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COMMENTARY

# Ethical Issues Concerning Organ Donation

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*The Duty to Protect, Abortion, and Organ Donation*[1] is an essay on transplantation that has as its premise: "For those who believe the fetus has full moral status, it is a given the fetus has all the rights of personhood. That includes the right not to be killed." The authors also presuppose that the obligations of a parent, who so believes, places "Responsibility on the parents to keep the fetus alive even at a cost to themselves." That cost, the authors propose extends to sacrificing one's own life to protect the life of the fetus. (No analysis is provided to support their proposition.)

Reading the essay reminds one of the 2013 interview of Pope Francis with Antonio Spadaro, SJ, in which the Pope commented, "If the Christian wants everything clear and safe, then he will find nothing."[2] He continued, "We cannot insist only on issues related to abortion, gay marriage and contraception." Such topics, he observed, "must be talked about in a context."

The desire of some to restrict the Church to a small band of likeminded ideologues is highlighted in an essay by Michael Moreland.[3] Moreland, a professor at Villanova Law School, began by noting, "Pernicious dual-loyalty arguments are a long-standing staple of anti-Catholic bigotry in American public life. That bigotry, he asserts, is found in the criticism that Judge Barrett, President Trump's nominee for a seat on the Supreme Court, "Is not Catholic like John F. Kennedy was Catholic." An opinion piece in *The New York Times* cites Greg Smith of the Pew Research Center that, "Catholic politicians have come a long way in their assimilation into American society since Kennedy's 1960 campaign speech to the Greater Houston Ministerial Association where Kennedy proclaimed 'I believe in an America where separation of church and state is absolute…where no Catholic prelate would tell the president (should he be Catholic) how to vote, and no Protestant minister would tell his parishioners for whom to vote'."[4]

Some 60 years after JFK's Houston speech, Smith opines, "No prelate, dead or alive, seems capable of influencing American Catholic politicians now." With the passage of over a half-century of assimilation of Catholics into American society, anti-Catholic bias had been greatly diminished. Remnants, however, may still be found in such comments as those of the authors of *The Duty to Provide* that "This is the sort of obligation to 'donate' that religious institutions such as those governed by the *Ethical and Religious Directives for Catholic Health Care Services* imply" or in the speech delivered at the 2020 Republic National Convention by former Notre Dame football coach, Lou Holtz who decried, "Former Vice-President Joseph Biden—and politician like him, who profess to be personally opposed to abortion but respect a woman's right to opt for the procedure—as 'Catholic in name only'."[5] Holtz' remarks were criticized in the same article by the President of Notre Dame, Rev. John Jenkins, C.S.C., with the observation, "We Catholics should remind ourselves that while we may judge the objective moral quality of another's actions, we must never question the sincerity of another's faith."

Mark Massa, S.J., the director of the *Boisi Center for Religion and American Public Life* at Boston College, is quoted in the article as saying, "It seems to me that making abortion not only the number one issue, but even *the only* issue in deciding whom to vote for, many U.S. bishops have crossed the sectarian line into a profoundly un-Catholic position, a position more about cultural warriorship than about moral theology." Massa reminds the reader of the need to comprehend the century's long traditions of Catholic moral theology to understand what "being a Catholic" means.

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That tradition ranges from the fourth century insights of Basil the Great, the thirteenth century teaching of Thomas Aquinas. The tradition also includes such well-known moral sixteenth century moralists as Domingo Bañez and Francisco de Victoria. There were also substantial contributions from such twentieth century moralists as Gerald Kelly, John C. Ford, Richard A. McCormick, James F. Keenan, Lisa Sowle Cahill, Kristin E. Heyer, and Josef Fuchs, each of whom not only mastered the prior traditions, but addressed such diverse moral issues as medicine, boxing, war, immigration, feminism, climate change, and new forms of reproduction.[6]

Justice Oliver Wendell Holmes in a lecture while an Associate Justice of the Massachusetts Supreme Judicial Court famously observed, "The life of the law has not been logic; it has been experience."[7] By "experience," Holmes explained he was discussing the proper method for understanding the law's evolution. That development, he tells us, is not formed by logical deductions from prior precedent, but by "the felt necessities of the times." Holmes continued that includes "Even the prejudices which judges share with their fellow men." These, he observed, are more significant than syllogisms [to] "determine the rules by which men should be governed."

It is clear that the authors of *The Duty to Protect* subscribe to a different understanding of the development of law from that of Holmes. They maintain moral rules on transplantation are derived from one's position on abortion. For them, "If you accept what they label the *highly contentious* thesis that at all points of fetal development the fetus has full moral status," several proportions follow. "The first is that there is no change in the moral status once the fetus is birthed—They [sic] were a full-on person all along."

The implication is reminiscent of a quip Barney Frank made early in his political career when he told an anti-abortion caucus of the Massachusetts House that they "believed life began at conception and ended at birth." Frank went on to note that the interest of those legislators in the welfare of a child seemed to be limited to the fetal stages. Post-birth, he observed, their interest in the well-being of the infant and child quickly dissipated.[8]

More important from a legal perspective was the U.S. Supreme Court's 1972 opinion in *Roe v. Wade*, that a fetus did not achieve the status of personhood until birth.[9] More significantly for the recognition of the role of the patient in decisionmaking was Justice Anthony Kennedy's statement in *The Planned Parenthood of Southeastern Pennsylvania v. Casey* that, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[10] This was seemingly the Supreme Court's adoption of John Stuart Mill's proclamation that "Over his mind and his body every man [and woman] is sovereign."[11]

The authors' position in *The Duty to Protect* emphasizes that parents' interest toward their fetus follows from the notion that the fetus has full moral status and the notion that there are "special obligations" of parents toward the fetus. (A "notion" is not a particularly firm foundation for such far reaching propositions.)

In today's environment, with its emphasis on personal autonomy, the authors' ideas are less and less frequently experienced as a "felt necessity." From the 1973 *Roe v. Wade* opinion onward, there has been no support by any American court for the proposition that a fetus at all times in its development has "full moral status." The prevailing standard among bioethicists in the United States, as well as in the American legal and the medical world, is that the Hippocratic belief that medical decisionmaking is the exclusive province of the physician is an outmoded theory. Hippocrates' perspective, Edmund Pellegrino, MD, noted in a classic essay entitled "The Metamorphosis of Medical Ethics," prevailed fairly much unchallenged in the Western World from the time of Hippocrates until about 1990.[12] It continues to be the prevailing standard on medical decisionmaking except in English speaking nations. In other countries, medical decisions are generally the domain not of the patient, but those of the physician.

The authors' reliance on Robert Grodin's position that "Obligations are derived from the relationship between a vulnerable person and the person to whom they are vulnerable" seems overly constrained. The authors own standard includes "the satisfaction of an individual's psychological interests." Their standard extends to the proposition that "the person upon whom they depend is obliged to protect those interests." What, one might inquire, is the limit, if any, to an individual's psychological interests?

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The authors of *The Duty to Protect* essay claim, "The duty to protect is violated when a protector fails to shield a protectee from preventable suffering." When applied to the authors' example of the "psychological interests" of the recipient, their' grasp seems to exceed their reach. Additionally, they propose that, "A procedure ought not present a significant risk to the life or well-being of the donor." That proposition clashes with their position that if a donor believes that a fetus at all times possess full moral statue, the donor must donate an organ, even at the risk of the donor's own life.

There is a lack of internal consistency in the authors' essay, e.g., they state *a captain* of a ship has a duty to protect their [sic] passengers even before they are onboard. The authors provide an explanation for their problematic proposal: "They [sic] have a duty to protect future passengers. Passengers may come and go, but anyone on the ship is entitled to some participation." It is a strange theory of "negligence" that implies a captain's duty to "passengers on a ship" includes those not on the ship, but who might be future passengers. The extreme reach of the authors' argument is found in their position that if abortion ought to be prohibited in all cases—even when it requires that the parent die—then the parent must donate organs, even if that "donation" foreshadows the parent's own death.

The medical ethics community had occasion to explore such topics when the transplant surgeons at the University of Chicago Hospital acquired the technical skill to perform human segmented liver transplantation. Before the procedure was attempted, the surgeons asked the director of the Hospital's Center for Clinical Ethics to explore the ethical issues involved in such a procedure.[13] A group of surgeons, bioethicists, social workers, and psychologists, labeled "a research-ethics consultation," convened a year-long series of seminars and discussions that were open to the entire community to examine potential issues. Among the areas of concern were the risks and benefits for recipients and donors, the selection process for both parties and the quality of consent required of both. In its deliberations, the research-ethics consultation team was guided by the insistence of Brigham Hospital's renowned Chief-of-Surgery, Francis Moore, who in an editorial in *JAMA* observed, "Surgical innovation required the "open display, public evaluation and discussion" of the ethical conduct of therapeutic innovations."[14]

Another risk that occasioned interest in the University of Chicago consultation was the substantial divorce rate among parents who donated a segmented liver to their child. The moral issue was "Is the cost of a family break-up to too high a price to justify the 'donation'?" A further concern was the pressure within a family for the altruistic "donation" of a needed organ. Since at the time a human segmented liver transplant had never been attempted, the procedure was undoubtedly "experimental." That raised the question of how could one adhere to the Nuremberg Code's insistence that the consent of patients in an experimental procedure be free, uncoerced and voluntary.[15]

A different set of issues arose among the French surgeons who performed the world's first adult full facial transplants. Among the questions they raised with regard to attempting such a transplant on minors was how one could "guarantee" that a teenaged recipient would not upon reaching adulthood refuse to abide by the demanding protocol of a lifetime regimen of immunosuppression drugs. A consultation group of bioethicists, surgeons, and psychologists explored such concerns. (The author of this commentary and the Editor of the *Cambridge Quarterly* were members of the French consultation group). That group published its findings that while a competent adult has the right to decline any and all unwanted medical procedures, including a decision with potentially lethal consequence, a similar choice by a parent for a minor who needed a facial transplant would not be ethically, medically, or legally acceptable.[16]

## Conclusion

The essay on *The Duty to Protect* is a thoughtful presentation of the authors' premise on abortion and what follows from their postulates. They might have benefited from Holmes's insight that the development of social policy follows not from a syllogism's logical deductions, but from what Holmes labeled the "felt necessities of the times." Today these "felt necessities" are highly fractured along ideological lines. They have become the subject matter of the "culture wars" that divide and endanger social cohesion.

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Among the "felt necessities of the times" is the view that abortion is the primal sin of our day. Opposed to that position is the perspective of the "#Me Too Movement" with its commitment to women's issues and that of "Black Lives Matter" with its focus on racial and economic disparities within society.

As we saw from the discussions on human segmented liver transplants and the possibility of full facial transplants for children, what appear to be surgical issues are, in fact, ethical problems. As both the University of Chicago surgeons and the French pioneers on facial reconstruction learned, it is better to raise ethical concerns before venturing into the public forum to understand what the issues are and which, if any, possible procedures will find support among the general public. As Francis Moore observed in his landmark *JAMA* editorial, "it is prudent to proceed, only after a thorough, public airing of the issues."

## Notes


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