' Basil uses the term *phonou*, which he also uses to denote manslaughter and homicide, so there is some ambiguity about how to render this word in this context.⁹⁸ Then, Basil addresses the Aristotelian distinction between being formed or unformed. I have found two translations of the next sentence: the former is prescriptive, the latter descriptive.

<i>Nicene and Post-Nicene Fathers</i> , edited by Philip Schaff and Henry Wace	<i>The Cambridge Edition of Early Christian Writings</i> , edited by Ellen Muehlberger
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⁹⁷ Spyros Troianos, 'The Embryo in Byzantine Canon Law,' (publication and date unknown) writes, 'The problem was addressed at the local Synod of Neokaesareia (314 – 325 A.D.), where it was determined that the baptism of a pregnant woman, in whatever stage of gestation, did not include the embryo which, in principle, possessed ontological autonomy: 'The child-bearing woman must be enlightened [baptized] whenever she wills it. For in this respect the bearing woman has nothing in common with that which is born, because each of the two expresses its will through the affirmation of faith.' (can.6)'

⁹⁸ Andrew Radde-Gallwitz, edited by Ellen Muehlberger, *The Cambridge Edition of Early Christian Writings, Volume Two: Practice* (Cambridge: Cambridge University Press, 2017 Kindle edition)

'And any fine distinction as to its being completely formed or unformed is not admissible amongst us.' ⁹⁹	'Among us there has been no technical discussion of whether [the fetus] is or is not fully formed.' ¹⁰⁰
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Obviously the latter translation 'softens' Basil's statement. This difference may be important when it comes to a historical inquiry as to Basil's own position. Whatever Basil intended, subsequent Orthodox tradition follows it prescriptively, as shown on the left hand side of the table, and as shown below.

Also, who is the 'us' of whom Basil speaks? 'All Christians'? 'Christians of Asia Minor?' The latter is much more likely. At the start of his letter, Basil states the importance of following local customs: 'It is right to follow the custom obtaining in each region.'¹⁰¹ Basil is also conscious of 'Asia' (meaning Asia Minor) being such a 'region' when he says, 'it has seemed to some of those of Asia that, for the sake of management of the majority' of schismatics returning to the church, the bishops decided this or that. Some interpret the Council of Ancyra of 314 AD to have been a meeting of bishops from both Asia Minor and Syria, which might be historically accurate, and this might be the administrative 'region' which Basil has in mind. But this view does not explain why the authors of the *Apostolic Constitutions*, originating in Syria at around 380 – 400 AD, discuss abortion while making the distinction between unformed and formed, unlike Basil. I discuss this below.

Basil continues,

'For in this case not only the child which is about to be born is vindicated, but also she herself who plotted against herself, since women usually die from such attempts. And there is added to this crime the destruction of the embryo, a second murder – at least that is the intent of those who dare these deeds. We should not, however, prolong their punishment until death, but should accept the term of ten years [of penance]; and we should not determine the treatment according to time but according to the manner of repentance.'¹⁰²

And when in the same letter he discusses the importance of intentional and unintentional homicides, he says,

'Women also who administer drugs to cause abortion, as well as those who take poisons to destroy unborn children, are murderesses.'¹⁰³

Basil also says in *Epistle 217* that if a woman abandons

'her newborn child uncared-for on the road, if, although she was really able to save it, she disregarded it, either thinking in this way to conceal her sin or scheming in some entirely brutal and inhuman manner, let her be judged as for murder. [But] If she was unable to protect it and the child perished through destitution and the want of necessities of life, the mother is to be pardoned.'¹⁰⁴

We see in Basil the bishops being sensitive to poverty as an understandable and acceptable reason for a mother – and presumably a father when a father is also involved in the decision – to abandon her infant. In other words, they see the problem not just as a personal issue, but a social issue, in which one's social context affects how we understand personal choices.

Taken together, Basil's position is noteworthy for various reasons. First, in order to arrive at this position, Basil rejects the Greek and Roman positions available to him: the Aristotelian position on the fetus being 'unformed'

⁹⁹ Basil of Caesarea, *Epistle 188.2* translated by Bromfield Jackson, edited by Philip Schaff and Henry Wace, *Nicene and Post-Nicene Fathers* (Buffalo, NY: Christian Literature Publishing Company, 1895)

¹⁰⁰ Basil of Caesarea, *Epistle 188.2* translated by Andrew Radde-Gallwitz, edited by Ellen Muehlberger, *The Cambridge Edition of Early Christian Writings, Volume Two: Practice* (Cambridge: Cambridge University Press, 2017 Kindle edition)

¹⁰¹ Basil of Caesarea, *Epistle 188.1* translated by Bromfield, edited by Schaff and Wace, revised and edited by Kevin Knight for New Advent; <http://newadvent.org/fathers/3202188.htm>

¹⁰² Basil of Caesarea, *Epistle 188.2*

¹⁰³ Basil of Caesarea, *Epistle 188.8*

¹⁰⁴ Basil of Caesarea, *Epistle 217.52*; cf. Ambrose of Milan, *De Nab. Hist.* 5:19 – 25

versus ‘formed,’ and subsequent ‘quickening’; the Stoic position that the fetus became human per se at birth when it drew its first breath; and the Roman tradition of seeing the husband’s permission as primary and determinative.¹⁰⁵ Second, for purposes of establishing the moral category, Basil categorizes abortion as both self-harm to the mother, and other-harm to the child. He considers it a murder or homicide or manslaughter of a human being. While we might be uncertain of Basil’s precise category of moral sin, Basil may simply be illustrative of a long Christian tradition which did not need to identify the fetus as a full human person, necessarily. Third, however, Basil does not actually explain from Scripture where he derives his view. This is unfortunate, because Basil might have helped us better understand the Hebrew and Greek manuscripts of Exodus 21:22 – 23 which discuss abortion. They contain very important differences over whether that particular Jewish law was considering the mother or the fetus, and whether the fetus’s developmental stage (‘unformed’ or ‘formed’) was significant. I will discuss those differences below. Fourth, he accepts the Council of Ancyra’s distinction for the purpose of establishing the length of penance (no eucharist) between abortion and murder in every other sense. However, fifth, he encourages the bishop to use discretion about whether to shorten that period of ten years based on the sincerity of the mother’s repentance, and, perhaps, the mother’s social context, based on the evidence provided by *Epistle 217* that he was amenable to such factors.

In light of all this, Basil of Caesarea’s willingness to reject the distinction between ‘unformed’ and ‘formed’ is unexpected.¹⁰⁶ Given his preference for the LXX translation of the Old Testament – not to mention the overwhelming Greek patristic preference for using it in the church’s liturgy – one wonders how Basil justified disagreeing with it, and why the Eastern Orthodox churches regard him as their spokesperson on the issue.¹⁰⁷ Add to this the possibility that Basil believed God created the human soul *before* He joined it to a human body. This means Basil did not necessarily believe that the human soul and the human body were a unity from conception, but became such shortly thereafter. In a sermon, Basil says:

‘Understand God as incorporeal, on the basis of the incorporeal soul which dwells in you. God is not circumscribed in a place just as the soul’s intelligence has no residence in a place, *before the soul is joined to your body*. Having gazed upon your soul, which is inaccessible to sight, believe in God as being invisible.’¹⁰⁸

Did Basil prefer an earlier Hebrew translation of Scripture on this point? Though it is possible that Basil knew some Hebrew, since he had a deep interest in the Genesis creation account, and dialogued with Jewish rabbis, it is unlikely, and I have found no scholarly treatments of that question. Or, did Basil know about MT Exodus 21 from his contact with the Jewish synagogue communities of Cappadocia and Asia Minor, which by all reports was sizable?¹⁰⁹ I find this possibility rather likely, but besides the point; MT Exodus 21 would not have led him in this direction. The likely reason behind his statement is his sympathy for the theology of Origen of Alexandria.¹¹⁰ But regardless of how we reconstruct Basil’s personal biography, his position and its reception are still surprising. In view of the ecclesial, textual, and practical ramifications of taking the more challenging ethical stance, what is remarkable is that Basil provides no justification at all. From a strictly exegetical standpoint, if Exodus 21 is the most relevant biblical passage on the subject, then Basil appears to have *ignored* the Scripture that was available to him.

¹⁰⁵ Spyros Troianos, ‘The Embryo in Byzantine Canon Law,’ (publication and date unknown) writes, ‘The...view, that the embryo possessed ontological autonomy, was maintained by the adherents of Platonic philosophy.’ I presume Troianos includes Aristotle here.

¹⁰⁶ Basil of Caesarea, *Epistle* 188.2

¹⁰⁷ E.g. Nikolaos Hatzinikolaou, ‘The Embryo and Its Development in Regards to Its Formation as a Complete Human Being,’ *Hellenic Center for Biomedical Ethics*, September 11 – 15, 2002, p.10; H. Tristram Englehardt, *The Foundations of Christian Bioethics* (The Netherlands: Swets & Zeitlinger Publishers, 2000), p.275 cites Basil as an authority and representative of the whole Orthodox Church, which he makes clear on p.328 in his discussion of footnote 136

¹⁰⁸ Basil of Caesarea, *Homilia In Illud, Attende tibi ipsi* 7, PG 31:216A. Cited by Maximos Arghioroussis, *In the Image of God: Studies in Scripture, Theology, and Community* (Brookline, MA: Holy Cross Orthodox Press, 1999), p.21. The fact that this passage is translated and cited by an Orthodox clergyman (the author is Metropolitan of Ainou) and theologian is weighty. Below, I consider the possibility that Gregory of Nyssa, the younger brother and close friend of Basil, tried to *correct* Basil’s view on the subject.

¹⁰⁹ Mitchell Stephen, ‘Jews in Asia Minor (Antiquity),’ *Encyclopaedia of the Hellenic World, Asia Minor*, 2002; <http://asiaminor.ehw.gr/Forms/fLemmaBodyExtended.aspx?lemmaID=4150>.

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Which suggests that other biblical passages might have been equally, if not more, important. But which? Hays addresses other biblical texts which are often enlisted to prove abortion is not simply immoral, but equivalent to murder.¹¹¹ But he rightly points out that those texts must assume what they claim to prove. Exodus 20:13 and Deuteronomy 5:17 prohibit murder, but these passages do not tell us definitively whether the fetus is a human person. Psalm 139:13 – 16 and Jeremiah 1:5 speak of God calling His servants from the womb. But these passages, especially on account of their genre as poetry, ‘cannot be pressed as a way of making claims about the status of the fetus as a “person”; rather, they are confessions about God’s divine foreknowledge and care.’¹¹² Galatians 5:20 refers to ‘sorcery’ (*pharmakeia*) which might have include the practice of ingesting drugs to induce miscarriages, depending on some critical assumptions about context. But the term is far too generic to mean abortion in particular. Matthew 19:14 and Luke 18:15 recall Jesus affirming little children. But the affirmations concern already born, not unborn, children.

The likely textual source for Basil’s judgment, and the Eastern churches who follow him, is Luke 1:44. This is where Mary, pregnant with Jesus, goes to visit Elizabeth, pregnant with John the Baptist. Elizabeth tells Mary, ‘The child in my womb leaped for joy.’ In the respective wombs of their mothers, John the Baptist was acknowledging Jesus, the one he would serve as forerunner and herald. Indeed, Orthodox ethicists and theologians regularly cite this passage to prove that life begins at conception.¹¹³ Hays objects: ‘To extrapolate from this text – whose theological import is entirely christological – a general doctrine of the full personhood of the unborn is ridiculous and tendentious exegesis; indeed, it should not be dignified with the label “exegesis.”’¹¹⁴ To the extent that Hays, as a Protestant exegete, is responding to shallow Protestant usage of the text, this is a fair statement. But to the extent that he is open to engaging with Orthodox and Catholic theologians, Hays underestimates the intimate relationship between christology and theological anthropology, which is not provided by biblical exegesis alone. For those anchored in the Chalcedonian Creed of the Fourth Ecumenical Council of 451, the humanity of Jesus Christ is precisely a normative humanity. So to understand the humanity of Jesus, even in this prenatal stage, is to understanding something of our own humanity.

We must simultaneously acknowledge, though, that Basil is silent about his process of reasoning. He does not indicate that he is persuaded by *christology* to go beyond MT Exodus 21, and even beyond LXX Exodus 21. Even if he did, his reasoning would not be impervious to questions. For it is also possible that there was a time lapse between the angel’s pronouncement and the formation of the fetal physical body of Jesus in the womb of Mary, and between that point and his human ensoulment. After all, the narrative of Genesis suggests (however playfully or allegorically) that God ‘formed’ (a pottery term) the body of Adam from pre-human material – clay, dirt, and earth – and then, after some time, God breathed into him the breath of life. Then he became a living being (Gen.2:7; 1 Cor.15:45). The ‘fashioning’ (an architectural term) of Eve from the ‘rib’ or ‘side’ of Adam (Gen.2:22) would seem to imply, again, that the physical body is prepared first, before the soul is invested there by God. It is possible, then, that even Jesus, as the new Adam, undertook his humanity in a similar way as the old Adam. The sequence might have been: God formed a body of pre-human material in the womb of Mary before breathing in a human soul. It might have taken seconds, or days. Thus, in the end, even Luke 1:44 and the consideration of Jesus’ own conception are still indeterminate for purposes of this question. We simply do not know. And we are still left with the manuscript differences between the Greek Septuagint and Hebrew Masoretic on the developmental nature of the fetus.

In addition, we might consider the possibility that Basil’s source was the Christian tradition he inherited. Did Basil understand his Christian predecessors to have consciously rejected the distinction between ‘unformed’ and ‘formed,’ or ‘unquickened’ and ‘quickenened’? True, the *Didache*, the *Epistle of Barnabas*, and other early Christian literature did not make that distinction. And one can have such a high view of church tradition as to say that this position on abortion goes all the way back to a verbal dictum of Jesus himself. That is logically possible, and one cannot preclude it with absolute certainty. But we must also keep in mind that this early Christian literature, while

¹¹¹ Richard B. Hays, *Moral Vision*, p.446 – 448

¹¹² Richard B. Hays, *Moral Vision*, p.448

¹¹³ Nikolaos Hatzinikolaou, p.4 lists it first among the biblical passage he cites. H. Tristram Englehardt, p.328 notes that the Liturgy of St. Basil says, ‘O God, who knowest the age and the name of each, and knowest every man even from his mother’s womb.’

¹¹⁴ Richard B. Hays, *Moral Vision*, p.448

historically valuable, also contains material that was ignored or rejected even within the same period in question.¹¹⁵ Also, apologists like Justin Martyr of Rome, Athenagoras of Athens, Tertullian of Carthage, and Marcus Minucius Felix of Rome would not have found it relevant to make the distinction between ‘unformed’ and ‘formed.’ They made their point simply by calling attention to how poorly their pagan Roman peers treated children categorically. We would not expect them to address a deeper pastoral question.

I suspect that Basil was motivated to respond to the scientific questions of his own day. Examining Basil in this light is relevant for examining the Catholic and Protestant attempts to engage with scientific questions in the late nineteenth century onwards. Attempting to combine Christian theological anthropology with scientific knowledge is powerful, but also has possible pitfalls, as we shall see. Basil was a trained physician, philosopher, and Christian bishop-theologian who expounded on the Christian doctrine of *creation ex nihilo* in his famous nine sermons on the first six days of Genesis 1, called the *Hexaemeron*. Among his motivations was to compare the Christian understanding of creation against the Greek pagan philosophers’ explanations of the universe.¹¹⁶ I am not suggesting that Basil had the same socio-political anxieties, for Christian faith was growing and expanding in his day, not contracting. In his *Address to Young Men on the Right Use of Greek Literature*, Basil said he was open to helpful knowledge being found outside of the church or Christian faith in a formal sense, so long as that knowledge did not conflict with what is true of God as found in Christ and in Scripture.¹¹⁷ Emmanuel Clapsis points out that Basil ‘leaves freedom to his listeners to accept as plausible some rational explanations about the place of the earth in the universe and its immobility,’ while encouraging people not to wonder at amazement at nature, but at God.¹¹⁸ Basil even developed his own ‘theory of evolution’¹¹⁹ which is still worth appreciating. Nevertheless, Basil was also concerned to refute Origen’s proposal of the eternal universe, which he understood to be an intrusion into Christian theology of a pantheistic flavor of Greek philosophy – philosophy which also expressed the science of that time.¹²⁰

Basil was quite interested in reconciling various branches of knowledge.¹²¹ He appears to be familiar with the Greek physician Galen on embryology, for instance, because he works with Galen’s terms. Galen believed in three stages: conception, construction, and shaping.¹²² Galen believed that during construction, the fetus’ organs and parts of the body developed from the father’s semen. Basil, faced with the Christian conviction that Jesus was conceived immaculately without a biological father’s semen, suggested that Jesus’ fetal body was ‘immediately perfect in the

¹¹⁵ *Didache* chapters 11 – 15 contain material on itinerant ‘apostles and prophets,’ which was not practiced when the church became more settled and stable in its leadership structures, by the late 2nd century. The *Epistle of Barnabas* ch.10 is a bit too confident in allegorizing the unclean animals of Jewish law into archetypes for unclean human beings, and ch.11 is too supersessionist with regards to Israel in light of Romans 9 – 11. Pseudepigraphal literature was often met with deafening silence; only Clement of Alexandria quoted from the *Apocalypse of Peter*, for instance, and there only to make a very constrained, measured point. And so on.

¹¹⁶ Basil of Caesarea, *Nine Homilies of Hexaemeron* 1.2 – 4 demonstrates his knowledge of the various theories promoted by Greek pagan philosophers, calling them insufficient and measuring them against Genesis and the Christian doctrine of *creation ex nihilo*. In 5:10; 8:1; 9:2 Basil asserts that God gave the earth itself the power to produce life in its rich variety, even granting that some animals might still be spontaneously produced from the earth.

¹¹⁷ In the case of the creation, based on Basil’s *Hexaemeron*, that would include the convictions that God was creator, the creation was not co-eternal with God, God made creation originally good, and evil was the result of human beings misusing their faculty of will.

¹¹⁸ Emmanuel Clapsis, ‘St. Basil’s Cosmology,’ *Diakonia* 27:3 (1982)

¹¹⁹ An anachronism, of course, but a meaningful one.

¹²⁰ Basil of Caesarea, *Nine Homilies of Hexaemeron* 1.3 says, ‘Do not then imagine, O man! That the visible world is without a beginning; and because the celestial bodies move in a circular course, and it is difficult for our senses to define the point where the circle begins, do not believe that bodies impelled by a circular movement are, from their nature, without a beginning.’ On Origen’s views of the eternally existing creation, see Georges Florovsky, ‘St. Athanasius’ Concept of Creation,’ found in *Aspects of Church History*, Volume Four in *The Collected Works of Georges Florovsky* (Belmont, MA: Nordland Publishing Company, 1975)

¹²¹ Adam Rasmussen, ‘A Vessel Divinely Molded’: Basil of Caesarea on the Human Body, May 25 – 27, 2017; <https://core.ac.uk/download/pdf/159489109.pdf> is an excellent paper on the subject. Basil, *Hexaemeron* 1.10 shows his interest in cosmology (and the Ptolemaic theory of the geocentric universe) by arguing that the world must be at the center of the universe because it does not fall anywhere.

¹²² Galen, *De foetuum formatione* (CMG 5,3,3, Nickel). English translation by Peter N. Singer, ‘The Construction of the Embryo,’ from *Galen: Selected Works* (The World’s Classics; Oxford: Oxford University Press, 1997), p.177 – 201. Cited by Rasmussen, p.8 – 9. See Basil of Caesarea, *Adversus Eunomium* 2, 5

flesh,' that is, without gradual construction.¹²³ Basil's assertion demonstrates that his motivation was to develop, as far as possible, a unitary approach to knowledge, for science, theology, and ethics.

Basil believed that the soul of an animal was an earthly substance related to their blood. He took Leviticus 17:11, 'the life of the animal is in the blood,' not just as a theological statement about animals within the scope of the Jewish sacrificial system, but as a scientific one about their embryonic life, though he denied that it applies to human beings in quite the same way.¹²⁴ Basil, in my estimation, misappropriated and misapplied that particular biblical text, and not just because modern science would later discover that human blood forms in the human embryo in the fifth week.¹²⁵

I pointed out, above, that Basil seemed to believe that there is a short period of time between the formation of the body, and the union of the soul with it. At one time, Basil said that God brought the soul into existence before it is joined to the body. A unified embodied soul, and ensouled body, did not start at conception:

'Understand God as incorporeal, on the basis of the incorporeal soul which dwells in you. God is not circumscribed in a place just as the soul's intelligence has no residence in a place, before the soul is joined to your body. Having gazed upon your soul, which is inaccessible to sight, believe in God as being invisible.'¹²⁶

If this translation is acceptable, then Basil envisioned God creating the human soul at some point *before* He joined it to the human body of the fetus in the womb. How much time elapsed between the body of the fetus developing in the womb, and God investing it with a human soul, or uniting it with the soul? Such questions go unanswered. Again, this makes the matter more puzzling.

Since Basil did not finish his *Hexaemeron* to include the creation of humanity, his brother Gregory of Nyssa took up the task of completing his brother's work after his death. Gregory said that the human body-soul union started at conception. He denied that the story of God creating Adam from clay is a paradigm God repeats to achieve delayed ensoulment:

'Nor again are we in our doctrine to begin by making up man like a clay figure, and to say that the soul came into being for the sake of this; for surely in that case the intellectual nature would be shown to be less precious than the clay figure. But as man is one, the being consisting of soul and body, we are to suppose that the beginning of his existence is one, common to both parts, so that he should not be found to be antecedent and posterior to himself, if the bodily element were first in point of time, and the other were a later addition; but we are to say that in the power of God's foreknowledge (according to the doctrine laid down a little earlier in our discourse), all the fullness of human nature had pre-existence (and to this the prophetic writing bears witness, which says that God knows all things before they be), and in the creation of individuals not to place the one element before the other, neither the soul before the body, nor the contrary, that man may not be at strife against himself, by being divided by the difference in point of time.'¹²⁷

¹²³ Basil of Caesarea, *Homilia in sanctam Christi generationem* 4

¹²⁴ Basil of Caesarea, *Nine Homilies of Hexaemeron* 8.2 says, 'Why did the earth produce a living soul? So that you may make a difference between the soul of cattle and that of man. You will soon learn how the human soul was formed; hear now about the soul of creatures devoid of reason. Since, according to Scripture, 'the life of every creature is in the blood,' as the blood when thickened changes into flesh, and flesh when corrupted decomposes into earth, so the soul of beasts is naturally an earthy substance. Let the earth bring forth a living soul. See the affinity of the soul with blood, of blood with flesh, of flesh with earth; and remounting in an inverse sense from the earth to the flesh, from the flesh to the blood, from the blood to the soul, you will find that the soul of beasts is earth.' In 9.3, he says, 'Thus when the soul of brutes appeared it was not concealed in the earth, but it was born by the command of God. Brutes have one and the same soul of which the common characteristic is absence of reason. But each animal is distinguished by peculiar qualities.'

¹²⁵ 'Cardiovascular System – Blood Development,' *Embryology*;

https://embryology.med.unsw.edu.au/embryology/index.php/Cardiovascular_System_-_Blood_Development

¹²⁶ Basil of Caesarea, *Homilia In Illud, Attende tibi ipsi* 7, PG 31:216A. Cited by Maximos Arghioroussis, *In the Image of God: Studies in Scripture, Theology, and Community* (Brookline, MA: Holy Cross Orthodox Press, 1999), p.21

¹²⁷ Gregory of Nyssa, *On the Making of Man* 29.1

While Basil might have been more or less content to be uncertain, Gregory made the effort to be precise in his views.¹²⁸ For purposes of this study, I am content to let Gregory of Nyssa speak for his brother Basil's most mature view.

As regards abortion ethics for Christians in the church, however, we are still left with the fact that neither Basil nor Gregory left behind in writing *why* they set aside the 'unformed' versus 'formed' fetal distinction between the two manuscript options on Exodus 21, or *how* they deduced the moral significance of human life in the womb. It is not clear why, logically and biblically, the human being would be 'at strife against himself' if the body and soul were unified at some point soon *after* conception, and grew and developed together from that point. As I explored already, in the cases of both Adam and Eve, their bodies were formed before their souls were introduced and united with their bodies, at least as far as the biblical narrative recounts the matter. Nor is it clear why Gregory believes that the soul would be inferior to the body if it were created by God after the body, since both the creation hymn of Genesis 1:1 – 2:3 and the Eden story (Gen.2:4 – 25) which begins the genealogy of Genesis 2:4 – 4:26 portray creation as getting better and better. So Gregory of Nyssa's assertion unfortunately finds no supporting basis, and in any case there is some doubt as to whether his brother Basil agreed.

Perhaps Basil was trying to bring out what he believed to be the *latent significance* of Exodus 21:22 – 25 regardless of manuscript in cases of intentional abortion by the mother, since the text itself addressed the case of unintentional forced miscarriage. He was probably taking up a position which he believed had a satisfying level of internal consistency. In any event, it must be admitted that he, too, went beyond the biblical text – both the Hebrew Masoretic Text *and* the Septuagint.

Basil's position on abortion was adopted by the Orthodox Churches. In 691 – 692, two hundred and fifteen bishops from the Eastern Roman Empire convened the Council of Trullo. This larger Council – also called the Quinisext Council – was located in the Imperial Palace of the capital, Constantinople. The Orthodox Church regards this Council as an addendum to the Fifth and Sixth Ecumenical Councils, although the Roman Catholic Church never accepted the Council as authoritative or 'ecumenical.' This Council affirmed Canons 2 and 8 of Basil (from his *Epistle 188*) and Canon 2 of Ancyra.

Among Christians, as I described above, a difference emerged over the manuscript traditions. I have already highlighted the path taken by the Latin church, and subsequently Protestants, until roughly the mid 1800's. This difference reflects the thought and influence of Augustine of Hippo, and the general admiration and use of the Greek Septuagint. Augustine was not an advocate of abortion; he calls parents who expose and abandon their newborn infants 'heartless.'¹²⁹ Nevertheless, Augustine accepted the Aristotelian distinction between an 'unquickened' and 'quickenened' fetus. In *Questions on Exodus*, he relies on LXX Exodus 21:22 – 23, which actually does focus attention on the fetus, and says that the fetus being 'unformed' or 'formed' matters. Augustine 'argues that the abortion of an unformed fetus is not murder, since one cannot say whether it already had a soul at that stage. Although the abortion even of an unformed fetus is morally reprehensible, the punishment for this act is limited to a fine.'¹³⁰ Augustine's belief that the LXX was inspired in its translation from the Hebrew, and his endorsement of the earlier Aristotelian scientific view of the fetus being 'unformed' or 'formed' and then quickened, promoted by

¹²⁸ Although I am not entirely sure he was terminologically consistent. In his sensitive and admirable pastoral work, *On Infants Early Deaths*, Gregory compares the newborn to the fetus in the womb, saying, 'A human being enters on the scene of life, draws in the air, beginning the process of living with a cry of pain, pays the tribute of a tear to Nature, just tastes life's sorrows, before any of its sweets have been his, before his feelings have gained any strength; still loose in all his joints, tender, pulpy, unset; in a word, *before he is even human* (if the gift of reason is man's peculiarity, and he has never had it in him), such an one, with no advantage over the embryo in the womb except that he has seen the air, so short-lived, dies and goes to pieces again; being either exposed or suffocated, or else of his own accord ceasing to live from weakness. What are we to think about him? How are we to feel about such deaths?' (emphasis mine) By describing the newborn as 'before he is even human,' Gregory is probably making a rhetorical point about *flourishing* as a human, by developing his mind, and for the purpose of this study, I'm willing to grant him that.

¹²⁹ Augustine of Hippo, *Epistle* 98.6 says, 'Foundlings whom heartless parents have exposed in order that they may be cared for by any passer-by... are presented for baptism by these persons' who picked up the children.

¹³⁰ O.M. Bakke, *When Children Became People: The Birth of Childhood in Early Christianity* (Minneapolis, MN: Fortress Press, 2005), p.133 quoting Augustine, *Questiones in Heptateuchum* 2.80, where Augustine cites Exodus 21:22 – 23; cf. Augustine of Hippo, *Epistle* 121 cites Jerome's agreement

Aristotle, led him to a different position than Basil of Caesarea, who is held up as the representative spokesman for the Eastern Orthodox.

In addition, the fourth century church in Syria – which spoke both Greek and Syriac-Aramaic – according to Spyros Troianos gives evidence of being influenced by the LXX, as evidenced by the *Apostolic Constitutions*,¹³¹ which began circulation among Syrian Christians between 380 – 400 AD, contemporaneously with Basil of Caesarea. Troianos refers to *Apostolic Constitutions* 7.3, which reads:

‘You shall not slay your child by causing abortion, nor kill that which is begotten; for everything that is shaped [Troianos: ‘completely figured’], and has received a soul from God, if it be slain, shall be avenged, as being unjustly destroyed.’¹³²

The statement relates two conditions as being necessary and sufficient for defining a human person. The first involves the body (‘is shaped’). The second involves the soul (‘has received a soul from God’). As Troianos suggests, these two conditions reflect LXX Exodus 21.

Pastoral material like the *Didache* weighs heavily for the purpose of suggesting that, among the early Christians, abortion was forbidden from conception. But the *Apostolic Constitutions* is an expansion on the *Didache*, originates from the same region, presents itself as wrapped in the same mantle of ancient Christian authority, and either modifies or clarifies its predecessor on this very ethical question of abortion. The authors of the *Apostolic Constitutions* do this at the very same time that Basil of Caesarea wrote on the same subject.

The witness of Jerome to this question of abortion is also valuable. In 382 AD, Jerome was commissioned by his mentor Pope Damasus I of Rome to write the best Latin translation of the Bible possible. Jerome labored at this task until 405 AD. Jerome started to translate the Old Testament directly from a Hebrew manuscript, not the Greek LXX. When he came to Exodus 21:22 – 23, Jerome transcribed:

22 si rixati fuerint viri et percusserit quis mulierem praegnantem et abortivum quidem fecerit sed ipsa vixerit subiacebit damno quantum expetierit maritus mulieris et arbitri iudicant

²² If men quarrel, and one strike a woman with child and she miscarry indeed, but live herself: he shall be answerable for so much damage as the woman’s husband shall require, and as arbiters shall award.

23 sin autem mors eius fuerit subsecuta reddet animam pro anima

²³ But if her death ensue thereupon, he shall render life for life...’

Although Augustine and most other Christians believed that the LXX was an inspired translation, Jerome came to believe that the divine inspiration rested in the Hebrew language. It is unclear whether he tethered his assertion to a particular Hebrew text, and it is unlikely that he did. Nevertheless, in his historical context, Jerome’s position was unusual. Unfortunately, Jerome did not explain his every decision as a translator.

Jerome’s translation became known as the Vulgate version of the Bible, and it became the Roman Catholic Church’s official text until 1979. Jerome’s decision to not follow the LXX on these verses is noteworthy. Jerome’s opinion on this textual issue is significant to consider because he settled in Bethlehem and reportedly had access to a copy of Origen’s *Hexapla*. Origen of Alexandria (c.184 – c.253 AD) was the greatest biblical-textual scholar of the early church, and his *Hexapla* was a massive undertaking to compare the available manuscripts of the Old Testament. Origen wrote in six columns, placing side by side (1) an unknown Hebrew consonantal text; (2) the *Secunda*, a transliteration of the Hebrew text into Greek characters, which might have been a preexisting older text, or a translational step undertaken by Origen himself; (3) the 2nd century Greek translation of Aquila (or, Onkelos) of

¹³¹ Troianos, section 5, writes, ‘In the latter of these texts [i.e. the *Apostolic Constitutions*], the relevant passage is completed by a phrase, in which we find the term ‘completely figured.’ This augmentation shows the immediate dependence of this directive on the Old Testament excerpt as formed by the Seventy and by perceptions regarding the nature of the foetus expressed therein.’

¹³² *Apostolic Constitutions* 7.3, emphasis mine, translated by James Donaldson, in *Ante-Nicene Fathers*, edited by Alexander Roberts, James Donaldson, and A. Cleveland Coxe (Buffalo, NY: Christian Literature Publishing Company, 1886)

Sinope dating to around 130 AD; Aquila was said to have been a disciple of Rabbi Akiva; (4) the late 2nd century Greek translation of Symmachus, another Jewish interpreter who made wide use of elegant Greek idiomatic expressions; (5) the Septuagint translation with Origen's critical markings; (6) the 2nd century translation of the Hellenistic Jewish scholar Theodotion, whose translation of the Book of Daniel was so appreciated by the early Christians that they used it in place of the LXX. It is unknown whether the destruction of the Temple in 70 AD also destroyed the 'official' copy of the Hebrew Bible, or whether the Hebrew texts in existence in the 2nd century, which served as the basis for Aquila, Symmachus, and Theodotion, reflected the growing Jewish-Christian polemics about messianic passages.

Despite Jerome's choice to favor a non-LXX manuscript for Exodus 21, moreover, the story does not stop there. Jerome personally believed in delayed ensoulment as well. In Jerome's correspondence with Augustine of Hippo which started in the mid-390's, Augustine mentions the translator's agreement.¹³³ This fact is curious. Two aspects of his personal biography are important as they relate to Jerome's probable reflection about the question of abortion, the textual question, and the different positions that Christians held on the matter when he began his translation work from 382 – 405. First, in 380 – 381, Jerome stayed for almost two years in Constantinople, where Basil of Caesarea's influence must have been felt, as Basil had just died in 379. Jerome developed a personal acquaintance with Basil of Caesarea's close friend Gregory of Nazianzus (c.329 – 390), who was then serving in Constantinople as its bishop, and Basil's younger brother Gregory of Nyssa (c.335 – c.395), who was serving as bishop of nearby Nyssa.¹³⁴ Second, in 382 – 385, Jerome was back in Rome. He was chiefly known as a Christian moralist and ethicist. He was especially critical of the Christians living a morally lax life in a cosmopolitan center like Rome. He also befriended a circle of women from aristocratic families who wanted to be taught about monastic life. He almost certainly would have reflected on abortion. Yet in spite of this, Jerome did not advance the position of Basil of Caesarea.

Belief in delayed ensoulment held by Augustine, Jerome, and the entire Roman Catholic Church until 1869 (when the official Catholic position changed to ensoulment at conception) demonstrates that Christians can hold to Scripture, using science to clarify certain moral conditions that Scripture itself may have left ambiguous. On the one hand, they maintained the Hebrew Masoretic Text with its less clear view of fetal development, generally. There was no *conflict* with Scripture, for one need not equate the fetus from conception with a full human person in order to have a moral foundation against intentional abortion. On the other hand, the Latin tradition incorporated the contribution of Aristotle's developmental view of the fetus, which had the strongest scientific grounding of its time. Compared to the Stoic tradition, at least Aristotle conducted careful observation of miscarriages.

The Record of Christian Thought on Abortion and Exodus 21: Fifth Century Onwards

Placing ourselves in 400 – 410 AD and surveying the regional differences we can identify in the church, this is what we would observe:

- Christians in Syria, following the *Apostolic Constitutions*, accept LXX Exodus 21 and follow it;
- Christians in Asia Minor, following Basil, accept LXX Exodus 21 yet are more ethically demanding;
- Christians in Rome, following Jerome, accept MT Exodus 21 yet functionally follow LXX Exodus 21;
- Christians in Roman North Africa, following Augustine, accept LXX Exodus 21 yet will receive MT Exodus 21 from Jerome, and continue functionally following LXX Exodus 21

Clearly, none of this means that Christians took the issue of abortion lightly.

¹³³ Augustine of Hippo, *Epistle* 121; see O.M. Bakke, *When Children Became People: The Birth of Childhood in Early Christianity* (Minneapolis, MN: Fortress Press, 2005), p.133 quoting Augustine, *Quaestiones in Heptateuchum* 2.80, where Augustine cites Exodus 21:22 – 23

¹³⁴ Jerome visited Constantinople in 380 and stayed until the end of 381. While there, he received the instruction of Gregory Nazianzen, calling him 'a most eloquent man, and my instructor in the Scriptures' (*De Viris Illustribus* 117); Jerome frequently appeals to Gregory of Nazianzen's authority in his commentaries and letters (*Commentary on Ephesians* v.3; Epp. 1. 1, 52.8, etc.). When Gregory of Nyssa personally visited Constantinople, he read *Against Eunomius* to Jerome and Gregory of Nazianzus (*De Viris Illustribus* 128).

However, here I wish to suggest something about the tradition. During the first through third centuries, it was understandable for Christian bishops to be less concerned about the ‘unformed’ and ‘formed’ distinction when they managed their own pastoral responses to abortion entirely within the church: what should be the recommended time for penance and withholding of communion? In the first three centuries, the matter was not for society as a whole. But when Emperors and other government officials started to become Christians, they began to shape civil law, with its multi-leveled arrays and challenges of enforcement and punishment, by Christian norms. These leaders started to change the character of the Roman Empire’s laws from a pagan towards a Christian orientation.

Perhaps some Christian leaders recognized that they had to be more precise about their ethical pronouncements ever since Emperor Constantine became a Christian. The Christian teacher and writer Lactantius – who was a fierce critic of infanticide¹³⁵ – advised Emperor Constantine, which started a pattern of Christian teachers and bishops advising Emperors and other governors. If Christian leaders became concerned to delineate further what exactly they meant, they were often right to do so, especially if they were distinguishing between church and society. O.M. Bakke notes, for example, notes that Christian bishops and theologians adjusted their counsel on the subject of allowing poor parents to sell their children, rather than expose them. In effect, they chose what they believed was the lesser evil.¹³⁶ Perhaps LXX Exodus 21, which had always been close at hand anyway, became more attractive to consider. If Christian leaders also felt compelled to respect the best knowledge about the human fetus from the physical sciences at the time, that too is certainly understandable. In the next section, I will attempt a broader social analysis of both Byzantine-Roman and Frankish-Latin approaches to social issues that almost certainly had an impact on the occurrences of abortion, and coordinate it with the modern American context.

We must also be especially mindful of Christian interaction with science centuries later. In the 1800’s, other factors intruded upon the Western church and now on the church globally, impacting our views on abortion, which are seldom acknowledged. During the 1800’s, and since then, conservative Catholics and Protestants developed anxieties about modernism and science eroding their truth claims and authority. They were embarrassed about their previous trust for Aristotle. The Bible was thought to be challenged by Charles Darwin’s theory of evolution, the fossil record, the old earth theory, etc. Technology, the application of science, drew much consternation as well; for example, both condoms and diaphragms were mass produced in the late 1800’s,¹³⁷ which threatened the church’s traditional teaching against contraception,¹³⁸ and the mass produced car was perceived (whether true or not) as making sex easy for young people. The ‘modern birth control movement’ was launched in the 1800’s by debates over economist Thomas Malthus’ concerns about overpopulation and feminists arguing for education about contraception.¹³⁹ So conservative Christians, feeling the culture turn against them, sought authoritative certainty and accuracy akin to ‘science,’ to foreclose on ambiguity of all kinds, and to find moral causes around which they might still be relevant.

In 1870, Vatican I declared the doctrine of papal infallibility, just one year after the Roman Catholic Church changed its official position about abortion and declared that the fetus was ensouled and acquired human personhood at conception. These two decisions were not coincidental; they reflect the same character: to have

¹³⁵ Lactantius, *Divine Institutes* 6.20 writes, ‘For when God forbids us to kill, He not only prohibits us from open violence... but He warns us against the commission of those things which are esteemed lawful among men... Therefore, with regard to this precept of God, there ought to be no exception at all; but that it is always unlawful to put to death a man, whom God willed to be a sacred animal. Therefore let no one imagine that even this is allowed, to strangle newly-born children, which is the greatest impiety; for God breathes into their souls for life, and not for death’

¹³⁶ O.M. Bakke, *When Children Became People*, p.134 – 135. Bakke, p.128 introduces the subject thus: ‘Since an increasing number of Christian parents were poor and found it difficult to look after their children, the theologians were forced to take into account this situation and reflect anew on the question. This made it possible to take a more tolerant attitude toward poor people who exposed their children.’

¹³⁷ J. Peel and M. Potts, *Textbook of Contraceptive Practice* (New York, NY: Cambridge University Press, 1968) note that in America, rubber was developed for industrial and commercial purposes by Hancock and Goodyear from 1844, and a few decades later, rubber condoms were widely available.

¹³⁸ The church’s historical stance against contraception must be understood from its original context when abortifacients included chemicals which risked the life of the mother and fetus. More on this, as well as reasons why some Christian ethicists – and many Christians in practice – have reconsidered contraception and come to different conclusions, below.

¹³⁹ The Malthusian League was formed in 1877, and engaged in political advocacy to eliminate penalties from birth control education. See Rosanna Ledbetter, *History of the Malthusian League, 1877 – 1927* (Columbus, OH: Ohio State University Press, 1976)

intellectual consistency which had the appearance of engaging the physical sciences on its own terms, but to also withdraw the church's position beyond the reach of science, where it had not been placed before.

'While the teaching of the magisterium is also supported by a variety of types of evidence (biological, philosophical, and theological), its position finally appears to rest on one line of argument. This argument, which is actually the crucial point in the magisterial presentation, has been largely ignored by theologians who have offered dissenting opinions. For it does not depend either on biological information or on metaphysical theories. Rather, it is based on a theory of practical decision-making which was developed within Catholic moral theology. This theory, which provides methods for attaining practical certainty in the face of moral doubt, has a long history within the Catholic tradition.'¹⁴⁰

Indeed, while Catholic philosophers Daniel Dombrowski and Robert Deltete examine church history and the development of science to argue that a limited 'pro-choice position is defensibly Catholic,'¹⁴¹ the *New Catholic Encyclopedia* says:

'After a *certain stage* of intrauterine development it is perfectly evident that fetal life is fully human. Although some might speculate as to when that stage is reached, there is no way of arriving at this knowledge by any known criterion; and as long as it is *probable* that embryonic life is human from the first moment of its existence, the purposeful termination (is immoral).'¹⁴²

Similarly, white Protestant fundamentalists in the 19th and early 20th century were still defensive about their own heretical stance on slavery, still believing it to be biblically defensible while coming to terms with the crushing defeat of slavery in the Civil War, and interpreting abolition as the nation's rejection of authentic Christianity.¹⁴³ Conservative Protestants were especially troubled by their 'social gospel' liberal Protestant peers. They responded to the threat of modernity and science especially as applied to literary criticism of the Bible, locating the doctrine of *biblical* infallibility (a parallel to *papal* infallibility) in the original autographs, which were well beyond the reach of verification.¹⁴⁴ In 1902, the American Bible League produced twelve pamphlets called *The Fundamentals*, directed against higher biblical criticism. Nebraska politician William Jennings Bryan led a movement of populist Christian fundamentalism by advocating a literalistic interpretation of Scripture and opposing the theory of evolution, most famously in the Scopes trial of 1925.

'Both movements [Catholic and Protestant] represent a synthesis of a theological position and an ideological-political stance against the erosion of traditional authorities. Both are antimodern and literalist.'¹⁴⁵

Tellingly, many churches also rallied with Anthony Comstock, a very devout conservative Protestant, against *contraception*. They managed to pass the Comstock Act of 1873 and the subsequent Comstock laws against contraception, among other things. Contraception had been legal throughout the United States, *coitus interruptus* no doubt widely practiced, and lengthening the time of breastfeeding was already observed to reduce the likelihood of the next pregnancy.¹⁴⁶ But, because science, technology, the social sciences, and political trends were perceived by these Christians to be against Christian faith, matters of reproduction became a cultural and political battleground. They reinvigorated a tradition of Christian teaching against contraception, attempting to turn it into public policy for all. The Comstock Act of 1873 was finally ruled as unconstitutional in a series of Supreme Court decisions: *United*

¹⁴⁰ Carol A. Tauer, 'The Tradition of Probabilism and the Moral Status of the Early Embryo,' *Theological Studies*, 45 (1984); <http://cdn.theologicalstudies.net/45/45.1/45.1.1.pdf>

¹⁴¹ Daniel Dombrowski and Robert Deltete, *A Brief, Liberal, Catholic Defense of Abortion* (Champaign, IL: University of Illinois Press, 2000)

¹⁴² *New Catholic Encyclopedia*, Abortion II, p.29, Col 1; emphasis mine

¹⁴³ See e.g. Elizabeth L. Jemison, 'Proslavery Christianity After the Emancipation,' *Tennessee Historical Quarterly/JSTOR*, Winter 2013, p.255 – 268; <https://www.jstor.org/stable/43825502?mag=how-antebellum-christians-justified-slavery>; and Charles Reagan Wilson, *Baptized in Blood: The Religion of the Lost Cause, 1865 – 1920* (Athens, GA: University of Georgia Press, 1980; 2nd edition 2009); and Kelly J. Baker, *Gospel According to the Klan: The KKK's Appeal to Protestant America, 1915 – 1930* (Lawrence, KS: University of Kansas Press, 2011)

¹⁴⁴ H. Tristram Englehardt, p.212 in footnote 4 gives a concise summary of American evangelical fundamentalism.

¹⁴⁵ Lawrence Kaplan, *Fundamentalism in Comparative Perspective* (Amherst, MA: Univ of Massachusetts Press, 1992), p.84

¹⁴⁶ A.J. Ryerson, 'Medical Advice on Child Rearing, 1550 – 1990,' *Harvard Educational Review* 31:302, 1961

States v. One Package of Japanese Pessaries (1936) ruled that the federal government could not stop doctors from providing contraception to their patients; *Griswold v. Connecticut* (1965) ruled that a married couple could use contraception on the grounds of privacy; *Eisenstadt v. Baird* (1972) extended that to unmarried couples.

Like Catholics, conservative white American Protestants hardened their position that human personhood began at conception, which also seems to be more a *reaction* to science as a discipline than it was an honest response to Scripture, or even science itself. This created enormous strains with the U.S. Constitution, and between the States, in regards to the legal philosophy and jurisprudence surrounding abortion.

Jewish Tradition as a Christian Ethical Concern

In the end, on the matter of Exodus 21:22 – 25, I see no logical way to adjudicate between the two manuscripts. It does not *seem* likely that the Jewish community would move from a more ethically discerning and demanding text (LXX) to one that is less so (MT). This could weigh in favor of the MT being original, and the LXX being a context-specific translation or adaptation. It is possible, though, that the LXX translators were taking the opportunity to clarify a practical question, one that emerged within the Hellenistic Greek world, to be sure, but also one that would have emerged in everyday circumstances as well. It is possible the LXX translators were influenced by Aristotle, but this seems unprovable. How are we to establish beyond reasonable doubt causation over mere correlation, or intellectual dependence versus mere similarity? But both the MT and the LXX have their own internal integrity, and it does not seem absolutely possible to determine whether the LXX translators were working from an earlier, more ‘pristine’ Hebrew text *on this particular question*. The LXX has proven to be more reliable than the MT in some ways, which I have enumerated above, but not all.

Other biblical texts are important to consider as well, but unfortunately do not lead us to clarity. Numbers 5:11 – 31 authorizes a test of a wife accused of adultery, and Deuteronomy 22:13 – 30 the death of an adulterous man and/or woman. In either case, the woman may be pregnant from the liaison. Indeed, this may be one of the concerns any husband might have about the possibility that his wife has been unfaithful. In the case of Deuteronomy 22:13 – 19, it may be that a newlywed husband has concerns that his new wife had misrepresented herself; she might be pregnant from another man. But in Deuteronomy, no consideration is given to delaying the woman’s death. This leads Jewish scholars to discuss the following:

‘The permissibility of abortion has also been discussed in relation to a pregnancy resulting from a prohibited (i.e., adulterous) union (see *Havvat Ya’ir*). Jacob Emden permitted abortion to a married woman made pregnant through her adultery, since the offspring would be a mamzer [bastard], but not to an unmarried woman who becomes pregnant, since the taint of bastardy does not attach to her offspring (*She’elat Yavez*, loc. cit., S.V. Yuhasin). In a later responsum it was decided that abortion was prohibited even in the former case (*Lehem ha-Panim*, last Kunteres, no. 19), but this decision was reversed by Ouziel, in deciding that in the case of bastardous offspring abortion was permissible at the hands of the mother herself (*Mishpetei Uziel*, 3, no. 47).¹⁴⁷

These are weighty representatives of Judaism. Jacob Emden (1697 – 1776) was a leading German rabbi and Talmud scholar who championed Orthodox Judaism. Ouziel refers to Rabbi Benzion Uziel (1880 – 1953) who was elected Chief Rabbi of Mandatory Palestine from 1939 – 1948 and then Chief Rabbi of Israel from 1948 – 1953. So these are significant figures in Judaism. One can see that simply considering one or two other biblical texts increases the complexity of the issue. When might ‘immoral conception’ take priority over ‘fetus,’ or vice versa? How might other biblical texts be either informed by, or shape the interpretation of, Exodus 21:22 – 25?

My purpose in raising this question is not to take a side in an intra-Jewish debate, but simply to recognize that it surfaces, and has important consequences. The State of Israel currently permits abortion subject to review by a termination committee made up of two physicians and a social worker, where one of those three committee members must be a woman. This law passed in 1977. Prior to that, abortion had been illegal. Abortions are legal for women under the legal age of marriage (18 years), or over the age of 40, for women who conceived outside of wedlock or under illegal circumstances (rape, statutory rape, incest), for risk of the mother’s life, for risk of the mother’s health, and detected birth defects. A 2014 law provided abortion services to women up to the age of 33,

¹⁴⁷ ‘Issues in Jewish Ethics: Abortion,’ *Jewish Virtual Library*; <https://www.jewishvirtuallibrary.org/abortion-in-judaism>

paid for under the nationally funded health program. Significantly, a 2012 study found that half of all abortions occur in private clinics, without engaging the process of getting termination committee approval.¹⁴⁸ Women who procure abortions outside of the termination committee process do not face criminal penalties. The doctors who provide them are legally subject to a fine or up to five years of imprisonment. But there have been no known cases of doctors being prosecuted,¹⁴⁹ which raises the same question about the actual implementation of the law or not, in the State of Israel as in the United States. It is also significant that the State of Israel, through its national health program, subsidizes contraceptives, partially funds abortions for out of wedlock pregnancies, and fully funds abortions for teens nineteen years or younger, and for birth defects detected in the womb.¹⁵⁰ While Israel's laws might indeed change, the history of rabbinical opinion on this issue is weighty. Simply considering Numbers 5 and Deuteronomy 22 alongside Exodus 21 raises more, and fairly difficult, questions. Given the strong support white American evangelicals give to the State of Israel, the relative silence of those same evangelicals towards Israel's abortion policy is remarkable, and curious.

The remarkable conclusion one reaches when we consider all the evidence so far is this: *Biblical textual criticism, biblical exegesis, and appeals to Jewish and Christian history cannot settle this manuscript question at the heart of the Jewish and Christian position about abortion.* For now, we must entertain the possibility that the LXX and the MT have equally valid claims to being the original, inspired text of Exodus 21:22 – 25.

My conclusion about the manuscripts finds support by observing the way both Jews and Christians have actually expressed their convictions about abortion. For all intents and purposes, Christians have adopted a view from within their confessional, denominational allegiance to Orthodoxy, Roman Catholicism, or some branch of Protestantism. And this results in an intra-Christian debate which mirrors the intra-Jewish debate. Adopting a pragmatic position is not the same as having a reason for that position. For what is the firm intellectual and biblical basis by which to explain why one's church tradition takes the position that it does? It involves: choosing one biblical manuscript over another, or neither one, which is a choice one cannot fully justify; drawing out a suggestion that the MT makes about human legal personhood being established at birth, or the LXX at fetal 'formation,' which is a further interpretive decision; an assumption about ensoulment, which one must simply presume; other biblical texts which could inform this one, which involves more interpretive challenges; and/or the science of human fetal development, which does narrow the options, as I suggest below; and/or an argument from moral probability which presumes that Exodus 21 is irrelevant and sidesteps the biblical text altogether. Only Christians would find arguments from the New Testament or church history persuasive, but neither resolve the issue, anyway. The New Testament does not address abortion; and church history raises the same questions without settling them.

To be clear, I am not saying that Jews and Christians were, or are, wrong for trying to thoughtfully engage with the natural sciences. Quite the opposite: I think it wise to do so in as non-defensive and non-anxious way as possible – for example, without reference to contraception or 'culture wars.' I am actually proposing that both phrasings of Exodus 21:22 – 25 require that Christians ask for further clarity about the fetus using the natural sciences. MT Exodus 21:22 likely envisions the offender paying a fine relative to the stage of the woman's pregnancy, as I mentioned before. LXX Exodus 21:22 expresses that we should treat the fetus as a full human person at some stage where being 'formed' is relevant. In other words, both manuscript families leave room for the people of God to offer their best attempt at responding to God, and partnering with God, on these questions.

However, the very fact that significant differences appear in the Jewish and Christian approaches to abortion, engaging Exodus 21, means that this should be considered as a question specifically between Jews and Christians. Christian commentators and ethicists have pointed out that the apostle Paul, in Romans 9 – 11, instructs Christians to care for those people who identify with Judaism. Christian ethicist and political theologian Oliver M.T. O'Donovan, in his life's work of surveying both Scripture and church history, writes:

'One [error] is to think that Israel is sufficiently accounted for in the church, and so to look on its continued presence as a meaningless survival, so that the church, instead of wrestling with Israel for its own

¹⁴⁸ Ryan Jones, 'Abortion in Israel on the Decline,' *Israel Today*, February 7, 2011;

<http://www.israeltoday.co.il/NewsItem/tabid/178/nid/22647/Default.aspx>

¹⁴⁹ Law Library of Congress, Israel, *Reproduction and Abortion: Law and Policy*, Section III;

https://www.loc.gov/law/help/israel_2012-007460_IL_FINAL.pdf

¹⁵⁰ Ibid, Section IV.B; https://www.loc.gov/law/help/israel_2012-007460_IL_FINAL.pdf

fulfillment, turns its back on Israel as a displaced irrelevance... The other [error] is that Pentecostal authorization ceases to be determinative for the church's self-understanding. It sees itself as prolonging the ancient faithfulness of Israel (or of a remnant within Israel) subject to many changes of regime. It fails to see in itself the regime that answers Israel's hope for freedom, which was what Jesus proclaimed.'¹⁵¹

In effect, O'Donovan argues, what is fundamental and constitutive of a Christian approach to politics is not a paradigm of 'church and state.' It must be 'church, states, and Israel.' Let me be clear that what is meant here by 'Israel' is not the modern 'State of Israel' per se, but the older use of the term by Paul in Romans 9 – 11: all people who subscribe to Judaism which would today include the modern State of Israel, but also those whom Paul knew as 'diaspora Jews.' If the church in Europe had taken Romans 9 – 11 to heart, it would not have persecuted Jews as 'heretics' or 'Christ-killers,' nor called for pogroms and inquisitions and expulsions. Instead, Christians might have protected Jews from regimes that persecuted them, and engaged in thoughtful, humble, and loving dialogue with them with regards to Scripture and Messiah. Having learned from political pluralism with Judaism, perhaps the church might have been able to take an approach to other religions with a principled religious toleration. That might have saved Europe all the so-called 'Wars of Religion.'

When we put the matter in terms of American constitutional law, this dialogue between Christians and Jews over abortion policy, the legal status of the fetus, and biblical texts, involves the First Amendment. The First Amendment does not simply guarantee the religious freedom of Christians. Christians cannot simply ignore Jewish scholarship and opinion about the text of Exodus 21. After all, at least some Jewish opinions also come from a sincere wrestling with sacred texts, too – texts which Christians share in common with Jews. But it is not clear – to me, at least – how conservative Christians in the U.S. engage with this question. Instead, in order to feel intellectually 'strong' against the secular liberal, conservative Christians have developed what they believe is an airtight argument, not just for within the church community, but for public policy in general. In fact, sometimes the argument goes like this: 'I am completely justified in being a single issue voter; since life begins at conception, abortion is infanticide within the womb, and where else can you draw the line?' But to completely cut ourselves off from Exodus 21 – a text which *actually does suggest that a line can be drawn* – is an unacceptable theological and epistemological move. On what grounds can we ignore this text? To ignore the intra-Jewish debate on the subject, which does include discussion of Exodus 21, has something in common with abandoning Christian mission towards the Jewish community, because it signals that Christians are no longer connected to, and no longer respect – on this very important issue – a sacred text which we hold to be Scripture, and about which we say, 'All Scripture is inspired and God-breathed' (2 Tim.3:16). Religion is inextricably linked with the delineation of when a fetus can and should be treated as a full legal person. On the grounds of the First Amendment alone, conservative Christians need to stop perceiving 'liberals' as the only other party involved in the shaping of policy and culture.

In considering the beliefs of conservative Christians in the United States, it is also important to consider the comments of New Testament scholar N.T. Wright, from his exposition of Romans 9 – 11, reminding Christians of our mission to both Jews and Gentiles:

'When Paul speaks of the unity of the church he means specifically a unity which crosses racial barriers. This has immediate implications for the mission which Paul envisages. The gospel is 'to the Jew first and also to the Greek.' I submit that if all we had to go on were the text of Romans, no-one would have dreamt for a moment that Paul was not still engaged in a mission which, though its geographical sphere was of course the gentile world, habitually embraced Jews as well as Gentiles, much on the pattern of Acts.'¹⁵²

Wright cautions us against adopting a 'two-covenant' system – precisely the category popularized by Dallas Theological Seminary and hugely influential among conservative evangelical Protestants – whereby 'God has on the one hand maintained his covenant with ethnic Israel intact, and on the other hand has inaugurated the Christian 'covenant' as his regular way of saving Gentiles.'¹⁵³ Christians tend to adopt this 'two-covenant' theology to relieve themselves of any sense of humble and thoughtful mission to Jews, which would also require *making political space*

¹⁵¹ Oliver M.T. O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge: Cambridge University Press, 1996), p.162

¹⁵² N.T. Wright, *The Climax of the Covenant: Christ and the Law in Pauline Theology* (Minneapolis, MN: Fortress Press, 1991), p.252 – 253

¹⁵³ *Ibid*, p.253

for them domestically and trying to discern agreeable policy positions together, not just ‘over there’ in the State of Israel, but ‘right here’ in the U.S. Wright’s concern is primarily that we continue to hear Paul as a missionary to both Jew and Gentile, as the apostle Paul sensed a concern in the Roman church he had to address: Either they were facing the temptation of being a majority Gentile church without Jewish Christians and without further loving witness to Jews; or they had some Roman Jewish Christians who were concerned that Paul’s ministry and proclamation was overly ‘Gentile’ and no longer had a connection to Jews; or both. Regardless, the following words from Wright about Christian mission can be heard with regards to respectful civic engagement and Christian political theology as well:

‘[I]ronically, it is against Christian arrogance – specifically, gentile Christian arrogance – that Romans 9 – 11 is explicitly directed. Paul is writing, with all the weight of eleven chapters of theology behind him, in order to say that ‘gentile Christians’ have not ‘replaced’ Jews as the true people of God. The church has not become an exclusively gentile possession. Precisely because the gospel stands athwart all ethnic claims, the church cannot erect a new racial boundary. The irony of this is that the late twentieth century, in order to avoid antisemitism, has advocated a position (the non-evangelization of Jews) which Paul regards precisely as antisemitic. The two-covenant position says precisely what Paul here forbids the church to say, namely that Christianity is for non-Jews. To this extent, it actually agrees in form with the German Christian theology of the 1930’s – while of course disagreeing in substance, because it denies that Christianity is the only way of salvation.’¹⁵⁴

To the extent that conservative Christians in America have treated Jews – either ideologically or functionally – as the other side of a ‘two-covenant’ system, these words from Wright and O’Donovan are important. And to the extent that evangelical Americans see ‘the United States’ itself as a covenanted nation-state which has special ‘Christian’ blessings and obligations towards God,¹⁵⁵ and when this plays a part of our political narrative, this is immediately problematic. We cannot inhabit a political narrative in which Christians functionally treat non-Christians as villainous.

From this recognition of Jewish-Christian dialogue, we can discern more principles when advocating for, and designing, *social* policies addressing abortion.

(1) Christians must consider whether to make ethical distinctions between Christians and non-Christians, on abortion and related issues. God tolerated some undesired behaviors to some degree, like divorce, because of humanity’s ‘hardness of heart’ outside of personal relationship with Jesus Christ (e.g. Mt.19:3 – 12). Paul also attested to the internal war between the Spirit and the flesh, in those who follow Jesus, such that Christians commit sins even though we claim to have the highest moral standards (e.g. Rom.8:5 – 11; Gal.5:16 – 24).

Raising these questions brings us back to issues faced by the earliest Christians. Sometimes, as with service in the Roman army, Christians were content to take the road of political pluralism where different communities were treated differently under Roman law. The earliest Christians advocated against Christians serving in the military, although they accepted the imperial army’s role in internal policing, but not (say) warfare with the Persians. They were content with their own obedience; they did not try to make everyone withdraw from military service. However, sometimes, as with kidnapping and forced enslavement under Emperor Constantine, for instance, Christians sought to influence the entire Empire. They were not content to call forced kidnapping-enslavement a sin for Christians only, or to make it a criminal act among Christians only. They believed that everyone should obey that law, and that the Roman Empire should enforce it for everyone. Notably, this was a conviction that Christians could share with Jews, given Exodus 21:16 and Deuteronomy 24:7.

(2) What we know scientifically about human life in the womb and its development, as well as our ability to support life in the womb, will probably be a factor. Those insights will shape our practical response to Exodus 21 in both

¹⁵⁴ Ibid, p.253

¹⁵⁵ Mark A. Noll, *America’s God: From Jonathan Edwards to Abraham Lincoln* (Oxford: Oxford University Press, 2002), chs.1 – 3 discusses this and shows historically that there was no way to have a ‘national covenant’ because unbelieving children, excommunicants, and newcomers made a ‘society’ separate from ‘church.’ Robert Bellah, Richard Madsen, William M. Sullivan, Ann Swidler, and Steven M. Tipton, *The Good Society* (New York, NY: Alfred A. Knopf, 1991) p.241 – 243 cite Roger Williams as the earliest critic of the ‘national covenant’; he said that even America ‘lay dead in sin.’

MT and LXX variants. They will also impact our discourse with the Jewish community and their range of opinions, along with secular liberals and theirs.

The position I offer may not satisfy those Christians and orthodox Jews who believe ensoulment happens at conception based on the moral probability reasoning I noted above. However, I maintain that moral probability is not a decisive form of ethical reasoning. The proposal itself also depends on metaphysical and biblical assumptions which are open to question. For example, if monozygotic twinning occurs (which may happen within 8 – 10 days of fertilization, occurring in 3 – 5 cases for every 1000 pregnancies), when the body is divided, is the soul divided also? More troublingly, if we truly believed that full legal human personhood begins at conception, then the rather high likelihood that a fertilized egg (conceptus) might not implant in the mother's uterus ought to raise more ethical demands on us. Given our level of technology, should we therefore do more to facilitate proper implantation? Or should we invest more in the design of artificial wombs? Should we do more to save the fertilized egg from non-implantation and a natural death (if it is a death)? If a blind child was unable to find food and water and therefore died, would we call that a 'natural death'? If assistance was available, would we not call that 'neglect'? My position on taking the presence of a healthy nervous system at 23 days of fetal life as the marker of legal human personhood avoids these problems.¹⁵⁶

My position also coordinates beginning-of-life and end-of-life care and attempts to establish a reasonable ground for consistency between them. As such, it is epistemically accessible to people who identify as not belonging to any major religious tradition. That is, they can know it, and recognize it as a valid moral and legal argument. And as such, it can reflect one stable meeting place for public policy. It may contribute to gradual shifts of opinion from other religious groups, although, as I mentioned above, I believe Christians granting legal recognition and rights to Judaism is itself a Christian value.

(3) We should afford women, especially pregnant women, greater legal and social protections that correspond with our knowledge. Epigenetics and nutrition, for instance, should be a much bigger part of the conversation. If we say we would prefer that pregnant women not face the threat of injury – either to herself or to the life she carries in her womb – then what else are we doing *legally, socially, environmentally, and economically* to protect them as a moral unit, and not just while that life is within her womb, but outside it as well?

Therefore, I will continue to examine the Scriptures on the nature of how social systems support child-raising and parenting. I will point out the patterns within Israel under the Sinai covenant which helped them care for children and even give them an inheritance, the honor Jesus gave to children and families as his renewal of God's original 'creation order,' and the lessons from church history which probably brought down abortions, to the best that we can surmise.

PART THREE: CHILD-RAISING AS A COMMUNAL CONCERN IN THE BIBLE

The Bible and Child-Raising: Re-Examining the Church's Approach to Men

While not enough research has been done on the reasons women choose to have abortions, the data we do have is important. In one study conducted by The Guttmacher Institute in 2004, a survey was completed by 1,209 abortion patients at 11 large abortion providing locations, with 38 women from four of those sites giving in-depth interviews. The researchers describe their results thus:

'The reasons most frequently cited were that having a child would interfere with a woman's education, work or ability to care for dependents (74%); that she could not afford a baby now (73%); and that she did not want to be a single mother or was having relationship problems (48%). Nearly four in 10 women said they had completed their childbearing, and almost one-third were not ready to have a child. Fewer than 1% said their parents' or partners' desire for them to have an abortion was the most important reason. Younger

¹⁵⁶ Although, I admit that ectopic pregnancies still poses a moral challenge. Ectopic pregnancies result in approximately 1 out of 50 pregnancies, and are typically discovered in the 4 – 6 week range of pregnancy. Abortion of ectopic pregnancies is reasonable based on the value placed on the mother's life, but should we do more to save the fetus by designing an artificial womb? At which point, such a question enters the realm of the allocation of scarce research resources, which is far beyond the scope of my efforts.

women often reported that they were unprepared for the transition to motherhood, while older women regularly cited their responsibility to dependents.¹⁵⁷

The study itself summarizes some previous research done on the topic, including a 1985 study of 500 women in Kansas, a 1987 study of 1,900 women at large abortion providers across the U.S., and various studies done in Scandinavia. One might raise legitimate questions about sampling bias. For example, perhaps women who feel pressured by parents or partners are less likely to fill out these surveys. The researchers themselves suggest some limitations of their study as well.¹⁵⁸ But studies like these provide us with a concrete consideration for ethical reflection, as we approach the Scriptures and the perceptions of Christian leaders into abortion, not simply as an individual issue within a church context, but as a social phenomenon. This means Christians must be thoughtful about how we influence laws that affect economics especially the standing of women, whether we provide government-subsidized child care and public schooling, and how we encourage men and women to become emotionally mature in the societies in which they live. The issue of abortion therefore requires us to look at all our institutions, not simply the individual choice of a pregnant woman.

I will begin by examining how church leaders considered the roles of the mother and father in cases of abortion. How do we consider the ethical situation of a woman having an unreliable male partner as her baby's father? The most thorough historical study of abortion in the Byzantine Roman Empire to my knowledge, finds:

'The theoretical basis of the permanent and absolute condemnation of all kinds of abortions except those permitted for medical reasons, is greatly influenced by the spirit of Christianity. In fact, religion supported the view that the reception of the seed in the uterus and the conception of the embryo means the beginning of life and accepted that the foetus is already a living creature. All legislation of Byzantium from the earliest times also condemned abortions. Consequently, foeticide was considered equal to murder and infanticide and the result was severe punishments for all persons who participated in an abortive technique reliant on drugs or other methods. The punishments could extend to exile, confiscation of property and death. The physicians followed the tradition of Ancient Greece, incorporated in the Hippocratic Oath, representative of the ideas of previous philosophers. According to this famous document, it is forbidden them to give a woman "an abortive suppository." The Orthodox faith reinforced this attitude, protective of every human life. On the other hand, the Church and the State accepted selective abortion based on medical data, such as prevention of dangerous conditions in pregnancy or anatomical difficulties involved. In conclusion, science, church and legislation had a common attitude to matters concerning abortion and this fact reveals an effort to apply a fair policy for the rights of the embryo and the protection of human life in Byzantine society.'¹⁵⁹

From this summary statement, several things are clear. First, to shape their approach to abortion, the Byzantine Roman policymakers drew upon both Christian theological and Greek medical-philosophical resources. From the Christian side came the general position of perceiving abortion as a form of infanticide, generally. Of particular prominence was the view attributed traditionally to Basil of Caesarea, although his brother Gregory of Nyssa might actually be the actual spokesperson for it. From the Greek side came the Hippocratic Oath, a cultural precedent which must have appeared more attractive because of the Christian influence. Second, punishments for abortion were varied. Responsibility for abortion was typically assigned to the mother and, at least sometimes, the physician. In at least one significant and very interesting case, the father was also punished (see below). Third, medical and scientific information about the dangers of pregnancy were incorporated, and abortions were performed to prevent a dangerous pregnancy which ostensibly threatened the life of the mother.

¹⁵⁷ Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh and Ann M. Moore, 'Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives,' *Perspectives on Sexual and Reproductive Health*, Volume 37, Number 3, September 2005, p.110 – 118; <https://www.guttmacher.org/sites/default/files/pdfs/pubs/psrh/full/3711005.pdf>

¹⁵⁸ Ibid, p.118; 'This study is subject to some limitations. Our sample is not strictly nationally representative. Also, only 58% of the abortion patients seen by the participating facilities completed the survey, and nonresponse on some variables— notably, income—was high. However, the social and demographic characteristics of respondents were similar to those of two nationally representative surveys, which provides some reassurance that the findings are representative of abortion patients in the United States.'

¹⁵⁹ Effie Poulakou-Rebelakou, J. Lascaratos, Spyros G. Marketos, 'Abortions in Byzantine Times (325 – 1453 AD),' *Vesalius*. 1996; 2(1):19 – 25; <https://www.ncbi.nlm.nih.gov/pubmed/11618574>

Two further comments are very significant in this article. The first concerns how the church canon law and Byzantine civil law began to diverge:

‘Another remarkable point is that the Byzantine Church increases its clemency in sentencing the women who underwent an abortion, while the imperial legislation from the 8th c. increases its severity, adding whipping to exile.’¹⁶⁰

I assume what Poulakou-Rebelakou et.al. mean in their assessment of increased ‘clemency’ from the church is balancing the ethical imperatives of the mother’s health with the baby’s life, as a matter of policy. Unfortunately, they do not explore what I suspect to be the case: the reason why imperial legislation increased in severity about abortion policy was the army’s need for men. Islam threatened the Byzantine Roman Empire from the east. In the days of the pagan Roman Empire, when Augustus needed men for the army, he levied taxes on women who did not marry by age twenty, men by age twenty-five, and households who had less than three children. The Christianized Roman Empire probably felt a similar pressure as they steadily lost territory to Islam.

The second comment concerns increasing paternal responsibility for abortion in (at least) the civil law:

‘A very interesting trial about an abortion case took place in Constantinople in the year 1370. A monk from the monastery of Theotokos Hodigitria, named Ioasaph and an anonymous nun from Saint-Andrew-in-Krisi convent were the defendants in this affair. It was a rather unusual trial involving the Patriarch Philotheus Kokkinos and the prosecution of the father of the embryo, because the law exclusively punished the mother. The physician Syropoulos who provided the abortifacient drug was condemned to exile... The monk Ioasaph was punished with demotion and expulsion from his monastery.’¹⁶¹

That Byzantine Roman civil law for a millennium punished the mother exclusively is impossible to defend. The presumption that fathers were erstwhile innocent is far-fetched. This case in 1370 is the first known example where the father of the aborted child was punished. The question of why church leaders and civic government officials did not make more of an effort to define the father’s responsibility in cases of abortion can only be attributed to male chauvinism.

Raising the church’s response to *prostitution* serves as a very helpful, parallel point of comparison, to illustrate how Christian leaders, when possible, assigned responsibility to women and men for sins involving both:

‘Although the Church fathers fulminated against the commerce of the body with the same ferocity as against other sins of the flesh rampant in the Roman world, prostitution, being a social phenomenon rather than a personal sin (such as fornication), did not, strictly speaking, lie within the spiritual jurisdiction of the Church. Despite its condemnation of all premarital and extramarital sexual activity, the Church recognized prostitution to be an inevitable feature of worldly society, which it had no hope or ambition to reform. Saint Augustine even warned that the abolition of prostitution, were it possible, would have disastrous consequences for society; the practice, he believed, was a necessary evil in an inevitably imperfect world. Canonical wrath was focused, rather, on those who profited from this commerce, for, while prostitution was regarded as a social phenomenon distinct from the sin of fornication, procuring was considered by the Church to be synonymous with the sinful act of encouraging debauch (since the latter is usually associated with a pecuniary motive, whereas fornication can be committed out of passion as well as out of desire for money). Procuring was therefore considered to be a matter of spiritual jurisdiction, and strong measures were taken against it at the Council of Elvira (c. 300), whose canons were included in most of the major canon-law collections of the Middle Ages.’¹⁶²

It may surprise the general reader to know that the church took this course of action. Decriminalizing the prostitute but prosecuting the (male) buyer and probably also the (male) exploiter is precisely what many today call

¹⁶⁰ Ibid, p.22

¹⁶¹ Ibid, p.22

¹⁶² Leah Lydia Otis, *Prostitution in Medieval Society: The History of an Urban Institution in Languedoc* (Chicago, IL: The University of Chicago Press, 1985), p.12 – 13

‘progressive’ – it is even nicknamed ‘the Nordic model.’¹⁶³ It has been extremely successful. Seventeen centuries prior to Sweden, the church recognized that there could be many reasons for why a woman becomes a prostitute: she was desperately poor; she was kidnapped and forced to do it; she was being extorted and blackmailed; etc. It is always possible, theoretically, that a woman with sufficient knowledge voluntarily became a prostitute for pecuniary reasons alone, without any coercion or sexual abuse in her background. But as a matter of public policy – or even pastoral policy – it was sufficient to assume that such a woman was self-deceived, emotionally wounded, or mentally ill. There was, however, only one reason for a man to purchase sex.

Prostitution is an imperfect analogy to abortion, of course. But thinking through prostitution does highlight relevant ethical and pragmatic categories: Women are often both moral agents and moral victims of men. Giving women (and young boys, too, who are victims of human trafficking) this sort of ‘institutional advantage’ puts new power dynamics in place. Regarding abortion, the reason why a woman confronts an ethical decision to abort her child can be quite complex. She bears some personal responsibility, but others surrounding the woman – especially the man involved in fathering the child – typically have direct and indirect responsibilities as well. Even when a woman has ostensibly consented to having sex with a man, there is ground in Scripture itself to consider her to be a victim of male power, or false promises, or deception of some sort.

One curious aspect of the Sinai covenant is that in the case of a rape accusation in Deuteronomy 22:25 – 27, the usual requirement for two or three witnesses to accuse a person (Dt.17:6) is set aside. Procedurally, this variation gives significantly greater legal power to the woman over against the man. In theory, a Jewish woman who consensually had sex with a man could turn against him, become a false witness, and accuse him of rape. There are probably implicit procedural considerations for that possibility: The judicial council can probably consider other witnesses who can attest that the man was elsewhere, or draw divine counsel into the matter – could the ‘ordeal’ imposed by a suspicious husband against his wife (Num.5) be used to determine the truthfulness of a man accused of rape? Regardless, the risk that a woman would abuse this legal procedure is apparently *acceptable*, and that risk weighs *against men*. A woman who accused a man of rape was, in principle, to be believed; her testimony had the force of two or three witnesses. Perhaps that is because, in the covenantal context and sociology assumed by the Sinai covenant for biblical Israel, a woman had no real incentive to bear false witness in this circumstance. If a man found that the risk of being accused of raping a woman was so great, then he might consider that he was already commanded to submit himself and his sexual desires to the God of Israel. He could subordinate those sexual desires to God’s vision of marriage where a husband does not dominate but rather serves his wife, as is the case in Judaism (see below). He could be part of a moral community in his discernment about the character of any given woman. He could become absolutely transparent to others of good character about his intentions in friendship, dating, and courtship, and be as public as possible in his efforts to court a woman, with as many witnesses present as possible. Because of this simple procedural exception in the case of a rape accusation, women in the Sinai covenant were given institutional advantages, which would have resulted in social advantages over men in the realm of romance.

Another case where women are given an institutional advantage over men is in the realm of sex within marriage, demonstrated especially by Jewish tradition, but certainly generalizable as a human rights posture. In Israel in 1981, there was a Supreme Court case called *Cohen v. State of Israel*. Mr. Cohen had violently attacked his wife and forced her to have sex with him against her will. Subsequently, they were divorced. She accused him of rape retroactively. He appealed his conviction on the principle that a man cannot be legally guilty of raping his wife, which at the time was the principle upheld in both English and American law. Both English and American law, until the 1980’s and 90’s, ruled that when a woman said ‘yes’ at the altar, she said ‘yes’ to sex anytime her husband wished it. Even in cases when a husband had contracted a sexually transmitted disease, a wife had no legal right to say no to sex.¹⁶⁴ Israeli Judge David Belchor noted the position of English law at the time, since English law

¹⁶³ Women’s Justice Center, ‘Sweden’s Prostitution Solution: Why Hasn’t Anyone Tried This Before?’, *Women’s Justice Center*, 2005: ‘In just five years Sweden has dramatically reduced the number of its women in prostitution. In the capital city of Stockholm the number of women in street prostitution has been reduced by two thirds, and the number of johns has been reduced by 80%. There are other major Swedish cities where street prostitution has all but disappeared. Gone too, for the most part, are the renowned Swedish brothels and massage parlors which proliferated during the last three decades of the twentieth century when prostitution in Sweden was legal... In 1999, after years of research and study, Sweden passed legislation that a) criminalizes the buying of sex, and b) decriminalizes the selling of sex.’

¹⁶⁴ In England in the 1980’s and 90’s, three cases dealt with the crime of indecent assault within marriage. A wife was deemed to have consented to sexual intercourse with her husband at marriage, even if he had later contracted a venereal disease; additionally: *R v. Caswell* (1984): A married woman’s consent to sexual intercourse covered all acts preliminary to that

influenced the State of Israel before 1948. Obviously repulsed by this, 'Judge Belchor stated that he was 'delighted' not to have to follow English law on this issue because that would involve endorsing the marital rape exemption... He said, 'The people of Israel can take pride in the progressive and liberal approach of their blessed heritage and the position of Jewish law on this matter from time immemorial.'¹⁶⁵ This position compares remarkably against Hinduism¹⁶⁶ and Islam.¹⁶⁷ It has incredible apologetic value, as it suggests that the Bible's earliest documents suggest that ancient Israel was sociologically unique, because they did not simply copy their neighbors in the Ancient Near East. If the Bible did not come from a source that was 'male dominant,' is it the product of a loving, good God?

Jewish tradition thought hard about the situation in which women were the most vulnerable: *within marriage*. It gave wives moral and institutional advantages over husbands, and the downstream, social ramifications were unquestionably empowering to women. Given that roughly 17% of abortions are sought by married women,¹⁶⁸ it follows that if conservative Christians believe that abortion is always a moral tragedy, then in the practicing of their faith, they should seek to reduce this further by prioritizing the sexual rights and satisfaction of the wife over the husband. In the U.K. and the U.S., marital rape is now acknowledged legally, and criminalized, but that is a relatively recent phenomenon. The conservative Christian community, especially, should stand behind it. It is

intercourse. *R v. H* (1990): The marital rape exemption applied even to an estranged couple. In the United States, despite some differences between the fifty States, until the late 1970's, all States held that a man was legally entitled to rape his wife. 'A husband cannot be guilty of raping his wife unless he forces her to have sexual intercourse with a third person. Immunity shields the husband even though all the other elements of the offense are present – force, penetration, and lack of consent. He is immune from a rape charge in most states, however violent the force he uses and however long he and his wife have been living apart... For instance, a wife whose husband comes home drunk every night and violently forces sex on her... is not protected by the rape laws of forty-six states.' (*New York University Law Review* 52 (1977): 306 – 323)

¹⁶⁵ Warren Goldstein, *Defending the Human Spirit: Jewish Law's Vision for a Moral Society* (New York: Feldham, 2006), p.168ff. (italics mine). The biblical basis for this position flows from the fact that women are made in the image of God, along with men (Gen.1:26 – 28), the fact that Exodus accords marital, conjugal rights to a wife and not her husband (Ex.21:10), and the 'vulnerability principle' honored throughout the Torah.

The Talmudic writings show support for this: 'A man is forbidden to compel his wife to have intercourse with him.' (*Talmud Eiruvin* 100b) 'This Talmudic ruling appears in all the major codifications of Jewish law.' (Goldstein, p.170; cf. Rambam, *Hilchot Ishut* 15:17; Tur and Code of Jewish Law, *Orach Chaim* 240:3; *Even HaEzer* 25:2).

The agreement from later Jewish commentators is remarkable: 'He may not rape her by having intercourse with her against her will, but rather, he must do it with her consent and in an atmosphere of open communication and joy.' (Rambam (1135 – 1204 AD), *Hilchot Ishut* 15:17). 'If she finds her husband repulsive, she is freed from her conjugal duties.' (Rambam, *Hilchot Ishut* 14:8, quoted by Goldstein, p.172). 'Certainly she is not subject to him incessantly when she does not wish it...' (*Responsa Maharit* 1:5). 'Even those who would permit [unconventional sexual intercourse] do so only when the woman is willing, but if a husband forces it upon the woman he is called a sinner' (*Responsa Yaskil Avdi* 6:25). 'The vulnerability principle is the most influential one when it comes to Jewish law's outlawing of rape in marriage.' (Goldstein, p.176) 'A woman's conjugal duty is limited to having intercourse at certain regular intervals ['determined with reference to, on the one hand, the wife's needs and, on the other hand, the husband's capacity' (p.186)]... She is not required at all to ensure that her husband is sexually satisfied. He is responsible to guarantee to the best of his ability that his wife never feels unfulfilled sexual desire, which means that according to Jewish law a man must with great sensitivity constantly attune himself to his wife's sexual needs... The reason is that fulfilling her desires constitutes a Biblical commandment, whereas fulfilling his does not.' (Goldstein, p.184 – 9) 'According to Jewish law, sexual satisfaction is primarily the husband's duty and the wife's right. Married women need legal protection to ensure that their husbands treat them sensitively in the potentially volatile area of sexual relations. Men do not need to be protected; they need to be restrained and educated to think of their wives and not to view them as their sex objects.' (Goldstein 2006, p.190)

¹⁶⁶ 'Men may be lacking virtue, be sexual perverts, immoral and devoid of any good qualities, and yet women must constantly worship and serve their husbands.' (*Hindu Manusmriti* 5.157) 'Women have no divine right to perform any religious ritual, nor make vows or observe a fast. Her only duty is to obey and please her husband and she will for that reason alone be exalted in heaven.' (*Hindu Manusmriti* 5.158)

¹⁶⁷ 'If a man calls his wife to his bed and she refuses, and he spends the night angry with her, the angels will curse her until morning.' (*Hadith al-Bukhaari*, 2998, 4795; cf. *Hadith Sunan Abu Dawd* 2159 and *Qur'an* 2:223). 'It is not permissible for her to rebel against him or to withhold herself from him, rather if she refuses him and persists in doing so, he may hit her in a manner that does not cause injury.' (*Majmoo' al-Fataawa*, 32/279) 'No woman can fulfill her duty towards Allah until she fulfills her duty towards her husband. If he asks her (for intimacy) even if she is on her camel saddle, she should not refuse.' (*Sunan Ibn Majah* 1853) 'When a man calls his wife to fulfill his need, then let her come, even if she is at the oven.' (*Jami at-Tirmidhi* 1160)

¹⁶⁸ National Abortion Federation, 'Women Who Have Abortions,' https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/women_who_have_abortions.pdf

perplexing, for example, that North Carolina, home to many conservative Christians, stands in favor of the law that prevents a woman from withdrawing consent to sex after sex has begun,¹⁶⁹ even when the male partner removes his condom, which happens with unknown frequency, but one suspects often enough to be a major concern.¹⁷⁰

Kimberly Lawson, in her article for *Vice*, puts it bluntly: ‘Men Legally Allowed to Finish Sex Even If Woman Revokes Consent, NC Law States.’¹⁷¹ By contrast, in California, in *People v. John Z* (2003), the California Supreme Court ruled that ‘a woman who initially consents to sexual intercourse does not thereby give up her right to end the encounter at whatever point she chooses. In other words, when a woman tells her partner to stop, and he forces her to continue, he is guilty of rape.’¹⁷²

I suspect that many conservative Christians feel challenged by these positions because they have accommodated a male bias in sexual relations. For example, some have told youth, college students, and single people – implicitly or explicitly – that lots of sex in marriage is the proper *reward* for abstaining from sex before and outside marriage. In other words, they have incorporated a meritocratic mentality into their pastoral guidance, *where it does not belong*. Sex then becomes something that people feel entitled to, once they get married. Arguably, men gravitate towards this logic more explicitly than women. Biblically, the New Testament calls for people to submit all of their desires to Jesus, who radically reshapes them and makes them serve as reminders of our desire for him. Even Paul’s acknowledgement in 1 Corinthians 7:1 – 7, that sexual desires are a consideration within marriage and towards marriage, needs to be framed within the Jewish tradition which gives the woman’s sexual interests preeminence, and a man’s sexual interests something for the man to more aggressively submit to Jesus. Legally, the right for a woman – including a wife – to withdraw her consent to sex at any time needs to be firmly established, with the backdrop being *rape*. Giving women that institutional legal advantage over men should result in fewer abortions. It would also result in a culture change where men recognize that they are not entitled to sex, and not entitled physically or visually to women’s bodies. I also believe that public policy like this will encourage men generally to be much more self-reflective, and self-challenging, will require that Christians teach the orthodox position on sexuality from much more of the character-based and theological-ontological perspective true to the New Testament, and will actually force men in American culture to reckon with their own sexual self-centeredness to a greater extent that *many more will give their lives to Jesus*. The apostle Peter’s admonition is relevant here: ‘For it is time for judgment to begin with the household of God; and if it begins with us first, what will be the outcome for those who do not obey the gospel of God?’ (1 Pet.4:17)

Social Policies Empowering Women and Impacting Pregnancies, Child-Raising, and Abortion

When we ask what a Christian ethical response to abortion *as a social phenomenon* might be, we must consider *all possible angles that have a bearing on abortion*. I believe we must also highlight the remarkable achievements of Byzantine Christianity with regards to several other issues: abolishing kidnapping-based slavery (Frankish Christianity also did well on this score), promoting the rights of women, and developing hospitals and public health care. These larger developments – each of which are treated further below – are important because they set a social and legal context that surely reduced the occasions of abortion, even though we cannot retrieve the historical data on abortion rates. We consider the legal rights of women and wives, the cultural interactions between men and women particularly concerning sex and children, the presence of slavery or not, the investment in public health, protections against poverty, etc. When we look at abortion as a phenomenon in this way, then the example of the Byzantine civil case, from 1370 AD, which I discussed above, holding the father responsible for his paternity and the physician responsible for the surgical act, stands out as noteworthy in a different sense. I would not wish to institutionalize a penalty on a physician *per se*, because of the problem of creating perverse incentives to perform abortions in private. Also, since physicians have considerable latitude to define ‘risks to the mother’s health,’ physicians might deny abortions to women of color or poor women, while granting them to wealthy women who pay out of pocket.

¹⁶⁹ Erik Ortiz, ‘North Carolina Legal Loophole Prevents Women From Withdrawing Consent to Sex,’ *NBC News*, June 23, 2017, <https://www.nbcnews.com/news/us-news/north-carolina-legal-loophole-says-women-can-t-withdraw-consent-n776026>.

¹⁷⁰ Kalhan Rosenblatt, ‘Stealthingly’: Victims Describe Partners Removing Condoms During Sex Without Consent, *NBC News*, April 29, 2017, <https://www.nbcnews.com/news/us-news/stealthingly-victims-describe-partners-removing-condoms-during-sex-without-consent-n752681>

¹⁷¹ Kimberly Lawson, ‘Men Legally Allowed to Finish Sex Even If Woman Revokes Consent, NC Law States,’ *Vice*, June 22, 2017, https://www.vice.com/en_us/article/43y99g/men-legally-allowed-to-finish-sex-even-if-woman-revokes-consent-nc-law-states

¹⁷² Sherry F. Colb, ‘Withdrawing Consent During Intercourse: California’s Highest Court Clarifies the Definition of Rape,’ *FindLaw*, January 15, 2003, <https://supreme.findlaw.com/legal-commentary/withdrawing-consent-during-intercourse.html>

In 313 AD, Emperor Constantine, only two years after professing a conversion to Christ, banned kidnapping and forced enslavement, making that crime punishable by death.¹⁷³ Three years after that, in 318 AD, he banned the breaking up of enslaved families, and declared infanticide to be a crime. He legalized the manumission of slaves before a Christian bishop, granting them immediate Roman citizenship, making it very easy procedurally to free slaves. In 319 AD, he made the voluntary killing of a slave/servant a capital crime. Although it is impossible to gather data relating slavery and abortion from the age of late antiquity, it is well within reason to suggest that abortion rates must have went down if women were not under threat of being abducted into slavery and made to bear children for their masters. Constantine also gave financial assistance to impoverished parents during famines, on two occasions: 322 AD and 329 AD.¹⁷⁴ These decisions must have made abortion and infanticide rates decrease.

Women also steadily benefited from the Christianization of Greco-Roman law and culture. Constantine restricted a husband's right to divorce his wife, limiting his arbitrariness and addressing a particular vulnerability wives faced.¹⁷⁵ In the sixth century, Emperor Justinian – probably influenced by his wife Empress Theodora – legislated that a wife have legal protections *from her husband*: to divorce, have child custody, and keep property.¹⁷⁶ This outraged certain cultural conservatives at the time who imagined that the empowerment of women would lead to the breakdown of the family. This cultural and legal change concerning women is remarkable, and it continued until it touched the highest strata of law. Whereas Plato and Aristotle believed that men should rule over women as over animals, and whereas the classical Roman father wielded the power of life and death over his wife and household (*patria potestas*), the Christianized Roman-Byzantine Empire produced Irene (reigned 797 – 802 AD) and Theodora (reigned 842 – 855 AD), who reigned, not as figurehead Empresses, but as Byzantine *Emperors* in their own right. The Franks, by contrast, established their own 'Roman Empire' in part because the Franks did not accept Irene as Emperor, for Frankish law and custom did not allow for women to own land and be in such a position of authority. This Frankish position – which Pope Leo III sadly *honored* when he crowned Charlemagne 'Emperor of the Romans' in 800 – reflects a failure of the church of Rome to adequately disciple the Franks on issues of power and gender. The Byzantine church must be appreciated here, and the Pope of Rome faulted. Although here again we do not have historical data available to us, it is a reasonable assertion that abortions must have decreased in Christian lands when husbands had to treat their wives better *under the law*, and among the Byzantines, when a woman could be *Emperor*.

Moreover, the Christianized Byzantine Empire provided publicly funded health care and hospitals. Timothy S. Miller, in his book *The Birth of the Hospital in the Byzantine Empire*, sifts through an enormous amount of historical data to describe one of the most positive aspects of the millennium-long interaction between the Christian church and the Roman-Byzantine state.¹⁷⁷ Healing the sick was thought of as an obligation of Christian charity. Disease prevention was thought of as a public good. Laws incentivized charity and the construction of hospitals. The state even required doctors to work half their time in the hospitals, with reduced salaries during that time, leaving them their private practice the other half of the time, with their private salaries. These efforts must also have led to better maternal health, fewer cases of impoverishment due to disease, and therefore, reduced abortions.

¹⁷³ *Codex Theodosianus* 4.7.1; 9.40.2; *Codex Justinianus* 9.47.17; Sozomen, *Ecclesiastical History* 1.9

¹⁷⁴ O.M. Bakke, *When Children Became People: The Birth of Childhood in Early Christianity* (Grand Rapids, MI: Fortress Press, 2005), p.135 notes that in 322 AD, Constantine declared, 'If any parent should report that he has offspring which on account of poverty he is not able to rear, there shall be no delay in issuing food and clothing, since the rearing of a newborn infant will not allow any delay.' He was probably inspired by the Roman church, who had been running a food network for 4000 (?) poor people. In 329 AD, Constantine declared, 'Therefore if any such person should be found who is sustained by no substance of family fortune and who is supporting his children with suffering and difficulty, he shall be assisted through Our fisc before he becomes a prey to calamity.'

¹⁷⁵ *Codex Theodosianus* 3.16.1

¹⁷⁶ James Allan Evans, *The Empress Theodora: Partner of Justinian* (Austin, TX: University of Texas Press, 2002), p.17

¹⁷⁷ Timothy S. Miller, *The Birth of the Hospital in the Byzantine Empire* (Baltimore, MD: Johns Hopkins University Press, 1997). See also Joseph Magnus Frangipani, 'The Cosmological Vision of St. Basil and the First Hospital,' *Servant of Prayer blog*, April 8, 2014; <https://servantofprayer.wordpress.com/2014/04/08/the-cosmological-vision-of-st-basil-and-the-first-hospital/> and Father Johannes Jacobse, 'St. Basil the Great and Christian Philanthropy,' *American Orthodox Institute USA*, December 20, 2014; <http://www.aoiusa.org/st-basil-the-great-and-christian-philanthropy/> and Thomas Heyne, 'Reconstructing the World's First Hospital: The Basiliad,' *Hektoen International: A Journal of Medical Humanities*, Spring 2015; <http://hekint.org/2017/02/24/reconstructing-the-worlds-first-hospital-the-basiliad/>

Taking these social and political developments together, I am not sure that labeling the Byzantine church canon law on abortion a matter of increasing ‘clemency,’¹⁷⁸ as Poulakou-Rebelakou, Lascaratos, and Marketos do, is the right, or the only, way to label this trajectory. We might also understand it as applying Christian principles in law and policy to grasp the complexity of abortion as a social, and not merely individual, problem. It is true that summarizing the ‘canonical’ response to abortion per se yields a noteworthy pattern in itself. Christian bishops moved from withholding communion until death (Council of Elvira) to withholding it for ten years (Council of Ancyra) to varying it ‘according to repentance’ (Basil and the Quinisext Council). However, those three church decisions unfolded within the church community. When Christians influenced government policies, the nexus of issues became much larger.

Nonetheless, I do believe that abortion rates will come down *only* when men are held more responsible for paternity, and more than simply paying child support to a woman who is half-hearted about mothering his child. Therefore, I propose we perform DNA testing on any aborted fetus to determine paternity. I propose that the father of any aborted fetus be fined. The minimum fine should be up to the child support that he would ordinarily pay. The fine can be made lesser for lower-income or lower-wealth men, on the precedent of the Christian bishops making allowance for poverty in late antiquity. He can stagger the payments over 18 years, as expression of the larger community, payable to state agencies dealing with various related fields: mental health counseling services; foster child services; etc.

Naturally, the objection will be raised why the father needs to pay for anything beyond the abortion itself. One reason is that many conservatives on abortion policy maintain that a man should pay child support to his child’s mother, so in principle, conservatives should be willing to make the father pay something. But is it fair for him to pay something if the mother has an abortion? Yes, because there are always the costs of risks that are borne by both the woman and the larger community whenever an abortion happens. Those costs are uncertain and not usually readily apparent in the moment. Physically, for example, when a woman procures an induced abortion, her chances of getting an ectopic pregnancy at a later time increases, a risk which increases with each successive induced abortion.¹⁷⁹ The cost may therefore fall on the woman when she wants to be a mother, most likely with a man who wants to be a father, health care professionals who would much rather deliver a healthy baby than perform an ectopic abortion, and a health care system which would rather pay for a healthy baby to be delivered than an ectopic pregnancy. There is also a cost to the baby who must be aborted to save the mother’s life in those cases.

Psychologically, is there a cost to having an abortion? Who pays that cost? While the most reliable studies show that for the general population of women, there is not an increased risk of emotional and mental health distress when compared to carrying the baby to term,¹⁸⁰ those who tend to hold anti-abortion policies often maintain there are emotional and mental health costs borne by the woman. Once again, for conservatives who believe in that there are emotional and mental costs borne by the woman, in principle, they should be willing to fine the father. I accept the scientific evidence, but maintain the following: Abortion is still never desirable. Some studies compare procuring an abortion, on the one hand, and giving birth to an unexpected child on the other. Such an approach bypasses the

¹⁷⁸ Effie Poulakou-Rebelakou, J. Lascaratos, Spyros G. Marketos, ‘Abortions in Byzantine Times (325 – 1453 AD),’ *Vesalius*. 1996; 2(1):19 – 25; <https://www.ncbi.nlm.nih.gov/pubmed/11618574>

¹⁷⁹ American Pregnancy Association, <https://americanpregnancy.org/pregnancy-complications/ectopic-pregnancy/>. Several studies confirm the link. For example: C. Tharaux-Deneux, J. Bouyer, N. Job-Spira, J. Coste, and A. Spira, ‘Risk of ectopic pregnancy and previous induced abortion,’ *American Journal of Public Health*, March 1988, 88(3): 401 – 405; F. Parazzini, M. Ferraroni, L. Tozzi, E. Ricci, R. Mezzopane, C. La Vecchia, ‘Induced abortions and risk of ectopic pregnancy,’ *Human Reproduction*, July 1995, 10(7): 1841 – 1844.

¹⁸⁰ Antonia Biggs, ‘Explained: Abortion Research and Policy,’ 2017, <https://www.innovating-education.org/2017/05/explained-effects-abortion-womens-mental-health/> cites 16 studies conducted between 1989 (by Surgeon General C. Everett Koop, a Christian, who was under political pressure to declare that abortion increased risk of depression and suicide in women, but did not) and 2017. Studies include the American Psychological Association 2008, the U.K. National Collaborating Centre for Mental Health 2011. See also the U.K. Royal College of Obstetricians and Gynaecologists 2011. Vignetta E. Charles, Chelsea B. Polis, Srinivas K. Sridhara, Robert W. Blum, ‘Abortion and long-term mental health outcomes: a systematic review of the evidence,’ *Contraception* (2008), 78 (6): 436–50, [https://www.contraceptionjournal.org/article/S0010-7824\(08\)00369-7/fulltext](https://www.contraceptionjournal.org/article/S0010-7824(08)00369-7/fulltext) systematically reviewed the medical literature on abortion and mental health. They find, ‘A clear trend emerges from this systematic review: the highest quality studies had findings that were mostly neutral, suggesting few, if any, differences between women who had abortions and their respective comparison groups in terms of mental health sequelae. Conversely, studies with the most flawed methodology found negative mental health sequelae of abortion.’

sensitive but usually overlooked question of whether the woman should have been pregnant at all, or whether, in some cases, a prior lack of emotional or mental stability may lead some women to become pregnant. In which cases, there are further social costs that are difficult to quantify whenever any such woman gets pregnant and procures an abortion: costs to others to help her emotionally recover, for instance. The pro-choice Guttmacher Institute acknowledges ‘negative emotions’:

‘Difficulty with the abortion decision and the degree to which the pregnancy had been planned were most important for women’s postabortion emotional state. Experiencing negative emotions postabortion is different from believing that abortion was not the right decision.’¹⁸¹

Indeed, this study of women one week after their abortions, finds that the women

‘felt more regret, sadness and anger about the pregnancy than about the abortion, and felt more relief and happiness about the abortion than about the pregnancy.’¹⁸²

These women, upon discovering that they were *pregnant*, reported feeling sadness (74%), regret (66%), guilt (62%), and anger (43%). Those negative emotions were not interpreted as mutually exclusive with relief and happiness, which registered 25% and 33%, respectively, but the women also reported feeling those positive emotions at much lower levels. This particular study of 843 women is impressive in its scope and detail, but still lacking in qualitative and narrative texture which is admittedly hard to grasp in a study of this nature. For example, these women reported that ‘partner-related reasons’ ranked as the highest single factor for why they sought abortions. Surely many relevant details about said ‘partners’ are lost by creating a category so large. The study’s conclusion in reverse is also apropos: We must not confuse the belief that abortion was the right decision for these women with the circumstances and/or choices *and male involvement* which made abortion the more attractive option.

Moreover, one should not assume that the psychic cost to doctors performing abortions is negligible. While gynecologists may be willing to perform them, society as a whole cannot guarantee that they will be willing to, in steady or increasing numbers.¹⁸³ Therefore, it is always wise policy to create disincentives for people to seek access to this particular service, especially if the public expresses desire for a government-run, not-for-profit, public option for health insurance, as the U.K. already has, and as the U.S. may one day pass.

The institutional incentives would then be placed on men to approach women much more carefully, respectfully, wisely, and with much more self-restraint. Perhaps those paternity records should be placed in a secure health care database, so that a woman concerned for her own physical, mental, and emotional wellness would be able to consult her doctor to inquire as to the man she is starting to date has fathered any children who were aborted, prompting at least a conversation with him about whether he believes abortion *is* a birth control method. We would need to modify existing health care privacy (HIPAA) laws to accommodate for this practice. Lest this seem invasive, let us consider the fact that ‘abortions’ – not distinguishing between medically necessary or not, or other circumstances – is a category that appears on women’s health records, because it is medically significant. Do we not think that a man’s record of fathering aborted children might be medically significant to a woman? This would be an example of giving women institutional advantages, in an effort to hold men more accountable for abortions as a matter of social policy.

If it is argued that a man should not have to pay for the equivalent of child care when his child was aborted, one can simply say that the system must not produce perverse incentives where the man might pressure the woman to abort the fetus if the cost was less; in order for the pregnant mother to make as non-coerced a choice as possible to have the child or not, she must be in a situation where the father of her child has no financial incentive one way or the other.

¹⁸¹ Corinne H. Rocca, Katrina Kimport, Heather Gould, Diana G. Foster, ‘Women’s Emotions One Week After Receiving or Being Denied an Abortion in the United States,’ *Perspectives on Sexual and Reproductive Health*, September 2013; Volume 45, Issue 3; <https://onlinelibrary.wiley.com/doi/full/10.1363/4512213>

¹⁸² Ibid

¹⁸³ In the U.K., the Royal College of Obstetricians and Gynaecologists, ‘The Care of Women Requesting Induced Abortion: Evidence-Based Clinical Guideline Number 7,’ November 2011, p.1 notes, ‘Abortion accounts for a significant proportion of the workload of many gynaecologists.’

If it is argued that a man who wants to be a father is put into a defenseless position if the woman he impregnated wants an abortion, one can simply say that, unfortunately, he trusted the wrong woman. He did not spend enough time getting to know the woman in question, and restraining his own sexual desires until he did. A system which gives institutional advantages to women only puts men into the position that women are in today.

Abortion was, and is, not merely a personal act involving the pregnant mother. The practice was inherited from a pagan Greco-Roman context in which not only abortion, but infanticide through exposure and abandonment, were quite common. So were prostitution and abduction into slavery, significantly. Husbands had complete legal and social power over wives. They preferred boys over girls. So Christians had to respond on multiple fronts to the assortment of issues they confronted, knowing all the while the obvious: a baby must be welcomed and raised by parents. This is also to say that abortion itself was also embedded in a relational context and a social system, where typically the father and other agents involved in the abortion were routinely not held accountable for anything. Therefore, church history can be interpreted as the struggle for Christians to develop a complex and multi-pronged ethical response to issues including abortion, not just as a personal act, but as a part of larger social problems. The historically unfolding ethical response of church leaders to abortion might also be narrated in the following way: The church was growing incrementally in its ability to construct meaningful practices and policies that dealt with abortion as a social issue.

The question about the social ethics of abortion therefore broadens out. If women who seek abortion – single and married – do so because they believe raising another child is unaffordable, how do we make society more affordable and amenable to child-raising, in general?

God's Gift Economy vs. John Locke's Reward Economy

As an example of how taking all policies seriously which impact child-raising and abortion rates, I will explore housing in the U.S. because mortgage and rent is such a large portion of any household budget.

From creation, God showed concern for the relational design of the human family, starting from the oneness of male and female in marriage, in the context of a commission to multiply and fill the earth to express the wise and good reign of the Creator (Gen.1:26 – 28; 2:18 – 25). God provided a garden in the midst of the wild creation in which to place our first parents. In other words, God had a 'Housing First' policy. Land, housing, nutrition, clean water – all of the basic forms of wealth – were not 'rewards' given to human beings for their 'hard work.' They were gifts.

Under the Sinai covenant, God brought the people of Israel back into a garden land, to be a renewal of sorts, of Adam and Eve, of what humanity should have been. While God let Israel develop and keep animals, clothes, crops, and currency, He redistributed land. God designed the jubilee year to re-gift the garden land to all His children, hitting an economic reset button regarding the land (Lev.25). Land was the reminder of origins, the stuff from which Adam was made. For the Israelites, land was many things: the gift of God given through one's parents, a vehicle of both natural and supernatural blessing from God (Dt.11), the basic form of wealth, a first employment, agriculture and therefore nutrition, a school in which to learn wisdom, the physical place in the community and therefore a major contributor to mental health, the source of the ability to be generous, and the inheritance one gave to children and grandchildren. God's deliverance of Israel out of Egypt and into the garden land served as the rationale for Israelites to free their fellows from debt (Dt.15:1 – 17) and indentured service (Lev.25:55). Many of the social provisions for the poor, the alien, and the orphan revolved around the land (Dt.24). And through the jubilee arrangement, God prevented children and grandchildren from receiving all the advantage and disadvantage they could inherit.

Israel's prophets defended this vision, even against rapacious kings (1 Ki.21; Isa.1 – 5, 58 – 59; Ezk.16, 22; Mic.4:1 – 5; 6:8; Am.5; etc.). The psalmists sang of it, to nurture the people in worship and thanksgiving to God (Ps.1; 15; 37; 112; 119; etc.). The sages and historians wrote their wisdom literature to reinforce it: the plot of the book of Ruth revolves around the role of the kinsman-redeemer (Ruth 3:2 – 12; 4:1 – 6), which is found in Leviticus 25:25 – 27; Ezekiel's vision of the new temple (Ezk.40 – 47) was based on the numbers associated with the jubilee year in Leviticus 25:10 – 15; the Chronicles explained the seventy years of the Babylonian exile as the time needed for God to give the land its sabbaths (2 Chr.36:20 – 21), which comes from Leviticus 25:1 – 7. There can be no 'minimizing' the jubilee principle in particular on the supposed grounds that Israel did not seem to practice it; even

if they failed to observe it, the principle was integrated into the fabric of Israel's institutions and literature. God declared that Israel's laws would be 'wisdom' to the Gentiles (Dt.4:5 – 8). And when Israel went into captivity among the Gentile empires, the most tangible impact the Israelites had on their Gentile environments was empire-wide policies to care for the poor. In Egypt, Joseph cared for all of Egypt and the peoples roundabout, benefiting especially 'the little ones' (Gen.47:24). In Babylon, Daniel told Nebuchadnezzar to show 'mercy to the poor' throughout the Babylonian Empire (Dan.4:27).

Jesus transformed the 'people on the land' experience to a 'people around the table' experience with regards to wealth and community (Lk.6:21 – 49; 12:13 – 34; 14:7 – 35; 16:19 – 31; 18:15 – 19:10). The apostle Paul envisioned the geographically far-flung church as one community journeying through a 'wilderness period' together, relying on God's provision, waiting for a new 'promised land' when Jesus returns (2 Cor.8 – 9). He concretely believed that the Gentile Christians should share resources with the poverty-stricken Jewish Christians in Jerusalem and Judea. He reasoned, for one, that all Christians are informed by Jesus as exemplar – Jesus, who 'though He was rich, yet for your sake He became poor, so that you through His poverty might become rich' (2 Cor.8:9). Paul also reasoned that all Christians live in a period of God's timeline akin to biblical Israel's time in the wilderness, when God gave provision roughly equally to all His people, and all received a daily share of manna. Paul said:

'For this is not for the ease of others and for your affliction, but by way of equality – at this present time your abundance being a supply for their need, so that their abundance also may become a supply for your need, that there may be equality; as it is written, 'He who gathered much did not have too much, and he who gathered little had no lack.'" (2 Cor.8:13 – 15, quoting Ex.16:18)

In other words, Paul reminds Christians that God is generous, too, and will richly provide for their needs (not all their wants or wishes) (2 Cor.8:10 – 15). The apostle's quotation from the manna story in Exodus seems quite strategic: God gave manna to Israel to provide their daily needs. So also God gives to all His people, including through His people.

Discerning how Old Testament principles might be applied beyond Old Testament Israel is not a simple matter. Nevertheless, with such a rich resource for a broad social ethic regarding children and families, why do conservative evangelical American Protestants, in particular, ignore most of this tapestry? Roman Catholics, by contrast, stress the 'seamless garment of life,' and in the Catholic Social Teaching, take a more holistic approach to social policy.

American Protestant evangelicals, and perhaps Christians in the U.S. in general, have a tradition of interpreting wealth as *reward*, and not as *gift*. Much of the credit for this goes to John Locke, Enlightenment philosopher, political economist, and dominant influence on the framers of the United States Constitution. Since white Protestants could not look to the Catholic Popes' 'Doctrine of Discovery'¹⁸⁴ as their justification for seizing Native land, they turned to a new interpretation of the biblical text. In his work, *Second Treatise of Civil Government*, Locke draws out his notion of 'property' and those entitled to property from his novel reading of Genesis 1.

'God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniencies [sic] of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, (and labour was to be his title to [land];) not to the fancy or covetousness of the quarrelsome and contentious.'¹⁸⁵

Locke argued that according to Genesis 1, God gave land in common at first, but intended a shift of ownership to those who practice a certain kind of 'labor.' In Locke's mind, God's command to subdue and cultivate the land was synonymous with European-style settled agriculture and 'improvement.' For Locke, labor entitled people to

¹⁸⁴ The 'Doctrine of Discovery' refers to a body of Papal declarations from 1452 into the early 1500's. They began with Pope Nicholas V, *Papal Bull Dum Diversas of June 18, 1452*, who said: 'We...granted among other things free and ample faculty to the aforesaid King Alfonso — to invade, search out, capture, vanquish, and subdue *all Saracens and pagans* whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, *and all movable and immovable goods* whatsoever held and possessed by them *and to reduce their persons to perpetual slavery*, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and to convert them to his and their use and profit.' Translation sourced via <http://www.doctrineofdiscovery.org/> (emphasis mine)

¹⁸⁵ John Locke, *Second Treatise of Civil Government* Chapter 5, Section 41

property because, in his reading of Scripture, God did not want the land to remain ‘uncultivated’ and ‘wild’, but wanted the land to be used for ‘fruitful’ production. Therefore, Locke asserted that land should be given to those who are ‘industrious’ and ‘rational’ – those capable of ‘working the land.’

Correspondingly, Locke intentionally misrepresented Native Americans, even though he had better information in his own personal library,¹⁸⁶ becoming one of the first white people to accuse non-white people of ‘laziness.’ He said they were not entitled to the land because they did not ‘labor in’ or ‘improve’ it.¹⁸⁷ Using the white European as the exemplar of labor and industry, Locke asserted that Native Americans waste the gift of rich lands. In his view, they refused to improve it by labor.

The tradition which followed John Locke leads American Protestants, especially, to have a retributive ethic in public life, in general. They often take the view that economic hardship is the appropriate consequence for those who choose to have sex and risk getting pregnant. They tend to feel especially unsympathetic to single women who become sexually active. To them, economic hardship is the minimum deserved consequence for committing fornication and getting pregnant outside of marriage. Roman Catholics, by contrast, also stress the ‘seamless garment of life,’ and in the Catholic Social Teaching, take a more holistic approach to social policy.

Prior to John Locke, Christians read Genesis 1 very differently. They learned from Genesis 1 that every human being was supposed to have a share of ‘dominion’ in creation, and be nourished by creation, as well.

Basil of Caesarea (329 – 379 AD): ‘That bread which you keep belongs to the hungry; that coat which you preserve in your wardrobe, to the naked; those shoes which are rotting in your possession, to the shoeless; that gold which you have hidden in the ground, to the needy. Wherefore, as often as you were able to help others, and refused, so often did you do them wrong.’¹⁸⁸

Gregory of Nyssa (c.335 – c.395 AD): ‘You condemn a person to slavery whose nature is free and independent, and in doing so you lay down a law in opposition to God, overturning the natural law established by Him. For you subject to the yoke of slavery one who was created precisely to be a master of the earth, and who was ordained to rule by the creator, as if you were deliberately attacking and fighting against the divine command... What price did you put on reason? How [much money] did you pay as a fair price for the image of God? For how [much money] have you sold the nature specially formed by God? God said, ‘Let us make man in our image and likeness.’’¹⁸⁹

Ambrose of Milan (340 – 397 AD): ‘When giving to the poor, you are not giving him what is yours; rather, you are paying him back what is his. Indeed, what is common to all, and has been given to all to make use of, you have usurped for yourselves alone. The earth belongs to all, and not only to the rich... You are paying back, therefore, your debt; you are not giving gratuitously what you do not owe.’¹⁹⁰

¹⁸⁶ Morag Barbara Arneil, ‘*All the World Was America*’: *John Locke and the American Indian* (University College London, 1992), <http://discovery.ucl.ac.uk/1317765/1/283910.pdf> in this doctoral dissertation shows how Locke relied very selectively on travel journals and books in his library for information about Native Americans to portray them unfavorably.

¹⁸⁷ Locke, Ch. 5, Sec. 41(emphasis mine): ‘There cannot be a clearer demonstration of any thing, than several nations of the Americans are of this, who are rich in land, and poor in all the comforts of life; whom nature having furnished as liberally as any other people, with the materials of plenty, i.e. a fruitful soil, apt to produce in abundance, what might serve for food, raiment, and delight; yet for want of improving it by labour, have not one hundredth part of the conveniencies we enjoy: and a king of a large and fruitful territory there, feeds, lodges, and is clad worse than a day-labourer in England.’

¹⁸⁸ Cited in Charles Avila, *Ownership: Early Christian Teaching* (Eugene, OR: Wipf and Stock, 1983). See also *Saint Basil the Great On Social Justice*, edited and translated by C. Paul Schroeder (Yonkers, NY: St. Vladimir’s Seminary, 2009), p.69 – 70: ‘‘But whom do I treat unjustly,’ you say, ‘by keeping what is my own?’ Tell me, what is your own? What did you bring into this life? From where did you receive it? It is as if someone were to take the first seat in the theater, then bar everyone else from attending, so that one person alone enjoys what is offered for the benefit of all in common — this is what the rich do. They seize common goods before others have the opportunity, then claim them as their own by right of preemption. For if we all took only what was necessary to satisfy our own needs, giving the rest to those who lack, no one would be rich, no one would be poor, and no one would be in need.’

¹⁸⁹ Gregory of Nyssa, *Fourth Homily on Ecclesiastes*. Quoted by Charles Avila. Note Gregory of Nyssa’s reasoning from Genesis 1 and ‘creation theology.’

¹⁹⁰ Quoted by Charles Avila. See also Ambrose of Milan, quoted by Upton Sinclair, *The Cry for Justice: An Anthology of Social Protest* (1915): ‘How far, O rich, do you extend your senseless avarice? Do you intend to be the sole inhabitants of the earth?’

John Chrysostom of Constantinople (340 – 407 AD): ‘Are not the earth and the fullness thereof the Lord’s? If, therefore, our possessions are the common gift of the Lord, they belong also to our fellows, for all the things of the Lord are common.’¹⁹¹

Augustine of Hippo (354 – 430 AD): ‘The superfluities of the rich are the necessities of the poor. They who possess superfluities, possess the goods of others.’¹⁹²

Gregory I of Rome (c.540 – 604 AD): ‘In vain do they think themselves innocent who appropriate to their own use alone those goods which God gave in common; by not giving to others that which they themselves receive, they become homicides and murderers, inasmuch as in keeping for themselves those things which would alleviate the sufferings of the poor, we may say that every day they cause the death of as many persons as they might have fed and did not. When, therefore, we offer the means of living to the indigent, we do not give them anything of ours, but that which of right belongs to them. It is less a work of mercy which we perform than the payment of a debt.’¹⁹³

Thomas Aquinas (1225 – 1274 AD), the most esteemed of Roman Catholic medieval theologians, continued this interpretation: ‘In cases of need, all things are common property. There is no sin in taking private property when need has made it common.’¹⁹⁴

The quotes above demonstrate the Orthodox and Catholic stance on Genesis 1, that God gifted the earth to all human beings in common, *before* they did any work or technological development, and *whether* they did any at all. This stable tradition of interpretation confirms that John Locke’s view of Genesis 1, and all Protestants who followed him, were following a specific Protestant error. John Locke effectively reversed the entirety of the Christian tradition before him. Locke believed that there was no sin in taking what was held in common or even privately, whereas the Christian leaders before him called that attitude ‘pagan.’

Inflated Child-Raising Costs as Symptom of the American Racist-Reward Heresy

How, then, might social policies be enacted which would simultaneously reflect biblical concerns and also make child-raising more affordable, even for single mothers, to lower abortion rates? I examine the American housing market as an example.

Eamonn Fingleton, a writer for *Forbes*, examines Germany’s housing policy as a helpful contrast to housing policies across the United States. Fingleton’s title grabs one’s attention: *In World’s Best-Run Economy, House Prices Keep Falling – Because That’s What House Prices Are Supposed To Do*. As of 2012, German house prices had decreased by 10 percent decrease in real terms compared to 1982. That compares to the UK, where real prices rose by more than 230 percent in the same period.¹⁹⁵ How did Germany accomplish this? And why?

Why do you drive out the fellow sharers of nature, and claim it all for yourselves? The earth was made for all, rich and poor, in common. Why do you rich claim it as your exclusive right? The soil was given to the rich and poor in common—wherefore, oh, ye rich, do you unjustly claim it for yourselves alone? Nature gave all things in common for the use of all; usurpation created private rights. Property hath no rights. The earth is the Lord’s, and we are his offspring. The pagans hold earth as property. They do blaspheme God.’

¹⁹¹ Quoted by Charles Avila. See also Robert Van de Weyer, *On Living Simply: The Golden Voice of John Chrysostom* (Ligouri, MO: Ligouri Publications, 1996)

¹⁹² Augustine of Hippo, *Expositions on the Book of Psalms in Six Volumes*, trans. T. Scratton, Rev. H. M. Wilkins, and Rev. H. Walford, in *A Library of Fathers of the Holy Catholic Church* (Oxford: John Henry Parker, 1849-57), exposition on Psalm 147.12; also quoted by Upton Sinclair, p.398. Kate Ward, ‘Porters, Catapults, Community, and Justice: Augustine on Wealth, Poverty, and Property,’ *New Theology Review*, Sep 2013 provides an impressive, concise, and thorough summary of Augustine of Hippo’s teachings on wealth and ownership.

¹⁹³ Quoted in George D. Herron, *Between Caesar and Jesus* (1899), p.111 – 112

¹⁹⁴ Thomas Aquinas, *Summa Theologica*, Second Part of the Second Part, Question 66, Article 7

¹⁹⁵ Eamonn Fingleton, ‘In World’s Best-Run Economy, House Prices Keep Falling -- Because That’s What House Prices Are Supposed To Do,’ *Forbes*, February 2, 2014; <https://www.forbes.com/sites/eamonnfingleton/2014/02/02/in-worlds-best-run-economy-home-prices-just-keep-falling-because-thats-what-home-prices-are-supposed-to-do/#7a871d4d6ad0>

Germany views housing as part of the present and future labor market. Housing is linked to the present labor market because people need to be able to move to another city or region to take a new job, so Germany incentivizes people to rent and not own. Housing is also linked to the future labor market because parents care about the quality of local schools available to their children. Therefore, Germany's policymakers oversee new development very carefully.

'A key to the story is that German municipal authorities consistently increase housing supply by releasing land for development on a regular basis. The ultimate driver is a central government policy of providing financial support to municipalities based on an up-to-date and accurate count of the number of residents in each area.'¹⁹⁶

This carefully managed system results in developers working under different incentive structures than in the U.S.:

'In the German system moreover, house-builders rarely accumulate the huge large land banks that are such a dangerous distraction for U.S. house-builders like Pulte Homes, D. R. Horton, Lennar, and Toll Brothers. German house-builders just focus on building good-quality homes cheaply, secure in the knowledge that additional land will become available at reasonable cost when needed.'¹⁹⁷

The German approach to housing compares favorably with the American housing market, which is often imagined to be a 'private market' – but wrongly so. In reality, American housing patterns have been thoroughly shaped by white supremacist government policies designed to keep whites and non-whites segregated so that white people could own homes, and have those homes appreciate in value. The construction of 'whiteness' out of the various European ethnic groups is itself a fascinating and troubling story, which has its origins in Christian heresy – specifically, in fears that Jews were lying about conversion when pressured by the Spanish Inquisition,¹⁹⁸ and in colonialism when a new form of identification became possible.¹⁹⁹ This distinctly American pattern, which was always a government-funded and government-backed effort controlled by white supremacists, has now backfired and threatens to reduce most of the American population to a state of desperate indebtedness, where children are seen as the biggest of all economic liabilities.

White supremacists influenced housing policy at the federal, state, and municipal levels to make racial segregation the norm. Franklin Delano Roosevelt created the Federal Housing Administration with the support of Southern Democrats who were white supremacists. They required the FHA to have a whites-only stipulation.²⁰⁰ The FHA was committed to racially segregated schools, warning that if children

'are compelled to attend school where the majority or a considerable number of the pupils represents a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist.'²⁰¹

¹⁹⁶ Ibid

¹⁹⁷ Ibid

¹⁹⁸ J. Kameron Carter, *Race: A Theological Account* (Oxford: Oxford University Press, 2008) explains how biblical Israel was a multi-ethnic faith, but Jewishness was interpreted according to the 'blood theory of race' in Spain during the Spanish Inquisition and henceforth.

¹⁹⁹ Willie James Jennings, *The Christian Imagination: Theology and the Origins of Race* (New Haven, CT: Yale University Press, 2010) discusses how Christian missionaries and theologians interpreting Americans and Africans developed the modern theories of 'race' with which we now interact, as well as assumptions and stereotypes about intelligence and culture. For a brief summary of Jennings' work, see Sangwon Yang and Mako A. Nagasawa, 'How "Race" Emerged from Colonialism | A Long Repentance Post #4,' *New Humanity Institute* blog, October 22, 2018; <https://newhumanityinstitute.wordpress.com/2018/10/22/how-race-emerged-from-colonialism-a-long-repentance-post-4-new-humanity-institute-sangwon-yang-mako-nagasawa/>

²⁰⁰ Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: W.W. Norton & Company, 2017), p.64 – 65 notes that in 1934, the FHA 'insured bank mortgages that covered 80 percent of purchase prices, had terms of twenty years, and were fully amortized. To be eligible for such insurance, the FHA insisted on doing its own appraisal of the property to make certain that the loan had a low risk of default. Because the FHA's appraisal standards included a whites-only requirement, racial segregation now became an official requirement of the federal mortgage insurance program.'

²⁰¹ Ibid, p.65 – 66

Local zoning laws required new homes to be single-family houses, rather than the multi-family houses that made houses more affordable because of rental income, which also enabled extended family-style living. The FHA, through ratings and ‘red-lining,’ influenced how much houses in these neighborhoods appreciated, and how much financing was available to people who lived in certain neighborhoods. After World War II, the Veterans Administration adopted the same standards as the FHA. So the federal government subsidized white flight into new suburbs, especially for white GI’s returning home from World War II. Black families received only 2% of those federally subsidized loans from 1945 – 1959. By 1968, when Congress passed the Fair Housing Act and authorized the Department of Housing and Urban Development to try to undo some of the racial segregation built into the fabric of American home ownership, white families had a \$120 billion head start.

Earlier legal discrimination in the private housing market – such as racially restrictive covenants written into the deed, preventing a new buyer from selling the house to a black person – also played a major factor, of course.²⁰² So did intimidation, violence, and police complicity in keeping black people out of ‘white neighborhoods.’²⁰³ Generations later, wealth leveraged by homeownership is still the number one reason why white people have so much wealth, and black people do not.²⁰⁴ The number one factor in building wealth is not getting a college degree.²⁰⁵ It is not raising children in a two-income married household.²⁰⁶ It is not working more or spending less.²⁰⁷ It is the leverage that white families have through home ownership, including through this decades-long affirmative action government program for white people to create white suburbs.²⁰⁸ This pattern of residential

²⁰² Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1993). See also Christopher Silver, ‘The Racial Origins of Zoning in American Cities,’ edited by Manning Thomas, June and Marsha Ritzdorf, *Urban Planning and the African American Community: In the Shadows* (Thousand Oaks, CA: Sage Publications, 1997); <https://www.asu.edu/courses/aph294/total-readings/silver%20-%20racialoriginsofzoning.pdf>.

²⁰³ Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: W.W. Norton & Company, 2017), ch.9

²⁰⁴ E.g. In Boston, ‘Close to 80% of whites own a home, whereas only one-third of U.S. blacks... are homeowners’ according to Ana Patricia Munoz, et.al., ‘The Color of Wealth in Boston,’ *Federal Reserve Bank of Boston*, March 25, 2015; <https://www.bostonfed.org/publications/one-time-pubs/color-of-wealth.aspx>; Laura Shin, ‘The Racial Wealth Gap: Why A Typical White Household Has 16 Times The Wealth Of A Black One,’ *Forbes*, March 26, 2015; <https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#28960fda1f45>; Chuck Collins, ‘The Wealthy Kids Are Alright,’ *The American Prospect*, May 28, 2013; <http://prospect.org/article/wealthy-kids-are-all-right>.

²⁰⁵ Amy Traub, Catherine Ruetschlin, Laura Sullivan, Tatjana Meschede, Lars Dietrich, and Thomas Shapiro, ‘The Racial Wealth Gap: Why Policy Matters,’ *Demos and the Brandeis University Institute for Assets and Social Policy*, June 21, 2016; <http://www.demos.org/publication/racial-wealth-gap-why-policy-matters> find that equalizing college graduation rates between whites and people of color would close the wealth gap by 1 percent for blacks and 3 percent for Latinos. S. Michael Gaddis, ‘Discrimination in the Credential Society: An Audit Study of Race and College Selectivity in the Labor Market,’ *Oxford Academic Social Forces Journal*, Volume 93, Issue 4, June 2015; <https://doi.org/10.1093/sf/sou111> finds blacks who graduated from elite universities have the same chance in the job market as whites who graduated from less selective schools. In addition, black graduates are offered lower starting salary and less prestigious starting jobs.

²⁰⁶ 15.2 million children living in poverty also live in married, two-parent families. 16.7 million live with one parent. See NBC News, ‘Family Income – Not Married Parents – More Apt to Impact Kids’ Well-Being,’ *NBC News*, February 27, 2015; <https://www.nbcnews.com/health/health-news/family-income-not-family-structure-more-apt-impact-kids-lives-n313486>. Amy Traub, Laura Sullivan, Tatjana Meschede, and Tom Shapiro, ‘The Asset Value of Whiteness: Understanding the Racial Wealth Gap,’ *Demos and Institute of Assets and Social Policy at Brandeis University*, 2017; <http://iasp.brandeis.edu/pdfs/2017/AssetValue.pdf>, p.7 – 8 find, ‘According to data from the Survey of Consumer Finances, the median white single parent has 2.2 times more wealth than the median black two-parent household and 1.9 times more wealth than the median Latino two-parent household.’ See also Emily Badger, ‘Children With Married Parents Are Better Off — But Marriage Isn’t the Reason Why,’ *Washington Post*, September 8, 2014; <https://www.washingtonpost.com/news/wnk/wp/2014/09/08/children-with-married-parents-are-better-off-but-marriage-isnt-the-reason-why/> summarizing Kimberly Howard and Richard V. Reeves, ‘The Marriage Effect: Money or Parenting?’, *Brookings Institute*, September 4, 2014; <https://www.brookings.edu/research/the-marriage-effect-money-or-parenting/>

²⁰⁷ Noah Smith, ‘How to Reduce the Black-White Wealth Gap,’ *Bloomberg*, April 23, 2018; <https://www.bloomberg.com/view/articles/2018-04-23/how-to-reduce-the-black-white-wealth-gap> features very good household data, though his proposal needs further consideration and is certainly not the only form of reparations being considered.

²⁰⁸ Amy Traub, Laura Sullivan, Tatjana Meschede, and Tom Shapiro, ‘The Asset Value of Whiteness: Understanding the Racial Wealth Gap,’ *Demos and Institute of Assets and Social Policy at Brandeis University*, 2017; <http://iasp.brandeis.edu/pdfs/2017/AssetValue.pdf>; Peter Coy, ‘The Big Reason Whites Are Richer Than Blacks in America,’ *Bloomberg Businessweek*, February 8, 2017; <https://www.bloomberg.com/news/articles/2017-02-08/the-big-reason-whites-are-richer-than-blacks-in-america>

segregation laid the foundation for vastly different experiences of public schooling and educational opportunity, home equity and wealth building, crime and policing, local political power and voice, exposure to environmental pollution and health outcomes, stress, etc.

Over time, this economic philosophy combining home ownership and loose financing shifted enormous power from consumers to banks, which led to gross distortions in the housing market, along with the steady erosion of opportunities to own a home. Two additional legal changes in how we treat mortgage debt happened in the 1970's: (1) The Equal Credit Opportunity Act which allowed banks to calculate mortgage eligibility based on two incomes rather than just one; and (2) the federal tax code was changed so people could deduct interest on mortgages, which not only distorts the housing market, but benefits the wealthy and penalizes the poor.²⁰⁹ This incentivized people to take on more debt. Real estate developers simply built bigger, more expensive houses.²¹⁰

1950: 983 square feet
1960: ~1200
1970: ~1400
1980: almost 1800
1990: ~2100
2000: almost 2400
2008: 2519

Do the extra home office, guest room, and wine cellar contribute that much to happiness? Were Americans that unhappy with smaller homes in the 1950's to 1970's? I doubt it. People were (and are) not just trying to get into one nice house. They are looking to buy an entire experience: a place in a respectable community with a good school, and hopefully, growing home equity to pay for their kids' college tuition. This is, in part, a gamble. With residential segregation already built on a racist foundation, and public schools dependent on local property taxes, developers could charge vastly more for these houses, and banks implicitly colluded with them. For some white people, even the desegregation of public community swimming pools was too much: They built private, backyard swimming pools and private club pools.²¹¹ The price of housing skyrocketed:

²⁰⁹ Tax Policy Center, *Urban Institute* and *Brookings Institution*, <https://www.taxpolicycenter.org/briefing-book/what-are-tax-benefits-homeownership> explain, 'The deductions and exclusions available to homeowners are worth more to taxpayers in higher tax brackets than to those in lower brackets. For example, deducting \$2,000 for property taxes paid saves a taxpayer in the 39.6 percent top tax bracket \$792, but saves a taxpayer in the 15 percent bracket only \$300. *Additionally, even though they only represent about 20 percent of all tax units, those with more than \$100,000 in income receive over 85 percent of the mortgage interest deduction tax benefits. That difference results largely from three factors: compared with lower-income homeowners, those with higher incomes face higher marginal tax rates, typically pay more mortgage interest and property tax, and are more likely to itemize deductions on their tax returns.*' (emphasis mine) Seth Hanlon, 'The Mortgage Interest Deduction,' *Center for American Progress*, January 26, 2011; <https://www.americanprogress.org/issues/general/news/2011/01/26/8866/tax-expenditure-of-the-week-the-mortgage-interest-deduction/> also points out, 'Households with incomes between \$40,000 and \$75,000 receive, on average, \$523 from the mortgage interest deduction. Households with incomes above \$250,000 receive \$5,459, or more than 10 times as much.' See also Jonathan Chait, 'How Conservatives Tax the Poor,' *The New Republic*, April 1, 2011; <https://newrepublic.com/article/86132/how-conservatives-tax-the-poor> and Derek Thompson, 'The Shame of the Mortgage-Interest Deduction,' *The Atlantic*, May 14, 2017; <https://www.theatlantic.com/business/archive/2017/05/shame-mortgage-interest-deduction/526635/>.

²¹⁰ Average home size data distilled from U.S. census data, <http://www.census.gov/const/C25Ann/sfttotalmedavgsgft.pdf>; http://switchboard.nrdc.org/blogs/kbenfield/us_home_size_preferences_final.html

²¹¹ Jeff Wiltse, *Contested Waters: A Social History of Swimming Pools in America* (Chapel Hill, NC: The University of North Carolina Press, 2007); see also Yoni Appelbaum, 'McKinney, Texas, and the Racial History of American Swimming Pools,' *The Atlantic*, June 8, 2015; <https://www.theatlantic.com/politics/archive/2015/06/troubled-waters-in-mckinney-texas/395150/> summarizing the trend says, 'Backyard pools and private clubs only proliferated after municipal pools were forcibly desegregated.'



Meanwhile, people in lower-income brackets suffered because:

‘Beginning in the 1980s, under President Ronald Reagan and his successors, the US government departed sharply from earlier policies... Between 1980 and 1988, the Reagan administration decreased funding for the Department of Housing and Urban Development (HUD), the federal government body that oversees public housing, by 76%. Predictably, when the government began to starve public housing programs of necessary resources, public housing infrastructure deteriorated and quality of life for many residents declined.’²¹²

There is economic truth in the adage, ‘When white America catches a cold, black America catches pneumonia.’ The financial crisis of 2008 – 09 disproportionately devastated black and brown homeownership and wealth.²¹³

	White (median household)	Black (median household)
2005	\$134,992	\$12,124
2009	\$113,149	\$5,677

Moreover, we are now seeing more American citizens squeezed by this economic philosophy which originated in white supremacy, creating a hidden welfare system for many white people who believed that their wealth was the

²¹² Tiffany M. Gardner, Alec Irwin, and Curtis W. Peterson, ‘No Shelter From the Storm: Reclaiming the Right to Housing and Protecting the Health of Vulnerable Communities in Post-Katrina New Orleans,’ *Health and Human Rights Journal*, August 29, 2013 note, by contrast, ‘The Housing Act of 1949 [called] for the government to realize “as soon as feasible... the goal of a decent home and a suitable living environment for every American family.” Federal legislation over the next several decades continued to support public housing and the government’s role in maintaining it. By 1973, the US had more than 1.5 million units of subsidized housing, a threefold increase from 1961.’ <http://www.hhrjournal.org/2013/08/29/no-shelter-from-the-storm-reclaiming-the-right-to-housing-and-protecting-the-health-of-vulnerable-communities-in-post-katrina-new-orleans/>

²¹³ Jamelle Bouie, ‘The Crisis in Black Homeownership,’ *Slate*, July 24, 2014; <https://slate.com/news-and-politics/2014/07/black-homeownership-how-the-recession-turned-owners-into-renters-and-obliterated-black-american-wealth.html> observes, ‘In 2005, three years before the Great Recession, the median black household had a net worth of \$12,124. Yes, this was far behind the median white household—which had a net worth of \$134,992—but it was a huge improvement from previous decades, in which housing discrimination made wealth accumulation difficult (if not impossible) for the large majority of African-American families. By the official end of the recession in 2009, median household net worth for blacks had fallen to \$5,677—a generation’s worth of hard work and progress wiped out. (The number for whites, by comparison, was \$113,149.) Overall, from 2007 to 2010, wealth for blacks declined by an average of 31 percent, home equity by an average of 28 percent, and retirement savings by an average of 35 percent. By contrast, whites lost 11 percent in wealth, lost 24 percent in home equity, and gained 9 percent in retirement savings. According to a 2013 report by researchers at Brandeis University, “half the collective wealth of African-American families was stripped away during the Great Recession.”’

result of individual hard work, and a ‘you’re on your own’ posture turned against others. That ‘you’re on your own’ posture has now been deployed against the general population, as the Democratic New Deal policies that protected labor and the consumer, and created the white middle class, have gradually been eroded. The Federal Reserve Bank’s quantitative easing policy kept housing prices artificially inflated, rewarding boomer homeowners but penalizing asset-poor, already indebted millennials.²¹⁴ The fact that foreigners (Chinese businessmen, investors from Canada, the U.K., Mexico, and India, and oil oligarchs from Russia and Saudi Arabia) can purchase real estate in the U.S. – often with the very dollars that the U.S. Treasury uses to repay its own debt to them – further overheats the housing market, placing home ownership further out of reach for the average American while foreigners pay for a home, completely, with cash. The U.S. housing market is, in principle, an international market at the expense of American citizens. Absolutely reliable data is hard to come by, as money sources can be disguised, but as of 2014, foreigners purchased 35% of all American real estate purchases, spending roughly \$92.2 billion.²¹⁵ In 2017, even despite a strong dollar, foreigners bought real estate in the U.S. at record levels: \$153 billion of real estate, an increase of 49% over the previous year.²¹⁶ John S. Allen, after observing the same push for home ownership in the U.K. under Margaret Thatcher, and the same problems resulting, argues that big banks exploit a human psychological desire for security and status.²¹⁷

Does making child-raising more affordable, through measures like this, or a ‘Housing First’ approach, reduce the rate of abortions? We might take a lesson from German policies framing their housing and banking systems. As of 2010, Germany’s abortion rate for women aged 15 – 44 years was 6.1 abortions per 1,000.²¹⁸ As of 2011, the U.S. abortion rate for women aged 15 – 44 years was just under 17 abortions per 1,000 – almost three times higher. On the one hand, it may be statistically very difficult to calculate exactly how much the pressures associated with the cost of living and the cost of child-raising – housing in particular – contribute to women getting abortions. On the other hand, it is fairly intuitive that there is a real relationship there.

No discussion of child-raising in America would be complete without at least mentioning the problem of overwhelming college student loan debt, and now, health care debt. In economic terms, there is asymmetrical information and an element of gambling involved with both higher education and health care. People feel enormous pressure to buy a college education or top-quality health care, even though no one is certain how much these products should cost. People are risking their children’s future and their own lives; they are therefore willing to pay a lot of money. When a college raises tuition, a drug company charges a high price for medicine, or a hospital, a high price for a procedure, people feel more compelled to pay the cost because of groupthink: The education or the health care must be worth the cost because otherwise, why would they be charging so much? Not surprisingly, in higher education, third party lenders – either the Department of Education or a private bank – are willing to make sizable loans to the student, so colleges and universities, in turn, *simply raise their tuition*. For every dollar the

²¹⁴ Mike Shedlock, ‘Ben Bernanke – The Father of Extreme US Socialism,’ *FX Street*, March 4, 2019; <https://www.fxstreet.com/analysis/ben-bernanke-the-father-of-extreme-us-socialism-201903040305> summarizes an article by David McWilliams, ‘Quantitative Easing was the Father of Millennial Socialism,’ *Financial Times*, March 1, 2019; <https://www.ft.com/content/cbed81fc-3b56-11e9-9988-28303f70fcff>. Shedlocks writes, ‘McWilliams notes that Fed chairman Ben Bernanke’s “cash for trash” QE scheme drove up asset prices and bailed out the baby boomers. The cost of course, was pricing millennials out of the housing market. Unorthodox policy penalizes the asset poor. What assets do millennials have? Hardly any. Instead they are saddled with mountains of student debt which, thanks to president George W. Bush, could no longer be discharged in bankruptcy. The Bankruptcy Reform Act of 2005 would have better been called the Debt Slave Act of 2005. Then, when the Great Financial Crisis hit, the Fed came along bailed out the banks, bailed out the bondholders, bailed out Fannie Mae, and bailed out the asset holders in general, leaving millennials mired in debt unable to afford a house.’

²¹⁵ Kenneth Rapoza, ‘These Are The Foreigners Buying Up American Real Estate,’ *Forbes*, July 10, 2014; <https://www.forbes.com/sites/kenrapoza/2014/07/10/these-are-the-foreigners-buying-up-american-real-estate/#656b48f43876>

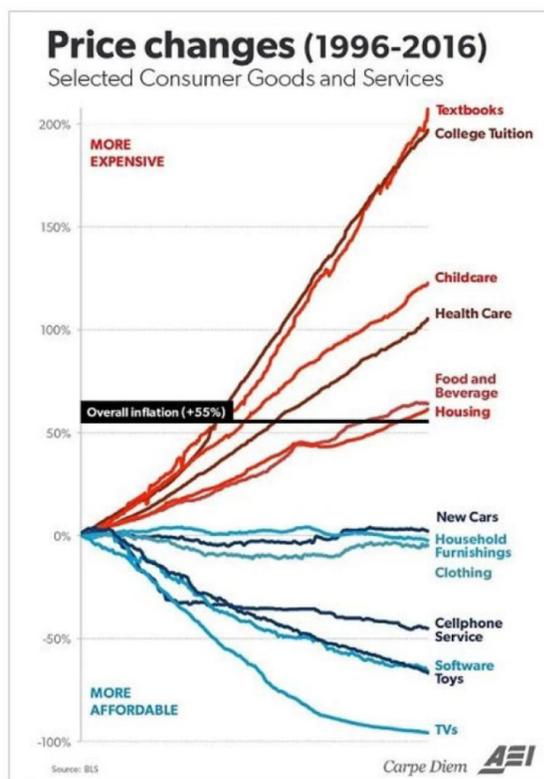
²¹⁶ Diana Olick, ‘Foreigners Snap Up Record Number of US Homes,’ *CNBC*, July 18, 2017; <https://www.cnbc.com/2017/07/18/foreigners-snap-up-record-number-of-us-homes.html>. For more information, see Matt Levin, ‘Data Dig: Are Foreign Investors Driving Up Real Estate in Your California Neighborhood?’ *CALMatters*, March 7, 2018; <https://calmatters.org/articles/data-dig-are-foreign-investors-driving-up-real-estate-in-your-california-neighborhood/>

²¹⁷ John S. Allen, ‘The Big Home Ownership Lie: Greed, Fear, and How the Big Banks Exploited a Human Need,’ *Salon*, January 10, 2016; https://www.salon.com/2016/01/09/the_big_home_ownership_lie_greed_fear_and_how_the_big_banks_exploited_a_human_need/

²¹⁸ United Nations, World Abortion Policies 2013; <https://www.un.org/en/development/desa/population/publications/policy/world-abortion-policies-2013.asp>. Retrieved May 30, 2019

government gives in Pell Grants, colleges simply raise tuition by 55 – 65 cents.²¹⁹ Prices rise to consume the available debt. Universities expand their real estate footprint, build dorms, make their dining services more expensive, etc. In health care, the American people are \$1 trillion in medical debt.²²⁰

Significantly, indebtedness itself is the result of another Protestant heresy. John Calvin, in his *De Usuris*, was the first major Christian theologian to argue that usury – the charging of *any* interest rate on a loan – was acceptable. To Calvin’s credit, he also tried to place caps on interest rates. But those caps proved to be based on thin sentiments which erected no real bulwark. Eventually, a predatory ‘buyer beware’ logic took hold. This violates everything the Bible teaches about usury as a form of extortion (Ex.22:25; Lev.25:35 – 38; Dt.23:19; Ps.15:1 – 5; Pr.28:7 – 9; 22:7; Ezk.18:8 – 9; 22:12; Hab.2:6 – 8; Neh.5:7 – 12; see also the ethics of forgiving debts in Dt.15:1 – 18; Mt.5:42; 6:12), especially of the poor in times of their misfortune. I have discussed this elsewhere in more depth.²²¹ Suffice to say here that we can draw a line connecting John Calvin to the financial crisis of 2008 – 09 and the rising cost of major expenses having to do with life and child-raising, the things on which we find it very difficult to put a price tag. Not surprisingly, when consumers are willing to go into debt for certain things, those who sell those things raise their prices.



²¹⁹ Bonnie Kristian, ‘Study: Federal Student Loans Increase Tuition, Not Enrollment,’ *The Week*, July 7, 2015; <https://theweek.com/speedreads/565036/study-federal-student-loans-increase-tuition-not-enrollment>. See also David O. Lucca, Taylor Nadauld, and Karen Shen, ‘Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs,’ *Federal Reserve Bank of New York Staff Reports*, July 2015; https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf.

²²⁰ Jerry Ashton, Robert Goff, Craig Antico, Judah Freed, *End Medical Debt: Curing America’s \$1 Trillion Unpayable Healthcare Debt* (Kauai, HI: Hoku House, 2018). See also Cenk Uyghur, ‘Medical Debt is Ravaging America,’ *The Young Turks Rebel HQ*, January 4, 2019; <https://www.youtube.com/watch?v=oafQ0H27fyQ>

²²¹ Mako A. Nagasawa, ‘Interpreting Jesus and Atonement – Practical Issue #8: Atonement, God’s Character, and Economic Justice (A Critique of Tim Keller),’ *New Humanity Institute* blog, September 22, 2015; <https://newhumanityinstitute.wordpress.com/2015/09/22/interpreting-jesus-and-atonement-practical-issue-8-atonement-gods-character-and-economic-justice-a-critique-of-tim-keller/>

The combination of John Locke's heretical teaching on land and John Calvin's heretical teaching on usury made for a lethal combination in the United States. This impacts the cost of child-raising, and in turn, the attractiveness or not of abortion. In these matters, and others, I believe a similar dynamic is present, rooted in the history of Protestant heresy and white supremacy in the United States. A hidden welfare system allows people who can pass as 'white' to believe their 'hard work' is the cause for all they enjoy in a 'pure meritocracy.' In health care, for example, Chris Ladd discusses how the government developed major American corporations during World War II, and crafted the policy of giving health insurance through corporate employers so corporations could write off the expense in the tax code. Meanwhile, employment discrimination against non-white people kept minorities out of both good jobs and the health care system.²²² Ladd calls this 'white socialism.' White people get government assistance, while everyone else gets 'meritocracy.'

This self-deception, or historical amnesia, as it were, allows white Americans – and perhaps white male evangelicals most of all – to believe that poor people are poor because they are lazy. The same mentality operates when women who seek abortions are held individually to blame for being promiscuous, and even worthy of criminal charges and punishment. Coupled with the 'myth of meritocracy' is the 'myth of heroic, white masculinity.' Perhaps there is a better explanation for why so many white evangelical men are so easily able to turn away from poor women and women of color. For it is those women who will bear the brunt of anti-abortion laws in their bodies one way or the other – either as mothers who attempt back-room abortions, or as mothers who receive little to no assistance raising a child – a child who will be perceived and treated as morally deserving of the hardship s/he inherits from the circumstances of her/his conception. Such an attitude is completely against both Old and New Testament ethics, where God regifted the garden land to all Israelites, preventing children from inheriting all the possible advantages and disadvantages their parents and grandparents gave (Lev.25), and where God declared in the new covenant that children will not suffer for the sins of their parents (Ezk.18). If there is a better explanation for these typically white, male evangelical attitudes and behaviors, then I am open to hearing it. But until then, the simplest, most reasonable explanation suffices: heresy.

To bring down abortion rates, not to mention to correct their complicity in heresy, conservative Christians should adopt much more family-friendly and child-friendly social policies, for all families, and for all children. They should support efforts by the Department of Housing and Urban Development to desegregate neighborhoods. They should support 'Housing First' programs wherever possible. They should support comprehensive reforms to the financial system and tax codes which either make home ownership more broadly affordable to all, or follow the German model of encouraging intergenerational wealth-building to occur outside of home ownership. They should abolish zoning laws that prevent multi-family housing. They should prevent foreign capital investors from buying American real estate. They should support government-funded childcare as the Scandinavian countries, or the Netherlands, do. They should support equal pay for equal work in the marketplace, so that single mothers can provide for their children more fairly. They should reform corporate law so that the pre-distribution of wages flows more equally, so that real wages increase. For example, they should tie executive pay to be a fixed multiple of the wages of the lowest paid custodial worker in the firm, so children of blue-collar workers benefit. They should set goals for all children to have access to green spaces and public parks. They should be for a public option for health insurance, recognizing that private, for-profit health insurance does not serve the public interest, and will not benefit all children. They should reinvest in public schools, from preschool to college, and close the opportunity gap. And so on.

I am persuaded that a fuller, deeper reading of Scripture, as well as both Jewish and Christian traditions, and a clear-eyed look at American law and law enforcement, produces for conservative evangelicals something they did not expect. It makes them feel a tender and painful uncertainty in the biological arena, where they expected to feel so certain, and so right. And it makes them feel a burning certainty in the socio-economic arena, where they did not expect to feel so heretical, and so very wrong.

²²² See for example Chris Ladd, 'Unspeakable Realities Block Universal Health Coverage In America,' *Forbes*, March 13, 2017; <https://www.forbes.com/sites/chrisladd/2017/03/13/unspeakable-realities-block-universal-health-coverage-in-the-us/#131ad46f186a> discusses how WWII led to a partnership between the government and corporations, and the crafting of a policy of giving health insurance through an employer so the corporation could write off the expense in the tax code, while employment discrimination against non-white people kept minorities out of the health care system.