

A SYMPOSIUM

ON THE REPORT AND RECOMMENDATIONS OF THE NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH

RESEARCH ON THE FETUS

INTRODUCTION

ROBERT A. DESTRO†

THE DECISION of the editorial board of the *Villanova Law Review* to devote a part of this issue to a Symposium on the subject of human fetal research is both timely and commendable. When, at the request of Congress, the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research began the task of preparing its report, a new dimension was added to the continuing evolution of human rights in this country. The final report, entitled "Research on the Fetus,"¹ reflects the many hours spent by the Commission and its staff searching for a reasonable answer to a difficult question. Most importantly, however, the report and the Commission's guidelines reflect a judgment regarding the relative value to be placed upon the research subject under consideration: the human fetus.

Although the Commission's task was highly significant because its ultimate purpose was the formulation of a coherent national policy "for the protection of human subjects of biomedical and behavioral research," neither the report itself, nor the issues it considers, have attracted widespread public attention. One can only speculate as to the reasons for the comparative stillness, but it is fair to assume that the incredible complexity of the issue did much to restrict the development of the type of public debate which characterizes a closely related

† A.B., Miami University, 1972; J.D., University of California at Berkeley (Boalt Hall), 1975. Member of the Ohio and California Bars.

1. NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, REPORT AND RECOMMENDATIONS: RESEARCH ON THE FETUS (DHEW Pub. No. (OS) 76-127, 1975), also printed in 40 Fed. Reg. 33,530 (1975) (partially codified in 45 C.F.R. §§ 46.101-301 (1976)) [hereinafter cited as COMMISSION'S REPORT]. For the reader's convenience, chapters VIII and IX of the *Commission's Report* are reprinted in this symposium at pp. 300-24, and unless otherwise indicated, all citations to the *Commission's Report* refer to these pages.

human rights issue of current interest — abortion. Therefore, it is a great pleasure to introduce the first in-depth commentary on the work of the National Commission. The contributors to this Symposium are well qualified through both background and experience to make a meaningful contribution to the insight of each person who seeks to learn from what they have written.

Research on the Fetus had its genesis in the stormy aftermath of the 1973 decisions of the United States Supreme Court which legalized abortion.² Pursuant to Public Law 93-348,³ Congress established the National Commission and directed it to develop a set of guidelines to govern the research community.⁴ In addition, a moratorium on federally funded fetal research was imposed until such guidelines were developed.⁵ The Congressional message was clear: the public treasury was not to be tapped to fund controversial research involving human subjects until the matter had been considered carefully by a panel of experts.

Once abortion had been legalized by the Supreme Court the American research community was faced with a dilemma: elective abortion would furnish great numbers of living human research subjects, yet there existed no public or professional consensus regarding the extent to which they could be used. It seemed very clear to all but the most pragmatic that the difference between a policy decision to allow abortion in order to vindicate a supposed right of the mother and a policy decision which would permit the use of the living fetus as an experimental research subject was a significant one. Nevertheless, given the admitted scientific need for human subjects and reports of experiments which many would consider excessive,⁶ the need for some guidance was readily apparent.

At the crux of the controversy over fetal experimentation, just as in other areas where the use of human subjects is proposed, there exists a clash between two competing values which society holds dear: the protection of the individual, and the advancement of medical science. An entirely pragmatic view of the conflict would hold that failure to utilize biologically human subjects who are already doomed to destruction through abortion is a waste of a valuable opportunity to increase

2. *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

3. National Research Act, Pub. L. No. 93-348, 88 Stat. 342-354 (1974).

4. *Id.* § 202(b).

5. *Id.* § 213.

6. See, e.g., Adam, et al., *Cerebral Oxidation of Glucose and D-BOH-BUTYRATE by the Isolated Perfused Human Fetal Head*, 7 *PEDIATRIC RESEARCH* 309 (1973). See also, Walters, *Ethical and Public Policy Issues in Fetal Research*, in NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, *Appendix to RESEARCH ON THE FETUS 8-1 to 8-16* (DHEW Pub. No. (OS) 76-128, 1975).

the store of medical knowledge. This type of analysis, however, completely overlooks the opposing view that a human fetus is much more than a mere laboratory animal to be used and discarded so that the lives of its more mature relations might be improved.

Thus, at the root of every discussion regarding the nature and extent of restrictions on fetal experimentation lies the fundamental question: What intrinsic value has the human being during its period of gestation? Once it is recognized that this question is the one which makes the formulation of guidelines so difficult, it becomes much easier to appreciate the significance of the dominant issues in the debate: the use of living or dead fetal tissues, pre- and post-viability experimentation, intra- and extra-uterine research procedures, and proxy consent, to name only a few. Similarly, in other areas of biomedical and behavioral research, assumptions (all too often unspoken) regarding the worth of the research subject vis á vis the anticipated scientific gain will invariably influence the policy adopted.

The easiest method of solving the problems raised by the basic issue, especially in the area of fetal research, is to assume that the "value" question has already been decided by *Roe v. Wade*. But is it ever? Indeed, this is a question which each person who considers problems arising from biomedical research must ask. Clearly Congress' determination to have such matters considered by a national commission was rooted in the perception that the use of human subjects for biomedical and behavioral research presents national policy issues of the highest magnitude. Likewise, the editorial board of the *Review* recognized the importance of the questions raised and, in cooperation with the Symposium's distinguished contributors, presents each reader with an excellent opportunity to evaluate the issues personally.

Careful examination of *Research on the Fetus*, its supporting documents, and commentary such as that presented in the pages which follow is imperative if meaningful debate and thorough examination of the issues is to continue. Only those with a working knowledge of the arguments which produced the Commission's report will be in a position to judge the validity of those arguments in years to come. Such knowledge and understanding will be the only means available by which to insure that future national commissions will have the information necessary to fashion an adequate framework for the protection of the individual from the demands of individual third parties and society as a whole.